UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE LORAZEPAM & CLORAZEPATE ANTITRUST LITIGATION	CASE NO. 02CV1299 (TFH) CASE NO. 1:01CV02626 (TFH) MDL NO. 1290 (TFH) MISC. NO. 99ms276 (TFH)
This document relates to: Blue Cross Blue Shield of Minnesota, *et al.*, Plaintiffs, v. Mylan Laboratories, Inc., *et al.*, Defendants. Health Care Service Corporation, *et al.*, Plaintiffs, v. Mylan Laboratories, Inc., *et al.*, Defendants.	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTIONS FOR LEAVE TO FILE AN AMENDED COMPLAINT, TO DISMISS CLAIMS, AND FOR AN ORDER FOR REMITTITUR

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Defendants Mylan Laboratories, Inc. (n/k/a Mylan, Inc.), Mylan Pharmaceuticals, Inc., Gyma Laboratories of America, Inc., and Cambrex Corporation ("Defendants"), in accordance with the Court's Memorandum Opinion and accompanying Order dated October 24, 2012, respectfully submit this memorandum in response to Plaintiffs' Joint Motion for Leave to File Amended Complaints and Joint Motion to Dismiss Claims and for Order for Remittitur. *See* Dkt. Nos. 1037, 1038, 1049, 1051.

I. INTRODUCTION

Plaintiffs[1] in these proceedings have had multiple chances to establish complete diversity and have repeatedly failed to do so. Their first chance, which ordinarily would be their only chance, came at the outset of the case where they should have pleaded and proved the factual predicate for federal jurisdiction over the case. Their failure to do so, combined with the undisputed fact that this Court has had no actual jurisdiction over this case from the time of filing through today (including notably the date of final judgment) should ordinarily have led to vacatur of that judgment and dismissal of the case.

Nevertheless, Plaintiffs were afforded an opportunity on remand to establish jurisdiction through competent proof. They failed to do so, instead submitting Internet research and unsworn forms reciting legal standards for their corporate customers and nothing at all for their public entity customers. And now Plaintiffs have received an unprecedented third opportunity to establish the predicate federal jurisdiction that they should have established at the outset of the case. In their

[1] Plaintiffs are Blue Cross Blue Shield of Massachusetts ("BCBS-MA"), Blue Cross Blue Shield of Minnesota ("BCBS-MN"), and Health Care Service Corporation ("HCSC") as well as their self-funded customers along with Federated Mutual Insurance Company ("Federated"), which does not assert claims for any self-funded customers.

filings, Plaintiffs admit that they cannot prove jurisdiction for 775 self-funded customers, well over half the parties to the case.

Both the magnitude of the jurisdictional deficiency in this case and the constantly changing set of Plaintiffs which are claimed to be diverse show that the case should be dismissed entirely. Moreover, Plaintiffs' filings fail to establish the required jurisdictional facts for some of the customers they seek to keep in the case. As but a few examples, they identify customers whose very *existence* cannot be verified, present as a "diverse" public entity an agency under the control of the Massachusetts governor, and attempt to analyze unincorporated associations under the incorrect standard. The Court should thus dismiss the case outright; failing that, it should dismiss all of the self-funded customers, or, at a bare minimum, all of the customers noted in part III.C below. In addition, a new trial on damages must be conducted.

II. BACKGROUND

Plaintiffs have had multiple opportunities to establish federal jurisdiction. They could (and should) have pleaded and proved the factual predicate for federal jurisdiction during the original trial proceedings. Nevertheless, when it became apparent that Plaintiffs had included the claims of non-diverse entities in the litigation, the D.C. Circuit did not follow the normal course of "vacat[ing] th[is] [C]ourt's judgment and remand[ing] for dismissal," but instead remanded to this Court for further proceedings. *In re Lorazepam & Clorazepate Antitrust Litig.*, 631 F.3d 537, 542 (D.C. Cir. 2011). This Court in turn ordered Plaintiffs to file their jurisdictional evidence. *See* Tr. 26:8-14, May 9, 2011. This Court denied Defendants' motion to dismiss for lack of subject-matter jurisdiction even though such a dismissal would have been consistent with the Court's prior practice. *See* Tr. 53:16-17, May 24, 2012 ("[M]y practice in the past would be to dismiss the case for lack of

jurisdiction…."). It then allowed Plaintiffs an opportunity to submit entirely new evidence after recognizing Plaintiffs had failed to offer competent proof of principal place of business for their corporate self-funded customers and failed to offer any evidence at all on whether their public entity self-funded customers could invoke diversity jurisdiction. *See* Dkt. No. 1037 at 14-17.

Based on the jurisdictional discovery conducted concerning the public entity customers, Plaintiffs have been forced to concede that many of those entities are not sufficiently distinct from their states to invoke federal diversity jurisdiction, despite Plaintiffs' prior claims that such entities could be held diverse without any factual inquiry. *Compare* Dkt. No. 1036 at 7-9 (claiming no need for factual inquiry regarding public entity self-funded customers) *with* Dkt. No. 1051 at 5-6 (seeking remittitur for public entities). Moreover, as discussed below, Plaintiffs have once again shifted positions on various entities, including now asserting that they can prove diversity for entities for which they had previously said they could not establish diversity. *Cf.* Dkt. No. 1037 at 13 (noting "Plaintiffs have altered their jurisdictional allegations no less than three times in a year."). All told, Plaintiffs now only claim to show diversity for 612 self-funded customers out of the 1387 initially asserted and seek dismissal of 775 parties to the case. *See* Dkt. No. 1051 at 3-4.

III. ARGUMENT

By once again taking new and conflicting positions concerning their self-funded customers, Plaintiffs' latest filings only confirm their failure to sufficiently plead and prove the factual predicate for federal jurisdiction over this case. As such, the filings provide a further reason for dismissing the case entirely, or, at a minimum, eliminating all of the self-funded customers from the case. Moreover, their filings fail to show how applying a remittitur rather than conducting the new trial on damages contemplated by the D.C. Circuit could possibly comport with due process or the Seventh

Amendment. The filings also fail to support jurisdiction for multiple self-funded customers, and, at a minimum, those customers should be dismissed from the case.

A. THE ENTIRE CASE SHOULD BE DISMISSED, OR, AT A MINIMUM, ALL THE SELF-FUNDED CUSTOMER CLAIMS SHOULD BE DISMISSED

i. Dismissal of the Entire Case

Plaintiffs had the duty at the outset of the case to plead and prove a factual predicate for the exercise of federal jurisdiction in this case. *See generally Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside [federal] jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction . . . .") (citations omitted). Plaintiffs have now admitted that after at least three tries they cannot establish diversity jurisdiction for the claims of 775 self-funded customers, amounting to more than half of the parties to these proceedings.[2] There is no precedent for applying Federal Rule of Civil Procedure 21 so broadly, and there is likewise no precedent for a party receiving so many chances to establish jurisdictional facts. Instead, courts have strictly limited the opportunities afforded parties to remedy jurisdictional defects of their own creation. *See Media Duplication Servs., Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1236 (1st Cir. 1991) ("[A] party seeking to invoke diversity jurisdiction which fails to avail itself of opportunity to present evidence acts at its own peril.") (citing *O'Toole v. Arlington Trust Co.*, 681 F.2d 94, 98 (1st Cir. 1982)). The case should thus be dismissed in light of

[2] While Defendants acknowledge that a party that simply fails to *plead* jurisdictional facts appropriately may amend its pleadings at any time under 28 U.S.C. § 1653, the defect in these proceedings is not simply one of pleading since "the presence of a nondiverse party 'contaminates' the entire action, therefore stripping the district court of jurisdiction *in toto*." *In re Lorazepam*, 631 F.3d at 542. This action involves *hundreds* of non-diverse parties.

Plaintiffs' multiple failures to establish a sufficient factual predicate for the exercise of federal jurisdiction.

ii. Dismissal of all Self-Funded Customers

At a minimum, the self-funded customer claims should all be dismissed. Plaintiffs' constantly changing statements concerning which customers they claim as diverse and which customers they do not simply shows that wading through 1400 claims to sort the proper from the improper is too large a task for Rule 21. To the extent Rule 21 is applied, it should be applied to dismiss the self-funded customer claims completely to avoid the risk that the Court's jurisdiction will be enlarged to embrace claims of non-diverse entities.

Such a dismissal is particularly appropriate in light of the apparent lack of standing of the vast bulk of HCSC's self-funded customers. Standing to sue is a "threshold jurisdictional question." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). The Supreme Court of Texas has conclusively ruled that Texas indirect purchasers may not recover for antitrust injuries under any legal theory. *See Abbott Labs., Inc. v. Segura*, 907 S.W.2d 503, 507 (Tex. 1995). Therefore, allowing customers who are bound by the laws of the State of Texas to recover not only runs counter to the considered policy choices of that State, but extends federal jurisdiction to claims by parties that lack even an arguable right of recovery. *See Steel Co.*, 523 U.S. at 89 (subject-matter jurisdiction implicated where claim is completely foreclosed by governing law). This Court's holding that Defendants have waived the argument that HCSC's Texas customers have no cognizable legal claims thus extends this Court's jurisdiction to claims barred by Article III's standing requirements. The Court should resist such a broadening of its jurisdiction and dismiss all of the self-funded customers (or at least all of the Texas customers). *Id.* at 101 ("Much more than

legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers . . . .").

B. EVEN IF THE CASE COULD GO FORWARD, DAMAGES DISCOVERY AND A NEW TRIAL ON DAMAGES WOULD BE REQUIRED

Even if the remaining customers are allowed to proceed, appropriate damages discovery and a new trial on damages are necessary. This Court has not finally resolved that issue, and Defendants here renew their arguments for a new trial on damages as contemplated by the D.C. Circuit. *See In re Lorazepam*, 631 F.3d at 542 ("Since this may also affect damages, the district court may have to conduct a partial retrial on that issue.").

Plaintiffs' argument for use of a remittitur rather than a new trial on damages essentially rests on a single line from a reply brief in post-trial motions. Following the jury's verdict, Defendants moved to strike Plaintiffs' damages claims, for a new trial, or for a remittitur. *See* Dkt. No. 890 at 12 (arguing as the proper solution that "Plaintiffs' damages claims should be stricken or a new trial on damages should be held" and alternatively arguing for remittitur). In response, Plaintiffs conceded that five claims should be eliminated and proposed a remittitur amount. Dkt. No. 898 at 17-18. Defendants then responded by supporting their original request for relief. Dkt. No. 905.

Plaintiffs now contend that Defendants' argument constituted a binding admission that self-funded customer claims could be eliminated from the damages award on an *ad hoc* basis. *See* Dkt. Nos. 1030 at 6-7, 1036 at 10-11. Defendants have never conceded that the damages attributed to the self-funded customers can be remitted without a new trial. Rather, in their post-trial briefing, Defendants clearly argued that the proper means for eliminating improper damages was a new trial, and argued for a remittitur in the alternative. It would be highly improper to treat a statement in a reply brief supporting an argument in the alternative as a perpetually binding admission that any

number of self-funded customers can be dismissed based solely on the written opinions of an assistant to Plaintiffs' original damages expert. *See U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 833 n.4 (10th Cir. 2005) ("[I]nconsistent statements made in the alternative are not formal, deliberate declarations that could reasonably be construed as judicial admissions.").

The proper approach is to conduct a new trial on damages as anticipated by the D.C. Circuit. *See Lorazepam*, 631 F.3d at 542. Defendants are entitled to take discovery of Mr. McLean on his proposed testimony given that his prior deposition was limited to his role as a non-testifying assistant to Dr. Saha. *See Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 605-06 (10th Cir. 1997) (ordering discovery in light of new expert). They are also entitled to challenge Mr. McLean's methodology, particularly given the low value he assigns to dismissing half of the parties to the case. This should include an exchange of reports by Mr. McLean and Defendants' expert so Mr. McLean's testimony may be tested under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). An appropriate schedule has been suggested in Defendants' prior filings. *See* Dkt. No. 1031 at 17-18.

Assuming Mr. McLean's testimony meets *Daubert* standards, Plaintiffs may then present his testimony to a jury, and Defendants may challenge it. It is then up to the *jury* to determine what weight to give, if any, to Mr. McLean's testimony as to the newly disaggregated damages. *See Athridge v. Rivas*, 312 F.3d 474, 475 (D.C. Cir. 2002) ("The weighing of evidence and the drawing of legitimate inferences from disputed facts are jury functions, not those of a judge.").

In the absence of the consent of all parties, acceptance of Plaintiffs' remittitur proposal would violate the Seventh Amendment. *See Carter v. Dist. of Columbia*, 795 F.2d 116, 135 (D.C. Cir. 1986) ("[I]t is not the district court's prerogative to enter a remittitur by fiat."). Defendants are

entitled to challenge Plaintiffs' new expert before a jury and to have a jury determine the factual issues surrounding Plaintiffs newly disaggregated damages claims. As such, Plaintiffs' remittitur approach should be rejected and the Court should order damages discovery and a new trial on damages to be conducted according to the schedule proposed in Defendants' prior filings. *See* Dkt. No. 1031 at 17-18.

C. EVEN AFTER PLAINTIFFS' LATEST FILINGS, THERE REMAIN CUSTOMER-SPECIFIC JURISDICTIONAL DEFECTS

Plaintiffs have received an unprecedented number of opportunities to establish a factual predicate for federal jurisdiction over this case. Despite the solicitude they have received, they still have failed to support their assertions of jurisdiction as to multiple customers. This further supports either dismissing the case entirely or dismissing all the self-funded customers, and, at a minimum, the unsupported customer claims discussed in this section must be dismissed.

i. Objections to Specific Public Entities

Federal diversity jurisdiction does not lie over any case where one or more parties is an "arm or alter ego of the State" because the State is a real party in interest to such a case and states are not subject to diversity jurisdiction under 28 U.S.C. § 1332. *See Moor v. Alameda Cnty.*, 411 U.S. 693, 717 (1973); *Krieger v. Trane Co.*, 765 F. Supp. 756, 757 (D.D.C. 1991). *See also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279-81 (1977). There is no presumption that any type of entity is sufficiently independent of the State to allow the exercise of federal diversity jurisdiction. Rather, in determining whether an entity is an "arm or alter ego of the State," courts examine such factors as the entity's creation and political organization; whether it can levy taxes; whether it can hold property in its own name; its independence from the State; the manner in which its officers attain their positions; and the source of its operational funds. *See, e.g., Pub. Sch. Ret.*

Sys. of Mo. v. State St. Bank & Trust Co., 640 F.3d 821, 827-33 (8th Cir. 2011) (finding public school retirement agency to be "arm" of Missouri for diversity purposes); *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 261-62 (4th Cir. 2005) (finding University of Maryland to be an "alter ego" of the state for diversity purposes). *See also Daughtry v. Arlington Cnty., Va.*, 490 F. Supp. 307, 310 (D.D.C. 1980) (analyzing factors to determine if county is "arm of the state"); *Eason v. Clark Cnty. Sch. Dist.*, 303 F.3d 1137, 1141-44 (9th Cir. 2002) (same for school district).

Plaintiffs' filings and discovery productions fail to establish diversity jurisdiction over the Massachusetts Bay Transit Authority ("MBTA"), Pierce County, MN, and any of the Texas school districts. The MBTA should be considered an "arm of the state" because all of its directors are appointed by the governor of Massachusetts. MASS GEN. LAWS ch. 161A § 7. Under Massachusetts law, the board of directors is the body responsible for governing the MBTA and exercising its corporate powers. *Id.* In *Ellerbe Becket*, the Fourth Circuit recognized "[t]he fact that all of the University's decisionmakers are appointed by the Governor" to be "a key indicator of state control." 407 F.3d at 264; *see also Lewis v. Midwestern State Univ.*, 837 F.2d 197, 198-99 (5th Cir. 1988) (gubernatorial appointment of governing body "argue[s] strongly" that public entity is an "arm of the state…."). Therefore, since the MBTA's sole governing body is entirely appointed by the governor of Massachusetts, MBTA should be considered an "arm" of the Commonwealth of Massachusetts and its claims should be dismissed.

There is no evidence that Pierce County, MN exists despite Plaintiffs' identification of it as a public entity self-funded customer with claims in this case. Dkt. No. 1007-1, Diekmann Decl. Ex. MN-A, June 29, 2011. The very spreadsheet Plaintiffs rely on to establish that the Minnesota counties are organized under the statutes Plaintiffs cite lacks any listing for Pierce County. *See*

PLTSMN001055_MNcities.xls (Plaintiffs' provided spreadsheet listing every city in Minnesota and the corresponding county for each city does not contain a "Pierce County") (Ex. A).[3] The United States Census Bureau's listing of Minnesota counties also has no entry for Pierce County. Minnesota – State & County QuickFacts, UNITED STATES CENSUS BUREAU (last revised Jan. 10, 2013), http://quickfacts.census.gov/qfd/states/27000.html (dropdown of counties in Minnesota does not contain a "Pierce County") (last visited Jan. 24, 2013).[4] Since Plaintiffs' filings and productions fail to confirm Pierce County's *existence*, let alone its organization under state law, the Court should dismiss all claims attributed to that entity.[5]

The claims of all the Texas school districts should also be dismissed because Plaintiffs have failed to provide sufficient evidence to confirm that they are organized under the appropriate statutes. As part of the limited jurisdictional discovery ordered by this Court, Defendants requested that Plaintiffs produce evidence confirming that Texas school district self-funded customers are organized under state law. *See* Letter from Daniel P. Weick to Sara A. Poulos (Dec. 6, 2012) (Ex.

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[3] "Ex. _" hereinafter shall refer to exhibits attached to the Declaration of Daniel P. Weick, dated February 13, 2013 and submitted contemporaneously with and in support of Defendants' Response to Plaintiffs' Motions for Leave to File an Amended Complaint, to Dismiss Claims, and for an Order for Remittitur.

[4] There is at least one website stating that Pierce County was dissolved in 1855 and incorporated into neighboring counties. *See* Pierce County, Minnesota, WIKIPEDIA (last modified Feb. 2, 2013), http://en.wikipedia.org/wiki/Pierce_County,_Minnesota (last visited Jan. 24, 2013). Defendants do not endorse this website, but only reference it as a possible explanation for why there is no evidence of Pierce County's existence.

[5] There appears to be a Wisconsin county in the Minneapolis-St. Paul metropolitan statistical area called Pierce County. *See* Pierce County Home Page, www.co.pierce.wi.us (last visited Jan. 30, 2013). Plaintiffs never provided information in discovery for Wisconsin counties and never asserted when challenged on Pierce County that the customer was a Wisconsin county rather than a Minnesota county. As such, the Pierce County claims must be dismissed even if they pertain to the Wisconsin county.

B). Plaintiffs agreed to provide the organizing document establishing and governing each of the school districts on December 10, 2012. *See* Letter from George D. Carroll to Daniel P. Weick (Dec. 10, 2012) (Ex. C). However, Plaintiffs failed to produce any evidence confirming the organization of the listed school districts before the termination of jurisdictional discovery. *See* Letter from Ryan C. Tisch to Daniel P. Weick (Dec. 21, 2012) (Ex. D). Therefore, all claims arising from Texas school districts should be dismissed.

ii. Objections to Specific Corporations

In its October 24, 2012 Memorandum Opinion, this Court did not authorize Defendants to take discovery concerning the citizenship of Plaintiffs' corporate self-funded customers, despite Defendants' request for such discovery. Plaintiffs were only ordered to "provide competent proof of the principal place of business" for each corporate self-funded customer. Dkt. No. 1037 at 18. Despite the limited burden imposed on Plaintiffs, there remain defects for several corporate entities requiring the dismissal of all claims arising from these entities.

Plaintiffs assert claims for an entity identified as "Beth Israel Hospital" but provided no declaration for that entity. Dkt. No. 1007-1, Diekmann Decl. Ex. MA-B, June 29, 2011. While Beth Israel Hospital is listed as a separate entity from Beth Israel Deaconess Medical Center ("Beth Israel DMC"), Plaintiffs have not provided any information to distinguish the entities from one another. *See* Dkt. No. 1016-6, Krein Decl. Ex. 1, Aug. 4, 2011. According to the Massachusetts Secretary of State website, to which Plaintiffs have relied on to research the state of incorporation, Beth Israel Hospital and Beth Israel DMC have the same identification number and principal office location. *See* Public Browse and Search, SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, http://www.sec.state.ma.us/cor/corsearch.htm (last visited Jan. 23, 2013) (Ex. E). Therefore,

Plaintiffs have either failed to establish that Beth Israel Hospital has a separate existence from Beth Israel DMC or have not produced competent proof to establish the entity to be diverse. Under either view, the claims attributed to "Beth Israel Hospital" should be dismissed.

Concerning BCBS-MA customer Tighe & Bond, Inc. ("Tighe & Bond"), Plaintiffs produced a declaration stating that Tighe & Bond's principal place of business is Massachusetts. Dkt. No. 1049-7, Carroll Decl. Ex. 2, Jan. 14, 2013. However, the declaration additionally states "[i]n 2002, Tighe & Bond was registered as a corporation in New York and New Jersey," but fails to define what is meant by "registered as a corporation." *Id*. at 182. Since New York and New Jersey are both states of which certain Defendants are citizens, in the absence of evidence excluding the possibility that Tighe & Bond had New York or New Jersey citizenship at the time this action was filed, its claims should be dismissed.

Plaintiffs allege that Diocesan Pastoral Center, BCBSM Inc., and Mille Lacs Electric Cooperative are corporate self-funded customers whose claims this Court has jurisdiction over. Dkt. No. 1007-1, Diekmann Decl. Ex. MN-B, June 29, 2011. However, Plaintiffs failed to provide documentation regarding the principal place of business for any of these entities and none were listed as remittitur claims. Further, according to the Minnesota Secretary of State website, to which Plaintiffs have relied on for the certificates of incorporations, there is no entity operating under the names Diocesan Pastoral Center or Mille Lacs Electric Cooperative. *See generally* Minnesota Business & Lien System, OFFICE OF THE MINNESOTA SECRETARY OF STATE, http://mblsportal.sos.state.mn.us/ (last visited Jan. 23, 2013) (Exs. F, G). Thus, any claims associated with these entities should be dismissed for lack of competent proof of citizenship.

Plaintiffs filed declarations for Delta Dental Plan, Diocese of Duluth, and Great River Energy. Dkt. No. 1049-7, Carroll Decl. Ex. 1, Jan. 14, 2013. However, none of these corporate entities were listed in Plaintiffs' 2011 declaration of corporate self-funded customers. Dkt. No. 1007-1, Diekmann Decl. Ex. MN-B, June 29, 2011. Further, according to the Minnesota Secretary of State website, the Diocese of Duluth and Great River Energy are not corporations, and therefore, Plaintiffs must establish the citizenship of each of their members under the rules for unincorporated associations. *See* Diocese of Duluth Business Record Details, OFFICE OF THE MINNESOTA SECRETARY OF STATE, http://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=e70a575d-b7d4-e011-a886-001ec94ffe7f (listing entity's business type as "General Entity") (last visited Jan. 23, 2013); Great River Energy Business Record Details, OFFICE OF THE MINNESOTA SECRETARY OF STATE, http://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=dfea8e13-9dd4-e011-a886-001ec94ffe7f (listing entity's business type as "Cooperative (Domestic)") (last visited Jan. 23, 2013) (Exs. H, I). *See generally Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990) ("[W]e reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members. We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members' . . . .") (quoting *Chapman v. Barney*, 129 U.S. 677, 682 (1889)); *Ind. Gas Co., Inc. v. Home Ins. Co.*, 141 F.3d 314, 316-17 (7th Cir. 1998). Since Plaintiffs have only recently added these entities to their filings and have proceeded under the wrong standard for at least two of them, the entities should be dismissed.

BCBS-MN now provides a declaration claiming Minnesota Annual Conference of the United Methodist Church ("MACUMC") to be a diverse corporate self-funded customer. Dkt. No. 1049-7,

Carroll Decl. Ex. 1, Jan. 14, 2013. However, MACUMC was listed in Plaintiffs' 2011 declaration listing the self-funded customers for which Plaintiffs could not establish diversity of citizenship. Dkt. No. 1007-1, Diekmann Decl. Ex. MN-C, June 29, 2011. Plaintiffs should not be permitted to deny their prior representations to the Court, particularly where they have so aggressively claimed the existence of "admissions" by Defendants, and MACUMC should accordingly be dismissed.

Since the Court has not authorized the jurisdictional discovery of the corporate self-funded customers previously requested by Defendants, there is insufficient documentary evidence available for Defendants to make further factual challenges to the declarations from the customers. *See* Dkt. No. 1031 at 12-14 (requesting jurisdictional discovery for all customers whose claims the Court considers allowing). However, the ever shifting set of customers Plaintiffs claim can continue demonstrates why the continued assertion of jurisdiction over any of the self-funded customers would be improper or, at a minimum, requires further scrutiny by way of documentation. Thus, in addition to dismissing the specified customers, the Court should dismiss all of the self-funded customer claims.

IV. CONCLUSION

The Court should dismiss the case entirely for want of subject-matter jurisdiction or, at a minimum, dismiss all of the self-funded customer claims and hold a new trial on damages after a reasonable period of damages discovery. Failing that, the Court should dismiss all of the claims identified in part III.C of this brief, order further discovery concerning the corporate self-funded customers, and hold a new trial on damages after a reasonable period of damages discovery.

Respectfully submitted,

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