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**MONTANA FOURTH JUDICIAL DISTRICT COURT  
MISSOULA COUNTY**

THE DEPOT, INC., a Montana Corporation, UNION CLUB BAR, INC., a Montana Corporation, and TRAIL HEAD, INC., a Montana Corporation, on behalf of themselves and all those similarly situated,

Plaintiffs,

vs.

CARING FOR MONTANANS, INC., F/K/A BLUE CROSS AND BLUE SHIELD OF MONTANA, INC., HEALTH CARE SERVICE CORP., and JOHN DOES I-X,

Defendants.

**CAUSE NO. DV-16-521**

**SECOND AMENDED  
COMPLAINT  
PUTATIVE CLASS ACTION  
AND DEMAND FOR JURY TRIAL**

COME NOW the Plaintiffs, by and through the undersigned, and for their Complaint, state and allege as follows:

### **SUMMARY OF CASE**

1. Defendants sold “Chamber Choices” health insurance plans to Plaintiffs through a marketing program promoted by the Montana Chamber of Commerce. In the course of negotiations surrounding the sale of the plans, and before the plans became effective, Defendants established and represented charges for the plans that included undisclosed amounts exceeding the premium applicable to the insurance, which it used to pay kickbacks to the Chamber as a marketing incentive. This practice violated standards of ordinary and reasonable care and good faith in the insurance industry for setting premium rates and misled Plaintiffs and other similar consumers who justifiably believed that the charges reflected the premium for the insurance. In doing so, Defendants violated Plaintiffs’ rights and caused them damage, giving rise to causes of action grounded in state common law.

### **PARTIES AND JURISDICTION**

2. At material times, Plaintiffs The Depot, Inc., (Depot), Union Club Bar, Inc., (Union Club) and Trail Head, Inc. (Trail Head), are and were Montana Corporations; all maintain their principal places of business in Missoula, Montana, and all paid premiums for, received, and provided to

their employees health insurance coverage that was sold by Defendants. They are sometimes referred to collectively herein as “Plaintiffs.” The health insurance was marketed through the Montana Chamber of Commerce, a membership association (“the Chamber”), and the arrangement was known as the “Chamber Choices” health insurance program.

3. At material times prior to July 31, 2013, Blue Cross and Blue Shield of Montana, Inc. (“BCBSMT”) was an independent Montana health services corporation doing business in the State of Montana. On July 31, 2013, as part of the transaction described below, the name of BCBSMT was changed to Caring for Montanans, Inc (CFM), the Defendant so named above. CFM is a Montana domestic non-profit corporation.

4. On July 31, 2013, Defendant Health Care Service Corp. (“HCSC”) acquired the existing health insurance business of BCBSMT and the name “Blue Cross and Blue Shield of Montana” for purposes of doing business in Montana. (“the Transaction”) Under the terms of the Transaction, HCSC left the non-purchased “public assets” of BCBSMT in CFM. Applicable law required the fair market value of these assets at the time of the Transaction to be donated to a charitable entity, § 50-4-701, *et seq.*, MCA. However, HCSC also left the future contingent legal liabilities of BCBSMT in CFM to be paid out of the aforementioned public assets

before said assets are donated to the charitable entity. HCSC paid no consideration to BCBSMT or CFM in return for CFM's assumption of these liabilities.<sup>1</sup>

5. This case was removed to federal court and has been remanded to this Court by Judge Donald Molloy for lack of subject matter jurisdiction. Case 9:19-cv-00113-DWM, Doc. 25. This Second Amended Complaint, which is filed with written consent of the parties, also serves as a refiling of the case that was dismissed by Judge Dana Christensen without prejudice to refile in state court when federal claims were dismissed and he declined to exercise supplemental jurisdiction. Case 9:16-cv-00074-DLC, Doc. 71.

### **FACTUAL BACKGROUND**

6. From approximately 2004 through 2014, BCBSMT established and represented to employers purchasing Chamber Choices health insurance policies premium charges that included specific amounts in excess of the premium applicable to the insurance (the “medical premium”), which amounts it used to pay unlawful kickbacks to the Chamber. Plaintiffs were among these employers during certain material years and paid all or

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<sup>1</sup> For clarity and ease of reference, since the storefront of the insurer did not change, the term “BCBSMT” is used to describe the conduct of Blue Cross Blue Shield of Montana, Inc. n/k/a CFM before the transaction, and HCSC d/b/a Blue Cross Blue Shield of Montana after the transaction.

part of the premium charges for Chamber Choices coverage including the amounts in excess of the medical premium. The charges in excess of the medical premium, which BCBSMT called “external rates,” were embedded in the premium and were concealed during at least the years 2008 through the end of 2011 and not effectively disclosed during the years 2012-2014. BCBSMT paid the kickbacks in order to secure business for itself despite the fact such conduct was illegal and contrary to the interests of and harmful to Plaintiffs. At material times, BCBSMT’s “external rates” also included amounts used to pay for additional insurance products in a manner that was not disclosed to or approved by Plaintiffs. BCBSMT also developed and utilized “internal rates” which represented the actual cost of the medical premium for which BCBSMT was providing insurance benefits to the members, spouses, and dependents covered by the association plans.

7. During the negotiations between BCBSMT and Plaintiffs, including prior to each annual renewal, BCBSMT expressly or impliedly misrepresented the Chamber Choices premium charges as the medical premium — BCBSMT’s “internal rate” — and concealed or failed to properly disclose the fact that the premium charges included extra charges that it imposed for purposes of making illegal kickback payments or for purchasing other products that the Plaintiffs had not requested or

authorized. In deciding to purchase Chamber Choices health insurance, Plaintiffs justifiably relied on these express and/or implied misrepresentations.

8. On February 10, 2014, following a market conduct exam, the Montana Commissioner of Securities and Insurance imposed a \$250,000 fine against BCBSMT for illegal insurance practices, including improper medical premium billing (in violation of § 33-18-212, MCA) and kickbacks, also called “rebates” (in violation of § 33-18-208, MCA). Neither CFM nor HCSC challenged the findings of the Insurance Commissioner and the fine was paid out of the public assets that HCSC had left behind in CFM as part of the Transaction.<sup>2</sup> Publication of this finding and fine was the first time that the public was made aware of BCBSMT’s afore described conduct. Plaintiffs did not actually learn these facts until more than two years later.

9. BCBSMT concealed and did not disclose its misconduct, thus tolling applicable limitation periods relating to the claims presented herein until such time as BCBSMT’s conduct was discovered and exposed by the Insurance Commissioner or until such later time as Plaintiffs received actual notice.

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<sup>2</sup> BCBSMT’s violations of §§ 33-18-208 and 212, MCA, bear upon Plaintiffs’ common law claims asserted herein. See *Williams v. Union Fid. Life Ins. Co.*, 2005 MT 273, ¶¶30, 329 Mont. 158, 123 P.3d 213.

10. Under Montana law governing corporate succession and Montana's conversion of non-profit health entity law, § 50-4-701, et seq., MCA, HCSC was required to assume the liabilities of BCBSMT as part of the Transaction in which it acquired and continued doing business as BCBSMT and is liable for the relief sought herein by Plaintiffs and the putative class. Alternatively, HCSC is liable for the damages caused by its own conduct as described herein after the Transaction and CFM is liable for the conduct of BCBSMT prior to the Transaction.

#### **COUNT I – GENERAL NEGLIGENCE**

11. Plaintiffs incorporate by reference all prior allegations.

12. The standard of ordinary and reasonable care in the setting of health insurance premium charges requires setting the premium based on the cost of the insurance itself, which is known as the "medical premium," and in an amount that is consistent with the rates filed with the Montana Insurance Department. By embedding in the Chamber Choices premium extra charges in excess of the medical premium for the purpose of making illegal kickback payments or for purchasing other products that the Plaintiffs and the Class had not requested or authorized, in the course of negotiations and prior to the existence of each plan, BCBSMT breached the standard of ordinary and reasonable care and was negligent.

13. As a direct and legal result of BCBSMT's negligence, Plaintiffs and the Class suffered economic losses and are entitled to appropriate relief.

14. Either or both of the Defendants is/are the legal successor to BCBSMT and is/are therefore liable for BCBSMT's negligence and Defendant HCSC is directly liable for its own negligence as to conduct that occurred after the transaction.

### **COUNT II – COMMON LAW BAD FAITH**

15. Plaintiffs incorporate by reference all prior allegations.

16. Defendants had at all material times a duty to act in good faith toward Plaintiffs and the Class, a duty that exists independent of the insurance contract and independent of statute. This duty, which existed during the application process, required honesty in fact and adherence to reasonable commercial standards of fair dealing in the insurance business.

17. By embedding in the Chamber Choices premium extra surcharges in excess of the medical premium for the purpose of making illegal kickback payments or for purchasing other products that the Plaintiffs and the Class had not requested or authorized, by misleading Plaintiffs and the Class and concealing its conduct and by serving its own interests at the expense of Plaintiffs and the Class, all during negotiations and before each plan existed, BCBSMT breached its duty to act in good faith.



18. As a result of BCBSMT's breaches, Plaintiffs and the Class suffered economic losses and are entitled to appropriate relief.

19. Either or both of the Defendants is/are the legal successor to BCBSMT and is/are therefore liable for BCBSMT's bad faith and Defendant HCSC is directly liable for its own bad faith as to conduct that occurred after the transaction.

### **COUNT III – NEGLIGENT MISREPRESENTATION**

20. Plaintiffs incorporate by reference all prior allegations.

21. By acting as described herein, BCBSMT committed negligent misrepresentation; to wit, BCBSMT (1) supplied false information in the course of its business; (2) failed to exercise reasonable care in communicating the information; (3) Plaintiffs and the Class justifiably relied on the false information, which caused the their financial losses; (4) Plaintiffs and the Class are part of a limited group of persons for whose benefit and guidance the Defendant intended to supply the information; and (5) Plaintiffs and the Class relied on the information in transactions that the Defendant knew the information would influence.

22. As a result of BCBSMT's negligent misrepresentation, Plaintiffs and the Class suffered economic losses and are entitled to appropriate relief.

23. Either or both of the Defendants is/are the legal successor to BCBSMT and is/are therefore liable for BCBSMT's negligent misrepresentation and Defendant HCSC is directly liable for its own negligent misrepresentation as to conduct that occurred after the transaction.

#### **COUNT IV – UNJUST ENRICHMENT**

24. Plaintiffs incorporate by reference all prior allegations.

25. To the extent BCBSMT embedded in the Chamber Choices premium extra surcharges in excess of the medical premium for making illegal kickback payments, or for purchasing other products that the Plaintiffs and the Class had not requested or authorized, all during negotiations and before each plan existed, BCBSMT received a benefit that it knew about or appreciated and accepted or retained under circumstances where it was inequitable for defendant to do so. BCBSMT has unjustly been enriched to the same extent.

26. BCBSMT should be disgorged of any and all illegal or excessive premiums collected, and such funds returned to Plaintiffs and the Class.

27. Either or both of the Defendants is/are the legal successor to BCBSMT and is/are therefore liable for BCBSMT's unjust enrichment and

Defendant HCSC is directly liable for its own unjust enrichment as to conduct that occurred after the transaction.

### **CLASS ALLEGATIONS**

28. Plaintiffs bring this action on their own behalf and on behalf of a class of persons similarly situated pursuant to Rule 23, Montana Rules of Civil Procedure.

29. The Class is comprised of all persons who satisfy the following criteria: all Montana employers that purchased insurance from BCBSMT under a “Chamber Choices” insurance policy and who made premium payments that included charges—that were set and/or communicated to Plaintiffs and the Class during negotiations and before each plan existed—where the charges were in excess of the medical premium (the charge for the health insurance itself) and were added into the billed premium in order to generate revenue to make unlawful kickback payments or purchase other unauthorized insurance products, within the applicable limitations periods.

30. The Class is so numerous that joinder of all members is impracticable. The Complaint concerns a systematic and programmatic insurance premium rate setting practice as set forth above. There are questions of law or fact common to the Class. BCBSMT’s practice of embedding in the Chamber Choices premium surcharges in excess of the

medical premium involved the same surcharges in the same amounts for all members of the Class and these premiums were set and communicated to Plaintiffs and the Class during the negotiations and prior to each plan's existence in the same way for all members of the class. Therefore, the common questions include whether this conduct met the elements of each of the common law causes of action delineated above. The claims of Plaintiffs are typical of those of the Class. All claims of Plaintiffs and the Class are based upon the same factual and legal theories.

31. Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs have no interest antagonistic to those of the Class. Plaintiffs' counsel are competent and experienced in consumer class actions.

32. BCBSMT has acted on grounds generally applicable to the Class, thereby making final relief and declaratory relief appropriate with respect to the Class as a whole.

33. The questions of law and fact common to the Class predominate over any question affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy. The Class members are consumers who may be unable to locate or afford attorneys. Most are probably unaware that their rights under Montana law have been violated. The amounts of

actual losses per consumer, while not insignificant to a consumer, are too small to make individual suits economically feasible, and thus a consumer class action is particularly well-suited to address violations and for recovery by the Class.

34. The Class may be certified under Rule 23(b)(3), Mont. R. Civ. P., as such represents a superior method for the fair and efficient adjudication of this controversy in that:

(a) Most of the Class members are not aware of their rights and have no knowledge that their rights have been violated.

(b) The interest of class members individually controlling the prosecution of separate claims is small because of the limited losses per consumer.

(c) Management of this class action is not likely to present significant difficulties.

(d) Defendants acted on grounds generally applicable to the Class thereby making appropriate final injunctive and declaratory relief with respect to the Class as a whole.

(e) Certification of a class under Rule 23 of the Montana Rules of Civil Procedure is appropriate in that Defendants have acted on grounds generally applicable to the Class thereby making appropriate declaratory

relief with respect to the Class as a whole.

35. Plaintiffs request certification of a class action.

### **COUNT V – Punitive Damages**

36. Plaintiffs incorporate by reference all prior allegations.

37. The conduct of Defendants and each of them alleged herein constituted actual malice within the meaning of § 27-1-221, MCA, entitling Plaintiffs and the class to reasonable punitive damages.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of themselves and the putative class, respectfully request the following relief against Defendants:

- a. That this honorable Court certify the Class and appoint Plaintiffs class representatives and its attorneys as class counsel;
- b. Repayment of all amounts charged by BCBSMT and paid by Plaintiffs and other Chamber Choices consumers in excess of the medical premium as alleged above;
- c. Establishment of a constructive trust or common fund to receive the funds repaid to the class;
- d. Attorney fees and costs of suit;
- e. Pre-judgment interest pursuant to § 27-1-210, MCA;
- f. Punitive damages; and

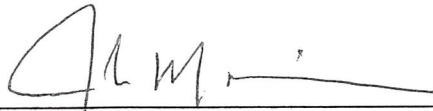
g. Such other and further relief as the Court may deem just and proper.

### DEMAND FOR JURY TRIAL

Pursuant to Rule 38, M. R. Civ. P., Plaintiffs hereby demand a trial by jury of the issues triable by right by jury.

Dated this 18 day of November, 2019.

MORRISON SHERWOOD WILSON DEOLA PLLP  
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A handwritten signature in black ink, appearing to read "J Morrison", is written over a horizontal line.

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