No. 18-5897

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOE,

Plaintiff-Appellant,
v.

BLUECROSS BLUESHIELD OF TENNESSEE, INC.,

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFF - APPELLANT

On Appeal From The United States District Court
For The Western District Of Tennessee,
Case No. 2:17-cv-02793-TLP-cgc

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INTRODUCTION

Notably missing from the brief of Defendant-Appellee Blue Cross Blue Shield of Tennessee ("BCBST") is any justification how – as a matter of law – it is permitted to discriminate against individuals who have been historically the subject of discrimination in denying them ready access to life-sustaining medications. When Plaintiff-Appellant John Doe needs a prescription for anything other than for the treatment of HIV/AIDS, BCBST allows him to use the pharmacist of his choice. But when John Doe needs access to his life-saving HIV/AIDS medications, BCBST takes that choice away from him. That is separate but unequal discrimination in its most paradigmatic and insidious form. Even worse for BCBST, on-point regulations prohibit such denial of access to retail "brick and mortar" pharmacies, showing a regulatory intent to prohibit discriminatory conduct on the grounds currently engaged in by BCBST. *See* 45 C.F.R. § 156.122(e) (discussed *infra* at Section I.A.)

Based on the facts asserted in the operative First Amended Complaint ("FAC") and summarized in the Opening Brief, Appellant should have the opportunity to present such claims. Yet the district court did not give him the chance to do so, finding that no set of facts would justify the relief requested here – simply, to have the same pharmacy access that BCBST grants to its other beneficiaries. This Court, as a matter of law, equity, and fairness, should reverse

the decision of the district court and permit John Doe to litigate such claims on the merits.

ARGUMENT

I. BCBST DOES NOT JUSTIFY THE DISTRICT COURT'S ERROR IN DISMISSING THE APPELLANT'S CLAIM UNDER THE AFFORDABLE CARE ACT AS A MATTER OF LAW

A. The ACA Expands Access and Protections to Consumers and Authorizes Disparate Impact Claims

Despite BCBST's dismissive contentions, there are a number of "good reason[s]" (Opposition Brief, p. 24),[1] to believe Congress intended to improve and increase protections for vulnerable populations in the health insurance context by permitting them to assert claims under a disparate impact theory of discrimination. Contrary to BCBST's assertions in its Brief, Appellant does not contend that Section 1557 of the Affordable Care Act ("ACA") "brushes aside" existing anti-discrimination standards. Rather, Section 1557 of the ACA in particular and the ACA in general expressly expanded and strengthened existing protections against discrimination. This included providing protections not only against discrimination in *access* to health insurance for vulnerable populations, but also protections from discrimination by the plans themselves in the form of prohibitions on discriminatory health plan benefit designs. *See* 45 C.F.R. § 92.207(b)(2) ("A

[1] References to briefs filed in this appeal refer to the actual pages of the document rather than the court issued Page ID#, which is used to refer to documents in the record.

covered entity shall not, in providing or administering health-related insurance or other health related coverage . . . have benefit designs that discriminate on the basis of . . . disability."); *see also* 45 C.F.R. § 156.122(e) ("[A] health plan must allow enrollees to access prescription drug benefits at in-network retail pharmacies, unless: (i) The drug is subject to restricted distribution by the U.S. Food and Drug Administration; or (ii) The drug requires special handling, provider coordination, or patient education *that cannot be provided by a retail pharmacy*." (emphasis added). BCBST has never contended that it requires individuals to obtain their HIV/AIDS medications by mail order or drop shipment because their needs cannot be satisfied by a retail pharmacy; in fact, as the FAC alleges, the opposite is true. Thus, if the law is as BCBST contends, Section 1557 and its attendant protections would be rendered illusory or redundant. For the very reason that "the rules under one statute might conflict with those under another," (Opposition Brief, p. 24), establishing a comprehensive anti-discrimination standard is exactly what Congress intended.

Undermining BCBST's narrow construction of the ACA as not permitting disparate impact claims, the federal Office of Civil Rights of the Department of Health and Human Services ("OCR") has interpreted Section 1557 consistent with this underlying intent. OCR could not have been more clear in interpreting the statutory language of Section 1557 to permit the claims asserted in the FAC under

the ACA: "OCR interprets Section 1557 as authorizing a private right of action for claims of *disparate impact* discrimination on the basis of *any of the criteria enumerated in the legislation.*" 81 Fed. Reg. 31376, 31440 (2016) (emphasis added). BCBST's analysis of the statute's language and the accompanying regulatory language to support its claim that there is no disparate impact claim under the anti-discrimination provisions of the ACA entirely ignores this regulatory pronouncement.

BCBST's statutory interpretation arguments are also inherently unworkable. Under BCBST's interpretation of Section 1557, "[i]f a health plan sponsor or administrator were to adopt a practice that would affect one protected class in a way that would be prohibited *only* as to a different protected class, the sponsor or administrator would not have done so on a 'ground prohibited under' *any* of the referenced statutes." Opposition Brief, p. 24. While not entirely clear, BCBST apparently believes that as long as it discriminates against one protected class "in a way that would be prohibited only as to a different protected class," it has license to discriminate as it pleases under the ACA. But to take that position requires the Court adopt a construction of the ACA that would impose an absurdly high burden on plaintiffs -- to show the only reason BCBST engaged in the conduct it did was to penalize those with HIV or AIDS. The ACA should not be construed in this way. Where there are two constructions of a statute, one of which would lead to

absurd results, the court is to adopt the more reasonable construction. *See United States v. Fitzgerald*, 906 F.3d 437, 447 (6th Cir. 2018) ("[C]ourts should not construe a statute to produce an absurd result that we are confident Congress did not intend.") (internal quotations omitted).

In light of the language of the statute itself, the regulations promulgated thereunder and the pronouncement of the OCR, it makes more sense that Congress intended to do away with any incompatible legal standards arising out of the referenced anti-discrimination statutes. Indeed, as the district court noted, the OCR's comments clarified unequivocally that disparate impact claims are in fact cognizable, because "[f]or example, it would not make sense for a Section 1557 plaintiff claiming race discrimination to be barred from bringing a claim for using a disparate impact theory but then allow a Section 1557 plaintiff alleging disability discrimination to do so." Order, R. 68, Page ID # 606. This rationale is far more consistent with the letter of the law as well as the expressed intentions of the OCR than the extreme position staked out by BCBST.

B. Appellant Adequately Alleged How He Suffered Discrimination under Several Claims Arising Out of Section 1557

BCBST's Brief misconstrues the applicable standards governing both Appellant's disparate impact and disparate treatment claims under Section 1557. In making its argument, BCBST ignores the plain language of the statute and the official comments of the OCR, as well as applicable case law.

1. Appellant Has Suffered Disparate Impact Discrimination by Being Denied Meaningful Access to His Prescription Benefits

With the passage of the ACA, the "meaningful access" analysis established by the U.S. Supreme Court in the context of the Rehabilitation Act (29 U.S.C. § 701 *et seq.*) is expanded by Section 1557 to apply to a facially-neutral policy in the health plan context. As discussed more fully in the Opening Brief at Section VII.A.3, the district court misapplied this standard. Despite BCBST's attempts to either justify or minimize this legal error, this Court must reverse this conclusion.

As a means of absolving itself of liability under Section 1557, BCBST clings to its contention that the mail order/drop shipment program in question is "neutral," thus ending the inquiry. BCBST is mistaken since, as noted above, an individual trying to access important HIV/AIDS medications cannot use the pharmacist of his or her choice, but (1) others can do so for their medications and (2) that individual can do so for his or her non-HIV/AIDS medications. FAC, R. 38, Page ID # 285-286. The very nature of a disparate impact discrimination claim requires an analysis that looks behind what may appear to be a facially "neutral" policy or practice, but which in practice denies "meaningful access" to benefits. *See* Opening Brief, pp. 25-26, 40–47. This is a largely factual inquiry that weighs the methods access is denied and the seriousness of the impact.

Just as the district court did, BCBST attempts in its Brief to downplay the seriousness of the impact suffered by enrollees with HIV or AIDS under this program. First, this argument is contrary to the allegations in ¶¶ 4-9, 14, 16, 17, 32-52, 57, and 61 of the FAC, where Appellant provided detailed factual allegations that, if proven to be true, would establish the clear disparate impact of BCBST's coverage policies. *See* Opening Brief, p. 40–45; FAC, R. 38, Page ID #267-271, 274-275, 280-321. Second, BCBST contends that Appellant does not allege how he has been denied meaningful access to his HIV medications as a matter of law, despite such a denial being at the crux of Appellant's discrimination claim based on the allegations in the FAC at ¶¶ 4-9, 14-18, 32-52, 57, 59, 61, and 77-79, detailing supporting allegations to the contrary. *See, e.g.*, Opening Brief, p. 40–47; FAC, R. 38, Page ID #267-271, 274-275, 280-321, 325-326.

BCBST further claims that because its specialty formulary includes medications that treat disabilities other than HIV/AIDS, that is an indication the Program is "neutral," and therefore non-discriminatory. However, in addition to being a factual dispute beyond the scope of a motion to dismiss, BCBST's reasoning is flawed. Appellant does not need to show that only HIV/AIDS medications are on the mail order/drop shipment tier of BCBST's formulary to establish that doing so was a discriminatory act in violation of the ACA. And placing a handful of medications that may not treat a disability does not immunize

BCBST from liability, as it is a factual question why such medications would be there in the first place. Appellant has alleged that BCBST does deny benefits or discriminate "solely by reason of" disability through, for example, its denial of any request to obtain HIV/AIDS medications from the same in-network community pharmacies from which other BCBST enrollees access their own medications. *See* Opening Brief, p. 29, 30–33; FAC, R. 38, Page ID #266-271, 274-275, 280-318, 332.

BCBST also continues to assert a number of disputed factual arguments inappropriate for a motion to dismiss. It argues, for example, that some members with HIV might actually prefer to utilize the mail order program at issue. In addition to there being no support in the FAC for that claim, Plaintiff alleges in the FAC at ¶¶ 4-9, 14-18, and 32-55 why it discriminates and works hardships upon individuals with HIV/AIDS. And in the end, that should be the choice of the member – not a heartless corporate mandate. BCBST goes so far as to speculate that its actions are legal because members could in theory request that their previous community pharmacists continue to counsel them on prescriptions not filled by them on a voluntary basis – with the pharmacist undertaking the potential liability for doing so for no consideration. *See, e.g.*, Opposition Brief, p. 36–37; FAC, R. 38, Page ID #267-271, 274-275, 280-318. Even if this were true—and there are no contentions in the FAC to support this argument—such speculation by

BCBST is not a basis for this Court to uphold a ruling on a motion to dismiss. This is an issue appropriately resolved by a jury at a later stage of the litigation, once discovery has taken place.

Finally, BCBST attempts to paint Appellant's discussion of the "meaningful access" legal standard as an entirely new and not previously raised claim. First, this issue had not been expressly addressed because BCBST did not move to dismiss the FAC on these grounds. Second, the FAC at ¶ 59 expressly alleged that BCBST did not comply with this standard. FAC, R. 38, Page ID # 319–20. The relevant case law cited in the Opening Brief, VII.A.3 at pp. 36-47, makes clear the "meaningful access" standard articulated by the Supreme Court in *Alexander v. Choate*, 469 U.S. 287, 301 (1985), is the standard courts should use to determine whether under Section 504 of the Rehabilitation Act (29 U.S.C. § 794), and thus under Section 1557 of the ACA, a plaintiff can properly assert a disparate impact claim. The FAC at ¶ 59 alleges all the necessary elements of the Supreme Court's "meaningful access" test. R. 38, Page ID # 319–20. This is not a new theory, as this allegation merely reflects how the Supreme Court has articulated how a plaintiff can establish disparate impact discrimination. Based on such allegations, Plaintiff properly asserted this claim in the FAC and it was error to dismiss this claim as a matter of law.

2. Appellant Has Also Sufficiently Pled a Disparate Treatment Discrimination Claim

As explained in Appellant's Opening Brief, pp. 27-35, to plead a *prima facie* case of disparate treatment discrimination Appellant need only allege he was denied HIV/AIDS medication benefits and/or subjected to discrimination under the Program "solely by reason of" his HIV status. John Doe has done so. *See, e.g.*, FAC, ¶¶2-9, 14-18, 32-55, 103-105, R. 38, Page ID # 266-271, 274-275, 280-318, 332; *see also* Opening Brief, p. 29. This Court should not support BCBST's attempts to raise the bar to allege a *prima facie* disparate treatment claim.

BCBST's unduly narrow view of discrimination ignores the ACA's prohibition on discriminatory plan design, despite the fact this type of discrimination is exactly what the ACA was intended to combat. *See, e.g.*, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375-01 (providing examples of likely discriminatory plan benefit designs, including "*placing most or all drugs that treat a specific condition on the highest cost tiers*") (emphasis added).

BCBST is also incorrect that, because Appellant's health plan "covers specialty medications only when obtained through the Program," it cannot be discriminatory as a matter of law. It is precisely *because* BCBST placed the current drugs used to treat HIV or AIDS on its formulary so that they could only be accessed by mail order or drop shipment that BCBST engaged in discriminatory

plan design. BCBST's conclusion to the contrary is thus at odds with both the ACA and the Rehabilitation Act. As has been found in response to substantially the same argument made by BCBST here, the language of Section 1557 and Section 504 of the Rehabilitation Act "bar[s] the operation of a program in a discriminatory manner even when a specific offered benefit is not being denied." *Doe One v. CVS Pharmacy*, No. 18-cv-01031-EMC, 2018 WL 6574191 (N.D. Cal. Dec. 12, 2018). While dismissing the claim on other grounds, in response to the argument that no discrimination had occurred because the plaintiff's health plan did not entitle him to the benefit being denied, the Court in *CVS Pharmacy* concluded that "Plaintiffs' ACA claim is not doomed just because they have not alleged that their benefit plan entitles them to obtain HIV/AIDS medication for favorable prices at non-CVS pharmacies." *Id.* The same rationale applies here. The ACA prohibits discriminatory plan *design.* Its protections are not limited to circumstances where a health plan administrator discriminates only in the administration of benefits, as BCBST contends. This Court should not permit BCBST to flout the ACA in such a manner.

BCBST's discussion of its motives for enacting the Program is also not relevant for purposes of this appeal. As discussed in Appellant's Opening Brief, discriminatory intent is not an element of a *prima facie* case of disparate treatment discrimination. *See* Opening Brief, p. 28–29 (citing *Tanney v. Boles*, 400 F. Supp.

2d 1027, 1047 (E.D. Mich. 2005); *Hicks v. Benton Co. Board of Education*, 222 F. Supp. 3d 613, 635 (W.D. Tenn. 2016); *Mayberry v. Von Valtier*, 843 F. Supp. 1160, 1166 (E.D. Mich. 1994); *I.L. through Taylor v. Knox Cnty. Bd. of Educ.*, 257 F. Supp. 3d 946, 969 (E.D. Tenn. 2017)). BCBST's categorical distinction in terms of medication access is based solely on the fact that these medications treat HIV and AIDS. FAC, R. 38, Page ID # 265-267, 285-286. Such a categorization undercuts BCBST's assertions that their program "makes distinctions based on the nature of individual drugs, for which different delivery mechanisms may be sensible as all considerations are taken into account." Opposition Brief, p. 28. First, that is not the case with these medications and second, that is a disputed factual inquiry. Thus, regardless of BCBST's motivations, it has designed the Program in a discriminatory fashion.

To further support his claim under the ACA, Appellant alleged at ¶¶ 8-15 of the FAC deliberate indifference on the part of BCBST. FAC, R. 38, Page ID #271-274. Appellant does not now proffer a "new deliberate-indifference theory" with regard to his disparate treatment claim. Rather, this is simply another way to establish discriminatory intent under the ACA. *See* Opening Brief, p. 29–31. Even BCBST points out "deliberate indifference" is not a separate claim, but rather a method courts have used to find that discrimination has taken place where discriminatory intent is not otherwise apparent. *See* Opposition Brief, p. 34. These

allegations are independently sufficient to state a *prima facie* case of disparate treatment discrimination under the ACA.

C. A Ruling for Appellant Would Not Upend the Insurance Industry

BCBST's final argument is an ironic one, as it suggests that granting Appellant the relief he seeks would upend the health insurance industry. It is ironic because UnitedHealth, Aetna, Cigna, Wellpoint *and almost every one of BCBST's sister Blue Cross Blue Shield companies* have previously agreed to modify this same program and allow enrollees nationwide to obtain their HIV/AIDS medications at the pharmacist of their choice if they elect to do so. The primary outlier on this issue is BCBST, not the health insurance industry.

So there is no ambiguity, Appellant is not requesting BCBST shut down its program entirely. Rather, as virtually every other health insurer has already done, Appellant suggests the current program be modified to permit members to obtain these life-saving medications at the pharmacist of their choice if they want to, using a community pharmacist already in the BCBST pharmacy network.

This Court should thus reject BCBST's hyperbolic representations. As noted above, the ACA prohibits discriminatory plan design. Such designs may have been lawful under previous Rehabilitation Act jurisprudence, but that is no longer the case under the ACA. A ruling in favor of Appellant would only require companies like BCBST to design plan benefits in a non-discriminatory manner.

BCBST asserts that "there is nothing to suggest that Congress meant to displace 'the historic and nearly universal practice inherent in the insurance industry of providing different benefits for different disabilities.'"[2] Opposition Brief, p. 44 (citing *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 149 (2d Cir. 2000)). As has been discussed throughout Appellant's Opening Brief and this Reply brief, however, there is plenty of evidence that suggests exactly that. Congress' intentions in changing the status quo with regard to health insurance discrimination are clear from the statute itself as well as the OCR's comments. Permitting Appellant's discrimination claims to proceed in this case directly furthers those intentions by preventing discrimination in both plan benefit design and plan benefit administration. *See* Opening Brief, pp. 19-26.

II. BCBST ALSO CANNOT JUSTIFY THE DISTRICT COURT'S ERROR IN DISMISSING APPELLANT'S ADA CLAIM

The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") prohibits discrimination based on disability "by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182. The ADA prohibits not only physical but also intangible barriers to access. *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002). In the FAC

[2] BCBST does not address the contradiction of defending its practice of "providing different benefits for different disabilities", while simultaneously asserting that it applies this program on an "evenhanded" basis with regard to those with HIV, other disabilities, or no disability at all.

at ¶¶1-6 and 14-15, Appellant detailed how the mail order drop shipment program implemented by BCBST denies both Appellant and class members the goods and services provided by community pharmacies, which as noted below are defined to be a place of public accommodation in 42 U.S.C. § 12181(7)(F), and thus violated Title III of the ADA. FAC, R. 38, Page ID #265-270, 274. Appellant thus sufficiently alleged that BCBST engaged in acts of discrimination based on disability, in violation of the ADA. The district court, however, erred by disregarding Appellant's well-pled allegations on this point, instead concluding that the public accommodation Appellant is seeking is "to Plaintiff's health plan, not a pharmacy." Order, R. 68, Page ID # 619.

In its response, BCBST purports to concede that the relevant public accommodation is community pharmacies, undermining the underlying holding of the district court. *See* Opposition Brief, p. 45. However, BCBST goes on to ignore Appellant's allegations at ¶ 87 of the FAC in arguing that Appellant's ADA claim relates not to access to community pharmacies but to his health plan. Opposition Brief, p. 47; FAC, R. 38, Page ID #327-328. Relying on this false premise, BCBST then argues that Appellant's claims are foreclosed by *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997).[3] But because Appellant

[3] In *Parker*, this Court concluded that because the plaintiff received insurance coverage through her employer rather than directly from MetLife, there was "no nexus between the disparity in benefits between the services which MetLife offers

does *not* contend his health plan is a place of public accommodation, *Parker* is inapposite. Much of BCBST's argument on this point is accordingly irrelevant.

In arguing that Appellant has not sufficiently alleged BCBST operates a place of public accommodation, BCBST misconstrues *Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995), for the proposition that BCBST cannot be liable unless BCBST has physical control over the facility in question. Opposition Brief, p. 46. First, the FAC at ¶¶ 50-51 specifically alleges because BCBST controls the formulary and what medications individuals like John Doe can access through his pharmacy and which ones he cannot, it exercises the requisite degree of control over the discriminatory condition at issue here for ADA purposes – access to life-saving medications that can only be obtained from a pharmacy. FAC, ¶¶ 49-55, R. 38, Page ID #286-318.

Second, the Fifth Circuit in *Neff* addressed whether the franchisor defendant "controls the modification of the franchises to improve their accessibility to the disabled" because the disabled plaintiff sought physical access to the store. *Neff*, 58 F.3d at 1064, 1066. The court in that case, however, did not limit its definition of

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to the public from its insurance office." *Parker*, 121 F.3d at 1011. BCBST mistakenly contends Appellant has attempted to substitute "nexus" for "operates." Instead, Appellant at pp. 6-8 of the Opening Brief demonstrated that he had pled the requisite nexus between BCBST's discriminatory acts and the community pharmacies. Critically, BCBST's Opposition Brief does not contend that Appellant has not sufficiently alleged such a nexus.

"operates" to physical control of the premises. Instead, as the Court in *Zamora-Quezada v. HealthTexas Medical Group of San Antonio*, 34 F. Supp. 2d 433, 444 (W.D. Tex. 1998), recognized in relying on *Neff*, "The term operates for the purposes of the ADA means a right to control the allegedly discriminatory conditions." *Id*. (citing *Neff*, 58 F.3d at 1066 n. 9). Thus, the relevant inquiry is whether the entity in question (here, BCBST) had control over the conditions of access to medications that Appellant alleges resulted in discrimination against both him and others similarly situated.

The plaintiff in *Zamora* "alleged it was the health care delivery system in which the Humana defendants were participants, and particularly the financial arrangements which fueled the system, which controlled the delivery of health care and caused the acts of alleged discrimination about which plaintiffs complain." 34 F. Supp. 2d at 444. Appellant similarly alleges in the FAC at ¶¶ 87, 121-125 that BCBST controls access to the goods and services of community pharmacies through contracting and financial incentives, and thereby denies Appellant access to these public accommodations on the basis of his disability because he cannot access these places of public accommodation to obtain his HIV/AIDS medications. FAC, R. 38, Page ID #327, 336. Tellingly, rather than address Appellant's lengthy discussion of *Zamora* in his opening brief, BCBST does not even acknowledge, much less attempt to distinguish, the court's holding in *Zamora.*

Appellant's interpretation of the ADA is supported by the plain language of this remedial statute, which is to be broadly construed. Pursuant to "traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly." *Cobb v. Contract Transport, Inc.*, 452 F.3d 543, 559 (6th. Cir. 2006). This rule of statutory construction should be applied given the broad remedial reach of the ADA, which was designed to "invoke the sweep of Congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities" (42 U.S.C. § 12101(b)(4)); to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" (42 U.S.C. § 12101(b)(1)); and "to bring individuals with disabilities into the economic and social mainstream of American life." H.R. Rep No. 485, Pt. 2, 101st Cong., 2nd Sess. 99 (1990). BCBST's narrow interpretation of the ADA is contrary to the broad remedial goals of the ADA. Thus, interpreting Title III of the ADA narrowly as BCBST suggests would undermine these remedial goals by unduly restricting disabled persons' access to community pharmacies. BCBST cannot dispute these are places of public accommodation, as they are defined as such under the ADA. 42 U.S.C. § 12181(7)(F) ("The following private entities are considered public accommodations for purposes of this subchapter . . . office of [a] . . . pharmacy . . .

or professional office of . . . a health care provider, hospital, or other service establishment".) The district court's order dismissing Appellant's ADA claim should therefore be reversed.

III. BCBST FAILS TO JUSTIFY THE DISTRICT COURT'S ERROR IN DISMISSING APPELLANT'S CLAIM UNDER TENNESSEE STATE LAW

In his Opening Brief, Appellant explained that "if this Court reverses the district court either outright or remands for further proceedings on either the ACA or ADA claims, this Court should also reverse the district court's claim for breach of contract under the common law of Tennessee." Opening Brief, p. 53. In response, BCBST counters that the district court was correct to dismiss the breach of contract claim because: (1) John Doe failed to identify any specific provision of his contract with BCBST that was violated; (2) the ACA and ADA are not relevant to his breach of contract claim; and (3) John Doe waived any argument that the ACA or ADA are relevant to his breach of contract claim. Opposition Brief, p. 49. All three of these arguments fall wide of the mark.

First, it is not true that Appellant failed to allege any specific contract provision that BCBST breached. He has consistently alleged, both in the FAC at ¶¶ 2-15, 36-46, 52-55, and 141-145 and in his principal appellate brief, that BCBST has breached its contractual obligation to cover his HIV/AIDS medication, Genvoya. Response in Opposition to Motion to Dismiss, R. 52, PageID # 529-30;

Opening Brief, p. 53-54; FAC, R. 38, Page ID #266-274, 282-285, 339. BCBST does not dispute that such a contractual obligation exists. And Appellant does not dispute that BCBST has *formally* recognized Genvoya as a covered specialty drug. What the parties *do* dispute is whether BCBST, through its actions, has so unreasonably limited John Doe's ability to obtain this medication that BCBST violated its duty of good faith and fair dealing and, by extension, its obligation to cover reasonable access to his medication, rather than just designate the medication as covered.

In the FAC at ¶¶ 2-15, 36-46, 52-55, and 141-145, John Doe made specific allegations about the numerous ways in which BCBST has severely limited his ability to obtain this HIV/AIDS medication. FAC, R. 38, Page ID #266-274, 282-285, 339. This includes BCBST unreasonably restricting his access to pharmacists to discuss HIV/AIDS medications, potential drug interactions, and side-effects; failing to provide a geographically adequate network of brick and mortar pharmacies for those enrollees, such as John Doe, who want to interact directly with a pharmacist; and providing insufficient and misleading information about how and where enrollees subject to BCBST's specialty drug program, such as John Doe, can actually obtain their HIV/AIDS medications. FAC, R. 38, PageID # 266-274, 282-285, 318, 339; *see also* Opening Brief, pp. 5-14 (summarizing factual allegations from FAC). Given these specific allegations that are deemed true for

purposes of reviewing the ruling at issue, the district court erred in finding, as a matter of law and without the benefit of any discovery, that John Doe has not alleged any actionable breach of BCBST's obligation to cover his HIV/AIDS medication by not acting in a manner that constitutes good faith. *See Lamar Advertising Co. v. By-Pass Partners*, 313 S.W.3d 779, 791 (Tenn. Ct. App. 2009) ("Whether a party acted in good faith is a question of fact.").

Second, BCBST wrongly suggests that, even if its conduct violates the ACA and/or ADA, such violation would be irrelevant to John Doe's breach of contract claim. There is no single, universal standard for what constitutes "reasonable" or "good faith" performance under a contract. The analysis is context-specific and is to be determined based on the factual development of a full record. *See Dick Broadcasting Co., Inc. of Tennessee v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 670 n.24 (Tenn. 2013) ("[W]hether particular conduct violates or is consistent with the duty of good faith and fair dealing necessarily depends upon the facts of the particular case, and is ordinarily a question of fact to be determined by the jury or other finder of fact.") (quoting 23 Richard A. Lord, WILLISON ON CONTRACTS § 63:22 (4th ed. 2002)). Whether the conduct at issue also violates the ACA and /or the ADA would therefore be inherently relevant to any inquiry into the specific facts and circumstances of whether BCBST has acted reasonably and in good faith in performance of its contractual obligations. It was not proper for the district

court to resolve as a matter of law based on the allegations of the FAC. FAC, ¶¶ 132-146, R. 38, Page ID #337-340.

Tennessee courts have held that the purpose of the implied covenant of good faith and fair dealing is "(1) to honor the reasonable expectations of the contracting parties and (2) to protect the rights of the parties to receive the benefits of the agreement into which they entered." *Lamar Advertising Co.*, 313 S.W.3d at 791. Here, once again, the unlawfulness of the underlying conduct is highly relevant. While health insurance agreements, such as the one between BCBST and John Doe, provide the insurer with some flexibility in changing the terms of coverage, it is inherently reasonable for the contracting beneficiary to expect that any change will comply with federal law. If this Court finds John Doe's allegations that BCBST unilaterally changed his coverage to limit his access to brick and mortar community pharmacies states a viable claim for relief under either the ADA or ACA, such a finding will be directly relevant to whether BCBST honored the "reasonable expectations" of John Doe or "deprived him of the reasonable benefits of the agreement." *Id.* at 791. These contractual and statutory issues, while not identical, are linked closely enough that if this Court finds reversal and remand warranted on either of Appellant's statutory claims, it should also reverse and remand the breach of contract claim for consideration in light of this Court's decision.

Finally, as a procedural matter, BCBST argues that Appellant has waived any argument about the relevance of the ADA or ACA to his breach of contract claim by failing to raise it before the district court. Opposition Brief, p. 50. But this is not true. John Doe's position, both before the district court and on appeal, is that BCBST so unreasonably burdened his ability to obtain his HIV/AIDS medication that BCBST violated its duty of good faith and fair dealing with respect to its obligation to provide coverage for such medications, in violation of federal laws. These allegations were specifically incorporated by reference into the breach of contract claim, and thus are neither new nor an argument that was waived. (*See* FAC, ¶¶ 1-17, 32-46, 56-68, 132-146, R. 38, PageID # 266-275, 280-285, 318-323, 337-340; see also Response in Opposition to Motion to Dismiss, R. 52, PageID # 529-30). As described above, whether BCBST's conduct violated federal law is directly relevant to whether it performed reasonably and in good faith under its contract with both John Doe and other similarly situated beneficiaries. That is a relevant and integrated aspect of John Doe's good faith and fair dealing argument that he made before the district court and thus was not waived on appeal.

CONCLUSION

For the numerous reasons previously provided to this Court and as set forth above in responding to BCBST's arguments, this Court should reverse the decision

of the district court and remand this matter to the district court for proceedings consistent with this Court's decision.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: February 15, 2019

CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25 and 6th Cir. R. 25, I hereby certify that on this 15th day of February, 2019, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. I certify that I am a registered CM/ECF user and that all parties have registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ADDENDUM:

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record	Description	Pages
38	First Amended Complaint, Page ID # 265-345	6, 7, 8, 9, 10, 12, 15, 16, 17, 19, 20, 22, 23
52	Response in Opposition to Motion to Dismiss First Amended Complaint, Page ID # 511-534	19, 23
68	Memorandum Opinion and Order, Page ID # 601-625	5, 15