UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BLUECROSS BLUESHIELD OF TENNESSEE, INC.,

Plaintiff, **Case No.**

v.

LAURIE S. LEE, in her official capacity as Executive Director of the Department of Finance and Administration (Benefits Administration) for the State of Tennessee,

and

JOHN AND JANE DOES 1-100, in their official capacities as employees of the State of Tennessee,

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MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff BlueCross BlueShield of Tennessee, Inc., (hereinafter "BCBST" or Plaintiff) submits this Memorandum in support of its Unopposed Motion for Temporary Restraining Order ("Motion").[1]

[1] As noted at that the end of the Motion, counsel for Defendants has advised immediately prior to the filing of this Motion, that they have no objection to the Temporary Restraining Order.

INTRODUCTION AND BACKGROUND

BCBST brings this motion to protect Tennessee consumers and businesses from anticompetitive harms that, in the absence of a temporary restraining order, will lead to a less healthy Tennessee – higher prices, less quality and reduced services for its citizens. The facts relevant to the issue before the Court are set forth in the Complaint and the contemporaneously filed Declaration of Scott Pierce, the Chief Operating Officer of BCBST. Those filings are incorporated by reference. In sum, individual employees of the State of Tennessee ("the State Employee Defendants") have agreed, at the request of Representative Martin Daniel (a Tennessee House member), that they will produce to Daniel (and thereby make public) an enormous quantity of BCBST's confidential, proprietary, sensitive, and trade secret business data (hereinafter BCBST "Confidential Information"). The State Employee Defendants have indicated that they will do so on or about December 16, 2019. Upon information and belief, Representative Daniel's request comes at the behest of a competitor of BCBST, and BCBST's Confidential Information (and potentially that of other health plan administrators under contract with the State) will be turned over to that competitor once the State Employee Defendants disclose it.

BCBST seeks a temporary restraining order under Federal Rule of Civil Procedure 65 to prevent that disclosure to Representative Daniel. Then, upon full consideration, the Court should enter a preliminary and then a permanent injunction

barring the disclosure of the Confidential Information. *Jacobs v. Securitas Elec. Sec. Inc.*, 2019 U.S. Dist. LEXIS 76018, *9 (N.D. Ohio Apr. 16, 2019)("the standard for issuing a TRO is the same as for a preliminary injunction; however, the emphasis is on the irreparable harm given that that purpose of a temporary restraining order is to maintain the status quo.")(quotation omitted).

The planned disclosure of BCBST's Confidential Information, while purportedly sought by Representative Daniel pursuant to state open records laws or other state sunshine laws (hereinafter "Open Records Laws"), would violate the Sherman Act and BCBST's rights under the Fifth Amendment to the Constitution (as applied to the states through the Fourteenth Amendment), legal constructs that clearly trump any claim of obligation under a state open records law.[2] *Collins v. Virginia*, 138 S. Ct. 1663, 1678 (2018) ("Federal law trumps state law only by virtue of the Supremacy Clause, which makes the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties . . . the supreme Law of the Land," Art. VI, cl. 2"); *United States v. Napier*, 233 F.3d 394,

[2] Indeed, this case is brought under the doctrine of *Ex parte Young*, through which BCBST has sued officers acting on behalf of the state for ongoing violations of federal law and BCBST seeks only equitable, prospective relief. *Westside Mothers v. Haveman*, 289 F.3d 852, 862, (6th Cir. 2002)("Under the doctrine developed in Ex parte Young and its progeny, a suit that claims that a state official's actions violate the constitution or federal law is not deemed a suit against the state, and so barred by sovereign immunity, so long as the state official is the named defendant and the relief sought is only equitable and prospective. . . . Plaintiffs seek only prospective injunctive relief from a federal court against state officials for those officials' alleged violations of federal law, and they may proceed under Ex parte Young.")

404 (6th Cir. 2000)("any state law that conflicts with federal law is without effect")(quotations omitted)

As explained in the Complaint and the attached declaration of Mr. Pierce, BCBST is a provider of health care coverage, financing and administrative solutions to individuals, businesses, governmental entities, and families in the State of Tennessee, with the mission to make Tennessee healthier through affordable, sensible health care coverage. (Pierce Decl. at ¶ 2.) In furtherance of that mission, BCBST contracts with the State of Tennessee to administer health and wellness plans sponsored by the State of Tennessee. (*Id.* at ¶ 3.) Administration of these health and wellness plans is comprehensive, including customer and member support, claims administration. (*Id.*)

In the course of fulfilling its obligations under its contracts with the State of Tennessee, BCBST necessarily provides extremely competitively sensitive, confidential data to the State of Tennessee. (*Id.* at ¶ 4.) The Confidential Information includes the Protected Health Information ("PHI") (as such term is defined and protected by the Health Insurance Portability Act of 1996, as amended, and its implementing regulations) (collectively, "HIPAA") of individuals covered by the State of Tennessee's employee benefit plans. (*Id.* at ¶ 5.) The Confidential Information also includes BCBST's proprietary, commercially sensitive, and trade secret information, the protection of which is vital to BCBST maintaining a

competitive position in the rapidly shifting health plan administration marketplace. (*Id*.)

A prime example of Confidential Information provided to the State of Tennessee is the "allowable amount" BCBST pays to specific health care providers based on private contract negotiations. (*Id.* at ¶ 6.) The "allowable amount" shows incredibly sensitive business information because it displays what BCBST pays to specific providers for services furnished to a BCBST member. (*Id*.)

No reasonable business would ever disclose this information to the public, because it could be used by actual or potential competitors to improperly collude on prices and other metrics of competition, and to improperly compete, and by providers to collude to drive up their cost for services or reduce quality, scope or quantity of services. (*Id*. at ¶ 7.)

However, pursuant to its contracts with the State to administer its health benefit plans, BCBST must disclose this Confidential Information to the State of Tennessee. (*Id*. at ¶ 4.) All of BCBST's contracts with the State contain provisions protecting BCBST's Confidential Information from disclosure to third parties. BCBST goes to great lengths to protect this Confidential Information, including but not limited to executing bilateral non-disclosure agreements with counterparties that receive the information, as part of its obligations under its contracts and BCBST's

commitment to ensure that this competitively critical information does not reach those who would use it for illicit and anticompetitive purposes. (*Id*. at ¶ 12.)

Representative Daniel has requested BCBST's Confidential Information and the State Employees Defendants have agreed to produce it to him, agreeing with Daniel that they will produce the requested BCBST Confidential Information on or about December 16, 2019. (*Id.* at ¶ 8.) BCBST representatives have repeatedly urged the State Employee Defendants not to disclose the Confidential Information because of the damage it will do to BCBST, the health care marketplace and the public. Unfortunately, that urging has come to naught. (*Id.*)

This production to Representative Daniel is likely to include BCBST Confidential Information regarding, among other things, how much health care providers have charged Tennessee state employees and their families ("State Members") for services provided to them, the amount the provider is contractually entitled to receive from BCBST (again, the so-called "allowable amount"), the portion of the allowable amount for which the State Member is responsible as a deductible or cost-sharing obligation, the portion of the allowable amount paid by BCBST on behalf of the State, along with information regarding when payments were made, the services provided, the provider treating the State Member, where the services occurred, the State Member's diagnosis and related codes (i.e. for claims submissions), along with legions of other data. (*Id.* at ¶ 9.)

The Court should enjoin this disclosure of Confidential Information because the arrangement between the State Employee Defendants and Representative Daniel is an agreement in restraint of trade in violation of the Sherman Act, and the disclosure would independently constitute an anticompetitive exchange of competitively sensitive information in violation of the Sherman Act as well as violate BCBST's rights under the Fifth Amendment. BCBST has a strong likelihood of success on the merits.

Additionally, the risk of irreparable harm to BCBST from the disclosure is acute and apparent. The disclosure of this Confidential Information, particularly the "allowable amount," will allow providers access to information regarding how much other providers charge and are paid. (*Id.* at ¶ 10.) This will permit providers to collude on prices and other metrics of competition, such as quality, scope or amount of service, in the markets for health care services, resulting in higher prices and lower quality that will harm payors, including the State, other employer-sponsored group health plans, and consumers. (*Id.*) Also, the disclosure will allow actual and potential competitors of BCBST to collude in the same manner based on BCBST's information, as well as affording them an illegitimate opportunity to alter their bids against BCBST and disadvantage BCBST's market position. (*Id.* at ¶ 11.) Because the "allowed amount" is the same for BCBST's State account as well as for non-State accounts, the anticompetitive harms described above will extend to other

adjacent health care markets, including but not limited to the private health plan market. (*Id.*)

Accordingly, BCBST's claims under the Sherman Act and the Fifth Amendment are likely to succeed on the merits. And while the risk of irreparable harm to BCBST, and competition and consumers, from the disclosure is enormous, the risk of harm to the State Employee Defendants or anyone else from the injunction would be negligible (if any at all). An injunction would simply preserve the status quo and maintain the health care market in its current, un-restrained position. Finally, the public interest strongly favors the injunction. The disclosure of the Confidential Information will likely restrict competition in the relevant market and result in higher prices and/or lower quality, scope and amount of services for the State, other payors (including other self-funded group health plans), individual insureds, and other consumers. All four factors thus strongly favor the issuance of a temporary restraining order here.

ARGUMENT

BCBST Is Entitled to Injunctive Relief

I. Legal Standard

A temporary restraining order may be issued with or without notice to an adverse party for up to fourteen days. Fed. R. Civ. P. 65. Courts employ a well-

settled four-factor test to determine if this injunctive relief should be permitted, which is the same standard applied to preliminary injunctive relief:

(1) The likelihood of success on the merits on at least one claim;

(2) The threat of irreparable harm to the plaintiff in the absence of preliminary relief;

(3) Whether the injunction would cause substantial harm to others;

(4) The public interest.

See Bays v. City of Fairborn, 668 F.3d 814, 818-19 (6th Cir. 2012); *Tumblebus, Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005); *Jacobs v. Securitas Elec. Sec. Inc.*, 2019 U.S. Dist. LEXIS 76018, *9 (N.D. Ohio Apr. 16, 2019)("the standard for issuing a TRO is the same as for a preliminary injunction; however, the emphasis is on the irreparable harm given that that purpose of a temporary restraining order is to maintain the status quo.")(quotation omitted). These factors are of course not applied in a "check the box" fashion, rather they are "interrelated considerations that must be balanced together." *Northeast Ohio Coalition for Homeless and Service Employees v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)(citation omitted). While each analysis is different based on the particular circumstances, generally the amount of "likelihood of success" that the plaintiff must show is "inversely proportional" to the amount of irreparable injury that must be shown, particularly when a temporary restraining order is sought. *See id*; *Advocacy & Res. Corp. v. United States Dep't of*

Agric., 2011 U.S. Dist. LEXIS 116222, at *14 (M.D. Tenn. Oct. 6, 2011). That is, the greater the risk of irreparable harm, the less certainty of success the plaintiff must provide to the Court. *See id.; Jacobs v. Securitas Elec. Sec. Inc.*, 2019 U.S. Dist. LEXIS 76018, at *9.

Additionally, plaintiff need not show likelihood of success on the merits as to all claims or all defendants. *See e.g. Woods v. Lynch*, 2016 U.S. Dist. LEXIS 171343, *6 (W.D. Tenn. Dec. 12, 2016)("Plaintiffs have shown a likelihood of success on the merits of at least one of their claims); *see also Nat'l City Corp. v. Boyd*, 2008 U.S. Dist. LEXIS 79630, *14 (N.D. Ohio Sept. 17, 2008).

Here, all of the factors weigh strongly in favor of granting BCBST injunctive relief.

II. Each of the Factors Weighs Strongly in Favor of BCBST

A. BCBST is Likely to Succeed on the Merits

Consistent with this Complaint being brought pursuant to the *Ex Parte Young* doctrine, this Motion only seeks to prevent one, discrete event: the disclosure of BCBST's Confidential Information on or about December 16, 2019 by the State Employee Defendants. This act, the disclosure of this Confidential Information, would be part of a clear, ongoing Sherman Act violation and a clear violation of BCBST's rights under the Fifth Amendment, as applied to the states through the Fourteenth Amendment.

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. The Supreme Court has interpreted Section 1 to bar "unreasonable restraints of trade." *Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984). The exchange of competitively sensitive information among competitors can independently constitute a violation of Section 1 if it leads to anticompetitive effect. *See,* e.g.*, United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) ("Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act."); *United States v. Container Corp. of Am.*, 393 U.S. 333, 335 (1969). Courts in the Sixth Circuit have adopted this framework. *See*, e.g., *NorthStar Energy LLC v. Encana Corp.*, No. 1:13-cv-200, 2014 U.S. Dist. LEXIS 39428, at *31-32 (W.D. Mich. Mar. 10, 2014) (*citing Continental Cablevision of Ohio, Inc. v. Am. Elec. Power Co.*, 715 F.2d 1115, 1118-1119 (6th Cir. 1983) and *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001)). Courts generally consider "the structure of the industry involved and the nature of the information exchanged" in determining whether the information exchange is anticompetitive. *Gypsum*, 438 U.S. at 441 n.16.

Here, the structure of the industry is especially susceptible to tacit collusion, which is enabled by the availability of the type of information being disclosed here. Commentators, competition scholars, and the Federal Trade Commission (FTC) have long identified health care markets as ones that are especially susceptible to tacit collusive conduct. *See generally*, Susan DeSanti & Ernest Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antirust Review*, 63 ANTITRUST L.J. 93 (1994); *see also* Boston Decl. Ex. A. (discussed *infra*).

In addition, the type of information being disclosed, including but not limited to the granular price information contained in the "allowable amounts" and details about the services provided, will enable providers and insurers to coordinate their prices, leading to higher prices and/or coordinate to lower quality and reduce the scope and quantity of services, which constitute anticompetitive effect. This is supported by the Supreme Court's holding in *Gypsum*: "Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act." 438 U.S. at 441 n.16.

The disclosure here will also have additional anticompetitive effects, including impediment of effective competition by BCBST and chilling of vigorous competition for the State's business, which may lead to reduced output.

NorthStar is instructive. The court there held: "NorthStar alleges that Encana and Chesapeake exchanged information about their current leasing activities, short-term and long-term strategies, market impacts, and strategies for the state lease sale in October 2010. These allegations, if taken as true, would have an anticompetitive effect and thus could support a Sherman Act violation claim." 2014 U.S. Dist. LEXIS 39428, at *32-33.

Similarly, here, the disclosure of BCBST's Confidential Information, including but not limited to the granular price information contained in the "allowable amounts" and details about the services provided, constitutes a state-compelled and one-sided "exchange" of competitively sensitive information in several health care markets, including the upstream markets for the supply of health care products and services. The disclosure will cause the anticompetitive effects described (including both coordination on prices and quality, and impediment of effective competition by BCBST and chilling of vigorous competition for the State's business). Therefore, the disclosure, in itself, constitutes an independent violation of Section 1.

The FTC, the independent, federal agency charged with maintaining competition and safeguarding the interests of consumers, has recognized that the forced disclosure of competitively sensitive business data to the public is highly anti-competitive in health care markets. In 2015, the FTC wrote a lengthy letter to two

Minnesota House of Representatives members, who were involved in the consideration of a law that would have potentially required public health plans administering health care coverage in Minnesota to disclose "competitively sensitive information, including information related to price and cost." (*See* Boston Decl. Ex. A.)

In that 2015 letter, the FTC discussed, in detail, the two primary harms that come from the public release of this type of competitively sensitive data: one, it permits improper collusion and chilled competition, and, two, it drives up cost. The letter is extensively quoted in the Complaint and attached to this motion, but there are two key points.

One, if competitively sensitive information related to how much companies like BCBST pay providers is made public, that information can then be used by providers (who now see what others are getting paid) to demand higher prices for their services and to undermine the effectiveness of selective contracting by health plans. This drives up cost for the company like BCBST, for the State, and ultimately for the consumers as well -- it is a ripple effect. (*See* Boston Decl. Ex. A at 6) ("disclosure of competitively sensitive information may enable providers to determine whether their pricing is above or below their competitors' prices, to monitor the service offerings and output of current or potential competitors and to increase their leverage in future contract negotiations.")

Second, public disclosure of private, health plan company information chills competition by facilitating unlawful collusion among competitors, including both competing health plans and other providers of health care services. (*See id.* at 2) (these types of disclosures allow "competing providers [to] discuss[] or coordinat[e] provider prices or costs.") Such collusion extends to several aspects of competition, including prices and quality of services or products, and extends to several health care markets involving the Confidential Information. The FTC has confirmed that these unchecked, unregulated disclosures of private Confidential Information like the State Employee Defendants have agreed to provide to Representative Daniel occur outside the "antitrust safety zone." (*Id*.) In short, there is no reasonable question that "public disclosure of [health care market] information could reduce competition and increase prices to consumers," as well as facilitate collusion and other conduct that harms competition in the health care markets. (*Id*. at 3.)

Another way that such disclosure can harm competition is that it will disincentivize BCBST and other market participants from competing vigorously for the State's business, which can reduce output and harm payors and consumers. This is also one of the harms recognized by the FTC.

The FTC letter from four years ago confirms what the Supreme Court held 50 years ago -- improper and unauthorized exchange of competitively sensitive information facilitates collusion and may violate Section 1 of the Sherman Act. *See,*

e.g., *United States v. Container Corp. of Am.*, 393 U.S. 333, 335 (1969). Again, here, the anticompetitive effect from this restraint of trade is obvious, as described above.

The disclosure of confidential pricing and payment information is likely to have a net-negative effect on consumers. While in theory transparency may help consumers in choosing health care, on balance the widespread publication of this information is more likely to result in upward pricing pressure and reduced opportunities for negotiated discounts. Just as consumers can react to public pricing information, so too can providers and competitors. Daniel's motivation for disclosure of this information - to assist a competitor of BCBST to position itself in the market - underscores the asymmetrical value that such information will have in the hands of providers and intermediaries vis-à-vis the public at large.

Accordingly, there are clear, unreasonable anti-competitive restraints at work here, with no countervailing benefit or any minimal procompetitive benefit is outweighed by the anticompetitive harms. BCBST has a strong likelihood of success on its Section 1 of the Sherman Act claim.

While the likelihood of success on the Sherman Act claim is sufficient to credit BCBST on this element, BCBST also has a strong likelihood of success on its Fifth Amendment, takings clause claim. As stated in the Declaration of Scott Pierce, some of the information that the State Employee Defendants have agreed to disclose

-- most particularly the "allowable amount" information -- is a trade secret under Tennessee law. (*See* Aff at ¶ 13; *ProductiveMD, LLC v. 4UMD, LLC*, 821 F. Supp. 2d 955, 961 (quoting T.C.A. 47-25-1702(4)(a trade secret is "information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that: (A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.") The amount that BCBST pays to providers for services rendered to State Members, which BCBST provided to the State pursuant to their contracts (and which are protected from disclosure by various clauses in the contracts themselves) has obvious and recognized independent economic value from not being generally known; indeed, it a principal source of BCBST's competitive position in the marketplace. (Pierce Decl. at ¶ 14.)

It has long been recognized that, under the Fifth Amendment applied to the states through the Fourteenth Amendment, the government may not take property without due process and just compensation. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-04 (1984). And the Supreme Court has recognized that business trade secrets are property that the government may not take without just

compensation and due process. *Id.* Here, the State Employee Defendants intend to disseminate to the public BCBST's private property (its trade secrets) without due process or just compensation. This is a clear and improper "taking" under the Fifth Amendment, and, therefore, BCBST has a likelihood of success on this claim as well.[3]

II. BCBST Will Suffer Irreparable Harm From the Disclosure

Once BCBST's Confidential Information is disclosed, the damage will have been done. *In re Professionals Direct Ins. Co*., 578 F.3d 432, 438 (6th Cir. 2009)("a court cannot restore confidentiality to documents after they are disclosed.") There is no way to un-ring the bell. Confidential Information, particularly regarding allowable amounts, that BCBST has developed through its own business experience and acumen will now be in the public domain, and actual and potential competitors could use that information to reverse engineer BCBST's business model (including price discounts and competitive bids), and alter their competitive strategies based on the information to BCBST's disadvantage rather than compete on the merits. (Pierce Decl. at ¶ 15.) And, as stated above, providers will able to use that information to collectively set higher prices or reduce their quality, scope and quantity of services, resulting in higher costs for BCBST. (*Id.* at ¶ 16.) More importantly, market

[3] BCBST is not seeking any "just compensation" from the taking in this lawsuit. It is, rather, pursuing a claim for prospective, equitable relief under *Ex Parte Young*.

participants, including both BCBST's competitors and other providers, will likely use the Confidential Information to collude on prices on other metrics of competition in the various health care markets, thus harming competition, payors and consumers. Once this train is out of the station, it cannot be stopped. The information cannot be clawed back, unlearned or unseen. A more clear case of irreparable harm can hardly be envisioned.

The FTC has recognized and forecasted the damage that can come from the disclosure of this brand of confidential information. And the case law is legion establishing that the disclosure of confidential information and trade secrets "constitutes irreparable harm sufficient for the issuance of an injunction." *Experian Mktg. Solutions, Inc. v. Lehman*, 2015 U.S. Dist. LEXIS 78953, *28 (W.D. Mich. June 18, 2015)(citing *Henkel Corp v. Cox*, 386 F. Supp. 2d 898, 904 (E.D. Mich 2005); *Invacare Corp. v. Nordquist*, 2018 U.S. Dist. LEXIS 92187, *18 (N.D. Ohio June 1, 2018)("courts have recognized that injunctive relief is appropriate when the disclosure of confidential or trade secret information might lead to difficult-to-measure damage."); *PartyLite Gifts, Inc. v. Swiss Colony Occasions*, 2006 U.S. Dist. LEXIS 57616, *26 (E.D. Tenn. Aug. 15, 2006)(internal quotation omitted)("Where confidential information would be extremely useful to competitors disclosure of that information may constitute irreparable harm.")

The risk of irreparable harm is acute here. To the extent the Court has any concerns about the likelihood of success on the merits, the Court may recall the "inverse relationship" between likelihood of success and irreparable harm. The risk of irreparable harm here could scarcely be higher. The second factor strongly and compellingly favors the issuance of an injunction.

III. Defendants and Others Would Suffer No Harm From The Injunction, Let Alone "Substantial Harm"

The third factor explores whether the Defendants or others would suffer harm from the injunction. *Bays,* 668 F.3d at 819. The answer to this one is straightforward -- no. The State Employee Defendants have agreed to produce BCBST's Confidential Information pursuant to a purported Open Records Law request. There is absolutely no harm or injury that can or would come to them if the injunction is entered. If an injunction is issued, they will simply not furnish a wealth of Confidential Information to Representative Daniel, whose request arises under dubious circumstances. There will be absolutely no injury or loss to the State Employee Defendants -- or anyone else -- from not disclosing this information immediately. Little more need to be said on this third factor because the answer is so clear. This factor clearly and strongly favors the issuance of an injunction.

IV. The Public Interest is Served by an Injunction

The public interest is plainly served by the issuance of an injunction. First, the public interest is served when the integrity of the Confidential Information that

a party has worked to generate and maintain kept secret. *See Fid. Brokerage Servs. LLC v. Busch*, 2014 U.S. Dist. LEXIS 32823, *2 ("[t]he issuance of injunctive relief will serve the public interest in the protection of proprietary business and customer information and [Plaintiff's] trade secret information, as well as by safeguarding [Plaintiff's] customer personal information.") Second, as the FTC has indicated, there is a substantial risk to the public from the improper disclosure of competitively sensitive information, such as health insurance information and the type of Confidential Information here, because it encourages collusion, which harms competition and consumers in several health care markets in the form of higher prices and/or lower quality, scope and quantity of services. (*See* Boston Decl. Ex. A.) No public interest is served by publicizing this type of competitively sensitive data.

To review, the publication of the data (particularly the allowable amount) will harm competition and consumers by: (a) facilitating collusion by providers in health care markets to raise prices and/or reduce quality, scope and quantity of services; (b) facilitating collusion by BCBST's competitors in the health plan administration market and adjacent health plan markets on prices and other metrics of competition; (c) enabling BCBST's actual and potential competitors to alter their bids based on the Confidential Information to disadvantage BCBST and impede effective competition from BCBST, rather than compete on the merits; and (d)

disincentivizing BCBST and its competitors from vigorously competing for the State's business, which may reduce output. It will also undermine the trust of providers who negotiate rates for services with BCBST in a confidential environment. (Pierce Aff. at ¶ 9.) In addition, it will create an environment ripe for fraud, as fraudsters will use private data to appear more legitimate and promote fraudulent schemes. (*Id.*. at ¶ 17.) The public interest will strongly benefit from an injunction, and this factor thus favors BCBST as well.

CONCLUSION

All four factors strongly favor the Plaintiff, and therefore BCBST respectfully requests that the Court enter an temporary restraining order under Fed. R. Civ. P. 65 that will enjoin the State Employee Defendants from disclosing BCBST's Confidential Information to Representative Daniel pending further order of the Court. This temporary restraint should ultimately be followed by a preliminary and then permanent injunction.

Dated: December 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, a copy of the foregoing Memorandum in Support of Unopposed Motion for Temporary Restraining Order was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

Laurie S. Lee
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/s/ Robert E. Boston, Esq.