

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division

CASE NO. 03-21296-CIV-MORENO/KLEIN

KENNETH A. THOMAS, M.D., et. al,

Plaintiffs,

v.

BLUE CROSS AND BLUE SHIELD  
ASSOCIATION, et. al,

Defendants.

FILED by [Signature] B.C.  
MAG. SEC.  
DEC 09 2004  
CLARENCE MADDOX  
CLERK U.S. DIST. CT.  
S.D. OF FLA. - MIAMI

CASE NO. 03-22935-CIV-MORENO/KLEIN

DR. JEFFREY SOLOMON, et. al,

Plaintiffs,

v.

BLUE CROSS AND BLUE SHIELD  
ASSOCIATION, et. al,

Defendants.

**PROTECTIVE ORDER GOVERNING PROTECTED MATERIAL  
OTHER THAN CONFIDENTIAL HEALTH INFORMATION**

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED

that:

**DEFINITIONS GENERALLY**

1. As used in this Order, the term "party" shall mean all named parties to both the Thomas and Solomon Action, including any named party added or joined to either the Thomas and Solomon Actions or any related complaint in these actions. As used in this Order, the term "third party" shall mean any individual, corporation, association, or other natural person or

[Handwritten initials/signature]

entity. The term "Medical Association" means any national, state, regional, or local medical association or society (including but not limited to any specialty association or society), or any of their subsection(s), committee(s), or other subdivisions(s).

2. This Order shall govern all documents produced and information supplied in any form (including, but not limited to, documents and information produced by a party or third party, disclosed through testimony, or contained in pleadings, briefs, or other documents filed with the Court) for purposes of discovery or otherwise. The term "documents" as used herein is intended to be comprehensive and includes any and all materials in the broadest sense contemplated by Rule 34 of the Federal Rules of Civil Procedure, and shall include all written, oral, recorded, or graphic material, however produced or reproduced, including, but not limited to: all written or printed matter of any kind, including the originals and all non-identical copies thereof, whether different from the originals by reason of any notation made on such copies or otherwise; software, computer data, including, but not limited to, information stored in a computer at any time; all graphic or manual records or representations of any kind, including, but not limited to, photographs, microfiche, microfilm, videotape, records, and motion pictures; electronic, mechanical, or electric records or representations of any kind, including, but not limited to, cassettes, discs, magnetic cards and recordings, optical and other media; and all drafts, alterations, modifications, changes, and amendments to any of the foregoing.

#### **CATEGORIES OF PROTECTED MATERIAL**

3. The term "Confidential Health Information," as used herein, shall have the meaning set forth in the Stipulated Protective Order Governing Confidential Health Information, entered on October 12, 2004.

4. As used in this Order, the term "Confidential Material" means any document or information supplied in any form, or any portion thereof, which contains confidential business,

commercial, research, or financial information of any party or third party, and which is denominated as Confidential Material for purposes of this litigation; provided however, that for purposes of this Order the term "Confidential Material" shall not include "Confidential Health Information." A denomination by a party or third party of "Confidential Material" shall constitute a representation to the Court that counsel believes in good faith that the information constitutes Confidential Material. The parties and third parties shall make a good faith effort to denominate information so as to provide the greatest level of disclosure possible, but still preserve confidentiality as appropriate. A party or third party denominating information as Confidential Material shall mark each page of the document containing such material as "Confidential" or "Subject to Confidentiality Order."

5. As used in this Order, the term "Highly Confidential Material" means any document or information supplied in any form, or any portion thereof, which a party or third party reasonably believes to be so economically or competitively sensitive that: (i) it is the subject of reasonable efforts under the circumstances to maintain its secrecy; (ii) it is sufficiently valuable and secret to afford a potential or actual advantage over others; (iii) its disclosure to existing or potential business competitors, existing or potential contracting providers, Medical Associations, health care vendors servicing the managed care industry, or any person regularly employed or engaged by such entities, would materially affect or threaten injury to the business, commercial, or financial interests of such party or third party; and (iv) that is denominated as Highly Confidential Material for purposes of this litigation. By way of example, and not limitation, "Highly Confidential Information" includes: strategic planning information; negotiation strategies; proprietary software or systems; proprietary edits or customizations to software; and pricing information, including fee schedules, payment rates, premium information, capitation tables or rates, and underlying documentation. "Highly Confidential" shall also mean

personnel files that are denominated as "Highly Confidential" for purposes of this litigation. *Provided, however, that for purposes of this Order the term "Highly Confidential Material" shall not include "Confidential Health Information."* A denomination by a party or third party of "Highly Confidential Material" shall constitute a representation to the Court that counsel believes in good faith that the information constitutes Highly Confidential Material. The parties and third parties shall make a good faith effort to denominate information so as to provide the greatest level of disclosure possible, but still preserve confidentiality as appropriate. A party or third party denominating information as Highly Confidential Material shall mark each page of the document containing such material as "Highly Confidential."

6. "Confidential Material," "Highly Confidential Material," and "Confidential Health Information" may be collectively referred to herein as "Protected Material."

#### **GENERAL PROVISIONS**

7. **Scope.** This Order only governs Confidential Material and Highly Confidential Material. The disclosure of, and other procedures relating to, Confidential Health Information shall be governed by the Stipulated Protective Order Governing Confidential Health Information, entered on October 12, 2004. In the event that a document or information contains more than one category of Protected Material, this Order shall be read together with the Stipulated Protective Order Governing Confidential Health Information. In the event of a conflict between such orders, the provisions affording the greatest protections for Protected Material shall control.

8. **Previously Produced Material.** Material produced prior to the entry of this Order, including materials previously produced in the Shane Action and made available to the parties subject to this Order, that was designated in some manner shall be treated in accordance with previous designations and will not be treated as "Highly Confidential Material" or "Confidential Material" unless designated as such (or in a similar manner) previously. (For

purposes of this Paragraph, material previously designated as "Attorneys' Eyes Only Material" shall be treated as "Highly Confidential Material"). Provided, however, with respect to any material previously treated as undesignated, a party or third party shall have forty-five (45) days from the notice of entry of this Order to denominate such materials as Confidential Material or Highly Confidential Material. Further provided, however, with respect to any materials produced in the Shane Action and previously treated as undesignated, which have been made available to the parties subject to this Order, a party or third party shall have ninety (90) days from the date the party or third party receives the materials to denominate such materials as Confidential Material or Highly Confidential Material. If no such designation is made by the party or third party within the applicable period, the materials shall thereafter be treated as undesignated.

9. **Production for Inspection Purposes Only.** Notwithstanding the provisions of Paragraphs 4 and 5, in the event that a party or third party provides documents for inspection only, no marking need be made by the providing party or third party in advance of the initial inspection, and the following procedures shall apply:

(a) The producing party or third party shall not be considered to have waived the status as Confidential Material or Highly Confidential Material of documents made available during such an initial inspection but not chosen by the inspecting party for copying.

(b) Thereafter, upon selection of specified documents for copying by the inspecting party, the producing party or third party shall, within twenty-one (21) days (or such longer period as may be agreed upon by the parties or ordered by the Court), and prior to providing copies of the selected documents to the requesting party, mark each

page of such documents as may contain Confidential Material or Highly Confidential Material in accordance with this Paragraph.

10. **Depositions.** At the time of a deposition or within thirty (30) days after receipt of the deposition transcript, a party or third party may designate as Confidential Material or Highly Confidential Material specific portions of the transcript, exhibits, and any videotape. This designation shall be in writing and served upon counsel of record. All transcripts, exhibits, and videotapes shall initially be treated as "Highly Confidential Material" pursuant to this Order for thirty (30) days following receipt of the deposition transcript; or, when applicable, ninety (90) days following receipt of the deposition transcript if the deposition was taken in the Shane Action and the transcript was made available to the parties subject to this Order. Any portions of a transcript, exhibit, or videotape designated as Confidential Material or Highly Confidential Material shall thereafter be treated in accordance with this Order.

11. **Objections to Designation or Treatment.** A party or any member of the public may, in good faith, object to the designation of any document or specific information as Confidential Material or Highly Confidential Material by stating its objection in writing, which specifies (by Bates numbers) the document or information challenged (or, where appropriate, by reasonably defined categories of documents or information challenged) and includes a statement of the legal or factual basis for each objection, to the party or third party making the designation, and it shall make a good faith effort to resolve the dispute with counsel for the party or third party so designating the document or information. If the parties cannot reach agreement as to the designation, the designating party may move the Court for an order determining whether or not such document is Confidential Material or Highly Confidential Material. The designating party will have seven (7) days to file such a motion, which period shall begin to run after completion of the meet and confer process regarding the specific document(s) at issue. Pending a final

ruling by the Court on the motion, the initial designation and the terms of this Order shall remain in effect.

**DISCLOSURE OF PROTECTED MATERIAL**

12. **Confidential Material.** Except as provided in Paragraph 15 below, Confidential Material may be disclosed only to:

- (a) the parties, the parties' counsel and their partners, associates, paralegals, and clerical and support personnel.
- (b) the Court and all persons assisting the Court in this action, including court reporters taking testimony involving such information, and necessary stenographic and clerical personnel thereof;
- (c) persons retained as consultants or experts by any party for the purposes of this litigation and principals and employees of the firms with which consultants or experts are associated (but excluding any person regularly employed or engaged by a current or prospective competitor of the party or third party that denominated the material);
- (d) persons other than consultants or experts who are retained to provide purely administrative assistance to counsel for any party for the purpose of this action, including litigation support services and outside copying services;
- (e) the persons listed on the document as authors or recipients (including copyees);
- (f) any person who is likely to testify as a witness at a deposition, hearing, mediation, trial, or other proceeding in this action, and for the purpose of assisting in the preparation or examination of the witness; and
- (g) any other person hereafter designated by written stipulation of the parties

or by further order of the Court.

13. **Highly Confidential Material.** Except as provided in Paragraph 15 below, Highly Confidential Material may be disclosed only to:

(a) the parties' outside counsel and their partners, associates, paralegals, and clerical and support personnel, provided they are not presently, and have no plans to become, employees of any plaintiff or defendant in this litigation.

(b) the Court and all persons assisting the Court in this action, including court reporters taking testimony involving such information, and necessary stenographic and clerical personnel thereof;

(c) persons retained as *independent* (i.e., non-party and non-employee) consultants or experts by any party for the purposes of this litigation and (except as set forth herein with respect to third party Medical Association consultants or experts) principals and employees of the firms with which such independent consultants or experts are associated, but specifically excluding any person regularly employed or engaged by a current or prospective competitor of the party or third party that denominated the material; *provided that* before disclosure to independent consultants or experts employed by, engaged by, or associated with a third party Medical Association, (i) counsel first must comply with the requirements of Paragraph 18 of this Order, and (ii) such disclosure shall be limited to the specific person retained as a consultant or expert and identified as such pursuant to Paragraph 18 of this Order;

(d) a person employed by, engaged by, or associated with a party Medical Association who is retained as a consultant or expert by any party for purposes of this litigation; *provided that* (i) counsel first comply with the requirements of Paragraph 18 of



this Order, and (ii) such disclosure shall be limited to the specific person retained as a consultant or expert and identified as such pursuant to Paragraph 18 of this Order;

(e) persons other than consultants or experts who are retained to provide purely administrative assistance to counsel for any party for the purpose of this action, including litigation support services and outside copying services;

(f) persons listed on the document as authors or recipients (including copyees);

(g) any person who is likely to testify as a witness at a deposition, hearing, mediation, trial, or other proceeding in this action, and for the purpose of assisting in the preparation or examination of the witness; and

(h) any other person hereafter designated by written stipulation of the parties or by further order of the Court.

Highly Confidential Material may not be disclosed to any person employed by, engaged by, or associated with a party or third party Medical Association unless such person is retained as a consultant or expert and such disclosure is made in accordance with the terms of subparagraphs (c) and (d). Even then, such person is not authorized to disclose any information received under this Paragraph 13 to any persons not otherwise authorized to receive such information under this Order, including other officers or employees of the Medical Association with which such consultant or expert is associated, and such person may not use such information for any purpose other than the prosecution or defense of this litigation.

14. **Acknowledgement.** No Confidential Material or Highly Confidential Material may be disclosed to any person pursuant to the provisions of Paragraphs 12 or 13 of this Order unless counsel first informs such person that pursuant to this Order the material to be disclosed may only be used for purposes of preparing and presenting evidence in this litigation and must be

kept confidential. No Confidential Material or Highly Confidential Material may be disclosed to any person identified in subparagraphs 12(c) through 12(g) of this Order or subparagraphs 13(c) through 13(g) of this Order, respectively, unless such person first is given a copy of this Order and advised that the information contained in the document is Confidential Material or Highly Confidential Material, as the case may be, and informed that an unauthorized disclosure of the information in the document may constitute contempt of this Court. Each person to whom Confidential Material or Highly Confidential Material is disclosed pursuant to Paragraphs 12(c), 12(d), 12(f), 13(c), 13(d), or 13(g) of this Order, as the case may be, shall execute an Acknowledgment in the form attached hereto as Exhibit A and shall agree to be bound by this Order prior to receiving any Confidential Material or Highly Confidential Material. Copies of the executed Acknowledgements, and a current log of the materials disclosed to each person executing an Acknowledgment, shall be retained by counsel for the party or parties who disclosed the Confidential Material or Highly Confidential Material to such persons. Copies of all Acknowledgements executed pursuant to this Paragraph 13 shall be disclosed to the party or third party who produced or supplied the Confidential Material or Highly Confidential Material (a) within thirty (30) days after the final resolution of this Action (including resolution of all appellate proceedings), (b) within thirty (30) days after settlement with the producing party, or (c) on good cause shown.

15. Notwithstanding any other provision of this Order:

(a) Nothing in this Order shall limit the ability of any party or third party to disclose to any person Confidential Material or Highly Confidential Material designated by it or that is a business record of that party or third party, as the case may be;

(b) Nothing in this Order shall limit any defendant's ability to disclose Confidential Material or Highly Confidential Material designated by it or that is a

business record of that defendant to other defendants or their counsel or to others as the defendants may mutually agree;

(c) Nothing in this Order shall limit any named plaintiff's ability to disclose Confidential Material or Highly Confidential Material designated by him or her or that is a business record of that plaintiff to other named plaintiffs or their counsel or to others as the named plaintiffs may mutually agree.

16. Except as provided in Paragraph 15, no person, firm, corporation, or other entity shall use, disclose, make available, or otherwise communicate Confidential Material or Highly Confidential Material in any manner whatsoever except for purposes of this litigation, and then only in a manner consistent with this Order. A party's use for any purpose of its own documents and information which it produces or discloses in this litigation shall not be considered a violation of this Order.

17. **Disclosure of Confidential or Highly Confidential Material to a Witness.** Counsel for a party may show documents containing Confidential Material or Highly Confidential Material to a witness during a deposition, hearing, trial, or other proceeding without providing prior notice to the party or third party who produced or supplied the Protected Material. Before doing so, however, the witness shall be shown a copy of this Order and advised that the information contained in the document is Protected Material and informed that an unauthorized disclosure of the information in the document may constitute contempt of this Court.

18. **Disclosure of Highly Confidential Material to a Consultant or Expert.** Before disclosing Highly Confidential Material under Paragraphs 13(c) or (d) of this Order to any person regularly employed by, engaged by, or associated with a party or third party Medical Association, the party wishing to make such a disclosure shall give seven (7) days advance

written notice (by facsimile transmission or electronic mail) to counsel who denominated such information as Highly Confidential Material, identifying: (1) the name of the expert to whom the disclosure will be made; (2) their field of expertise; (3) their current employment; (4) the nature of the relationship with the party or third party Medical Association; and (5) the documents or information (specified by Bates numbers(s)) to be disclosed. The denominating party or third party shall have five (5) days from receipt of the notice to object or agree to the disclosure, and shall provide written notice to the disclosing party (by facsimile or electronic mail) of such objection or agreement. If the denominating party or third party objects to the disclosure, the matter will be scheduled for a hearing. Disclosure is not permissible until final resolution of the issue by the Court.

**USE OF PROTECTED MATERIAL BY A PARTY IN THESE PROCEEDINGS**

19. Notwithstanding any other provision of this Order, the parties and third parties (to the extent applicable) shall confer and attempt to agree before any hearing, trial, or other proceeding on the procedures to be included in a protective order pursuant to which Confidential Material or Highly Confidential Material may be introduced into evidence or otherwise used at such hearing, trial, mediation, or other proceeding. Absent agreement, the Court shall be asked to issue an order governing the use of such Confidential Material and Highly Confidential Material at hearing, trial, or other proceeding.

20. In the event a party wishes to use Confidential Material or Highly Confidential Material in any affidavits, briefs, memoranda of law, exhibits to motions, or other papers filed in Court in this action prior to entry of a protective order governing use of Protected Material, such party shall take appropriate steps to safeguard such Confidential Material or Highly Confidential Material from documents filed with the Court, which steps may include redaction. In the event the Court wishes to review the redacted material, the Court may review

the redacted material in camera or order that the documents containing Confidential Material or Highly Confidential Material be filed under seal in accordance with this Paragraph.

Alternatively, such affidavits, briefs, memoranda of law, exhibits to motions, or other papers so filed shall be filed under seal, provided that filing under seal shall be governed by prior orders of this Court.

**THIRD PARTY REQUEST OR DEMAND FOR DISCLOSURE**

21. Should any person bound by this Order receive a subpoena, civil investigative demand, or other process from a third party seeking, requesting, or requiring the disclosure of Confidential Material or Highly Confidential Material in any form, such person shall give notice immediately to the party or third party who produced or supplied the Confidential Material or Highly Confidential Material so that the party or third party may seek appropriate relief, if any. No person bound hereby who receives a subpoena, civil investigative demand, or other process from a third party seeking, requesting, or requiring the disclosure of Confidential Material or Highly Confidential Material shall produce or disclose such documents or information unless and until (a) ordered by a court having competent jurisdiction, or (b) such production or disclosure is in accordance with the provisions herein and is expressly consented to by the party or third party herein which have produced or supplied the Confidential Material or Highly Confidential Material, as the case may be.

**INADVERTENT PRODUCTION OF PROTECTED MATERIAL**

22. The production of Confidential Material or Highly Confidential Material without a designation as Confidential Material or Highly Confidential Material, as the case may be, shall not be deemed a waiver or impairment of any claim of protection of the confidential nature of any such material. Notice of inadvertent production of Protected Material, and retrieval or redesignation of such material shall be governed by the Court's Joint Case Management

Order, dated June 14, 2004. Additionally, upon notice that any Confidential Material or Highly Confidential Material has not been appropriately so denominated, and should be redesignated as Confidential Material or Highly Confidential Material, the party receiving such notice shall make a reasonable, good faith effort to ensure that any analyses, memoranda or notes that were generated based upon such material before its redesignation shall immediately be treated in conformity with any such redesignation.

**MISCELLANEOUS PROVISIONS**

23. Nothing contained in this Order shall be construed as an admission that any document or information, or any testimony relating to such document or information, is or would be admissible in evidence in this case or in any other proceeding.

24. Nothing contained in this Order shall affect the rights of the parties or third parties to object to discovery on grounds other than those related to the confidentiality of documents or information, nor shall it relieve a party or third party of its obligation to properly respond or object to discovery requests, nor shall it preclude any party or third party from seeking further relief or protective orders from the Court as may be appropriate under the Federal Rules of Civil Procedure.

25. The parties to this action reserve all rights to apply to the Court for any order modifying this Order, or seeking further protection against discovery or other use of Confidential Material or Highly Confidential Material or other information, documents, or transcripts.

26. Nothing contained in this Order shall affect the ability of the parties to alter the time periods set forth in this Order by agreement.

27. Any person requiring further confidentiality protection may petition the Court for a separate order governing disclosure of its information.

28. The provisions of this Order shall survive the conclusion of this Action.

**COMPLETION OF LITIGATION**

29. Within ninety (90) days after the resolution of this Action (including resolution of all appellate proceedings), all documents and copies of all documents (other than exhibits of record) produced or supplied by a party or third party which contain Confidential Material or Highly Confidential Material shall be either returned to the party or third party who produced or supplied the Confidential Material or Highly Confidential Material, as the case may be, or destroyed. Upon request of the party who produced or supplied the Confidential Material or Highly Confidential Material, all counsel of record who received such documents shall certify compliance herewith and shall deliver the same to counsel for the party who produced or supplied the Confidential Material or Highly Confidential Material not more than ninety (20) days after the final resolution of this action.

SO ORDERED<sup>1</sup>, this 9 day of December 2004.



THEODORE KLEIN  
UNITED STATES MAGISTRATE JUDGE

---

<sup>1</sup> Although Defendants submitted this Protective Order and the Court is entering it, the Court in the main MDL case entered an Amended Protective Order (D.E. 1946; dated April 17, 2003) providing for additional signatories in the acknowledgment provision. In the event that is necessary here as well, this Court will entertain a request for an Amended Protective Order identical to that in the main MDL case.

**EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

---

**CASE NO. 03-21296-CIV-MORENO-KLEIN**

**KENNETH A. THOMAS, M.D., et al.,**

**Plaintiffs,**

**vs.**

**BLUE CROSS AND BLUE SHIELD ASSOCIATION, et al.,**

**Defendants.**

---

**CASE NO. 03-22935-CIV-MORENO-KLEIN**

**DR. JEFFREY SOLOMON, et al.,**

**Plaintiffs,**

**vs.**

**BLUE CROSS AND BLUE SHIELD  
ASSOCIATION, et al.,**

**Defendants.**

---

**ACKNOWLEDGEMENT OF PROTECTIVE ORDER GOVERNING PROTECTED  
MATERIAL OTHER THAN CONFIDENTIAL HEALTH INFORMATION**

I CERTIFY THAT I HAVE RECEIVED A COPY OF THE STIPULATED  
PROTECTIVE ORDER GOVERNING PROTECTED MATERIAL OTHER THAN  
CONFIDENTIAL HEALTH INFORMATION DATED \_\_\_\_\_ ("ORDER").

I FURTHER CERTIFY THAT I HAVE READ AND FULLY UNDERSTAND THE  
CONTENTS OF THIS ORDER.



I UNDERSTAND AND AGREE TO COMPLY WITH THE STANDARDS AND PROCEDURES WHICH ARE SET FORTH IN THE ORDER. I UNDERSTAND THAT COMPLIANCE WITH THESE STANDARDS AND PROCEDURES IS A CONDITION OF RECEIPT OF CONFIDENTIAL MATERIAL OR HIGHLY CONFIDENTIAL MATERIAL AND THAT A FAILURE TO COMPLY MAY CONSTITUTE CONTEMPT OF THE COURT AND/OR A VIOLATION OF APPLICABLE LAWS.

\_\_\_\_\_  
NAME

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
DATE SIGNED