

FILED & JUDGMENT ENTERED  
Steven T. Salata  
  
Feb 06 2015  
  
Clerk, U.S. Bankruptcy Court  
Western District of North Carolina



*J. Craig Whitley*  
J. Craig Whitley  
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

**In Re:** )  
)  
**JEMSEK CLINIC, P.A.** )  
)  
**Debtor.** )

**Case No. 06-31766  
Chapter 11**

**In Re:** )  
)  
**JOSEPH GREGORY JEMSEK** )  
)  
**Debtor.** )

**Case No. 06-31986  
Chapter 11**

**BLUE CROSS AND BLUE SHIELD  
OF NORTH CAROLINA,** )  
)  
**Plaintiff,** )  
**Counterclaim Defendant** )

**Adversary Proc.  
No. 07-3006**

**v.** )  
)  
**JEMSEK CLINIC, P.A. AND JOSEPH** )  
**JEMSEK, M.D. an individual,** )  
)  
**Defendants,** )  
**Counterclaim Plaintiffs** )

**ORDER DENYING PARTIES' CROSS-MOTIONS FOR SANCTIONS**

**THIS MATTER** came before this Court on October 29, 2014 on a motion for sanctions filed by Defendants, Joseph Gregory Jemsek, M.D. and the Jemsek Clinic P.A. Plaintiff, Blue Cross and Blue Shield of North Carolina (BCBSNC) responded, and both sides have extensively briefed and argued the following issues.

Like a ping-pong ball, this dispute has bounced between federal courts for the better part of a decade. Indeed, this bankruptcy court, the U.S. District Court in this judicial district, the U.S. District Court for the Southern District of Florida, and the Eleventh Circuit Court of Appeals have all endured this action's resistance to reach a final resolution. Its fate currently rests before the U.S. District Court for this district, which is considering this bankruptcy court's recommended order suggesting that no viable claims remain, any further amendments to the pleadings would be futile, and a final judgment should be entered ending the proceeding. *See* Order of July 29, 2014, Doc. No. 414.

Defendants now request sanctions for a litany of alleged wrongs committed by BCBSNC. BCBSNC counters with its own sanctions demand against Defendants' counsel for what it calls Defendants' meritless motion. Admittedly, the two sides have rampantly driven up the cost of this litigation and often skirted the edges of propriety during this proceeding; however, on this occasion, neither is entitled to an award of sanctions.

### **Factual Background and Procedural History<sup>1</sup>**

In September 2006, BCBSNC brought suit against Defendants in North Carolina Superior Court. *Blue Cross and Blue Shield of North Carolina v. Jemsek Clinic, P.A. & Joseph G. Jemsek, M.D.*, No. 06-CVS-18432. BCBSNC's claims arose from medical treatments provided by Defendants to BCBSNC members suffering from Lyme disease. Complaint, Doc. No. 2 at 9-15. BCBSNC asserted that Defendants improperly submitted and were paid for hundreds of insurance claims for these patients. BCBSNC sought recovery of all sums previously paid to Defendants and damages under a variety of legal theories including breach of contract, fraud, unfair trade practices, and negligent misrepresentation. Complaint, Doc. No. 2 at Ex. A, Part 3.

Shortly after the Superior Court case was filed, Defendants filed Chapter 11 and removed the state action to this Court. On January 24, 2007, Defendants filed their Answer as well as nine counterclaims against BCBSNC. The counterclaims ranged from breach of contract to tortious interference with a business relationship. Answer, Doc. No. 5. The counterclaims sought an affirmative recovery from BCBSNC in excess of \$20 million. *Id.* at 28.

After many months of extensive discovery activities, the action took a drastic turn in March 2008 when BCBNC disingenuously announced that it had "discovered" that the counterclaims were enjoined by a class action settlement in Florida.<sup>2</sup> *See Love v. Blue*

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<sup>1</sup> The unabridged history of this war between a health care insurer and one of its healthcare providers/physicians is detailed in prior decisions of this court and need not be repeated in its entirety here.

<sup>2</sup> Despite Blue Cross's extensive participation in *Love* as a named party for almost four years, BCBNC withheld the existence of the class action and settlement from this Court until March 21, 2008, allowing Defendants to litigate for over a year and unnecessarily expend hundreds of thousands dollars. As more fully discussed in this Court's orders dated September 22, 2010 and July 29, 2014, BCBSNC's primary claims were dismissed with prejudice long ago as a sanction for its acts of "flagrant bad faith" and

*Cross & Blue Shield Ass'n*, No. 03-21296-CIV-MORENO, 2008 WL 4097607 (S.D. Fla. Sept. 4, 2008) (the *Love* Case and the *Love* Court). The class action was founded on allegations quite similar to those made in Defendants' counterclaims. The *Love* complaint alleged that BCBSNC and other Blue Cross entities had adopted business practices intended to systematically deny, reduce, or delay payments to medical providers in order to reduce the insurers' operating costs. Notice of the proposed *Love* settlement had been given to the putative class members on July 27, 2007. The notice described the class action, the claims, and the proposed settlement. It also described the process by which a party could "opt-out" of the settlement and pursue its claims independently. Defendants, but not their attorneys, received the *Love* notice. Being in bankruptcy and engaged in voracious litigation with BCBSNC in this forum, Defendants failed to appreciate its significance. The opt out period expired on September 24, 2007 without Defendants taking the steps necessary to preserve their counterclaims, participate in the *Love* settlement, or even realize that action was required.

After announcing its "discovery," BCBSNC sought aid of the *Love* Court, asking it to enforce the injunction against Defendants. The *Love* Court obliged, holding that eight of the ten counterclaims were related to the *Love* "fee for service claims" which had been settled and enjoined by the class action. However, two of the counterclaims, defamation and tortious interference with a business relationship, were permitted to go forward in bankruptcy court. The defamation claim asserted that BCBSNC had made untrue, disparaging statements about Defendants to the North Carolina Medical Board and the Center for Disease Control (the CDC). The tortious interference cause asserted

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"disregard for its responsibilities to the courts" related to its nondisclosure of pending "split claims" and other discovery violations.

that BCBSNC had influenced a Medical Board action against Dr. Jemsek that resulted in the suspension of his medical license. The *Love* Court concluded that these two claims were not related to any “fee for service claim,” meaning they fell outside the *Love* settlement and injunction. *Love*, at \*8. Defendants appealed the *Love* Court’s injunction to the Eleventh Circuit Court of Appeals and lost. *See Thomas, et al. v. Blue Cross and Blue Shield Assn., et al.*, 333 F. App’x 414 (11th Cir. 2009) (unpublished)).

As a result, Defendants were compelled to amend their counterclaims on December 17, 2008. *See* Defendants’ First Amended Counterclaims, Doc. No. 124. The First Amended Counterclaims jettisoned all but the two counterclaims not enjoined, defamation and tortious interference with business relationship.

After discovery, Defendants again sought to amend their counterclaims ostensibly to conform the pleadings to information learned in discovery (the Second Amended Counterclaims). Unable to find support for allegations in the Second Amended Counterclaims, Defendants dropped the contention that BCBSNC had made defamatory statements to the Medical Board and to the CDC. Instead, the Second Amended Counterclaims changed the factual premise of the two remaining causes of action to statements allegedly made by BCBSNC to members who were also patients of Defendants and to other Blue Cross Blue Shield Association licensees. To “avoid further delays in this already drawn-out litigation,” BCBSNC did not oppose that motion but reserved its defenses including those under Rule 12(b)(6). BCBSNC’s Notice of No Opposition, Doc. No. 296, at 2.

Once Defendants filed their Second Amended Counterclaims, BCBSNC again sought to enforce the *Love* injunction before the U.S. District Court for the Southern

District of Florida. Despite previously ruling that the original claims for defamation and tortious inference did not relate to “fee for service” and allowing these two claims to go forward, on this occasion, the *Love* Court agreed with BCBSNC that both the defamation and the tortious interference claims were barred and enjoined the Second Amended Counterclaims. *Love v. Blue Cross & Blue Shield Ass’n*, No. 03-21296-CLV, 2014 WL 1028938, at \*4 (S.D. Fla. Mar. 17, 2014). The change in the *Love* Court’s ruling was occasioned not just by the change in the pled facts of the Second Amended Counterclaims, but also due to an intervening decision by the Eleventh Circuit Court of Appeals in a factually similar *Love* dispute, holding such claims to be within the scope of the *Love* injunction. *See id.*, at \*3 (citing *Thomas v. Blue Cross and Blue Shield Ass’n (Kolbusz)*, 594 F.3d 814 (11th Cir. 2010)). Defendants did not appeal, and that order is now final.

To comply with the *Love* Court’s latest injunction, Defendants requested leave to dismiss the Second Amended Counterclaims, which was allowed. Doc. Nos. 383, 384. Having no claims left against BCBSNC, Defendants then sought to amend their counterclaims again to “re-instate” the First Amended Counterclaims that they previously withdrew. For its part, BCBSNC moved for entry of final judgment to end the action.

Just prior to the hearing on those motions, Defendants filed this sanctions motion, requesting to be heard contemporaneously with the other matters. BCBSNC objected to the brevity of notice, and this court declined to hear the sanctions motions at that time. That round of hearings resulted in this bankruptcy court issuing the aforementioned proposed Findings of Fact and Conclusions of Law. *See* Order of July 29, 2014, Doc. No. 414. That order is pending in the District Court.

Thereafter, Defendants renewed their sanctions request, and BCBSNC agreed that this motion need be decided, bringing us to the issues currently before this Court. Generally, this matter was presented on uncontested facts, mostly documentary evidence gleaned from the voluminous court records and countless pages of correspondence between the parties' attorneys. This decision has been delayed primarily because of the exhaustive review of the record required to evaluate the parties' numerous and rancorous assertions.

### **Parties' Positions**

Facing a potential dismissal with no affirmative recovery, Defendants make a last gasp effort to defray their monumental legal tab by asking this Court to sanction BCBSNC for (1) making misrepresentations to this bankruptcy court; (2) making misrepresentations to the U.S. District Court in the Southern District of Florida; (3) making misrepresentations to Defendants; (4) threatening baseless Rule 11 sanctions against Defendants; (5) abusing the discovery process; and (6) unnecessarily protracting this litigation. Defendants seek attorney's fees and costs in an amount to be determined at a later date. BCBSNC flatly denies each accusation. BCBSNC requests attorney's fees and costs pursuant to 28 U.S.C. § 1927 from Defendants for "unreasonably and vexatiously multiplying these proceedings."

### **Analysis**

Defendants seek sanctions pursuant to a bankruptcy court's inherent powers under 11 U.S.C. § 105. Under these inherent powers, a court may shift attorney's fees, but "only in the extraordinary circumstances." *Hensley v. Alcon Labs., Inc.*, 277 F.3d 535, 543 (4th Cir. 2002) (citing, *inter alia*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46

(1991)). Among other reasons, “a court may assess attorney’s fees when a party has “ ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’ ” *Chambers*, 501 U.S. at 45-46 (citations omitted). “In this regard, if a court finds ‘that fraud has been practiced upon it, or that the very temple of justice has been defiled,’ it may assess attorney’s fees against the responsible party as it may when a party ‘shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.’ ” *Id.* at 46 (citations omitted).

## **I. Misrepresentations to this bankruptcy court**

### **A. BCBSNC’s Notice of No Opposition**

Defendants first allege that BCBSNC misrepresented its intentions to this Court in its Notice of No Opposition, Doc. No. 296, to Defendants’ Motion for Leave to File a Second Amended Counterclaim, Doc. No. 291. This Court disagrees. In its Notice of No Opposition, BCBSNC stated that it believed Defendants’ Motion for Leave was meritless. BCBSNC reserved its right to “challenge the merits of the Jemsek Defendants’ Second Amended Counterclaim once filed, including the right to assert that the amended counterclaims fail to state claims upon which relief can be granted.” Put differently, BCBSNC opposed the substantive basis and on-going validity of the amended claims, but did not lodge a procedural objection hoping “to avoid further delays in this already drawn-out litigation.” BCBSNC did not at that time assert that the Second Amended Counterclaims were barred by the *Love* settlement.

Defendants suggest the omission of the *Love* settlement from BCBSNC’s Notice of No Opposition was nothing more than a dirty trick to persuade this Court to grant Defendants’ request to amend. According to Defendants, BCBSNC was already planning



on opposing the filing in the Southern District of Florida at the time it filed its Notice of No Opposition.

Given BCBSNC's tactical nondisclosure about the split claims litigation, one can understand Defendants' fear that they may have been duped once again. However, there is no evidence in this record that indicates BCBSNC knew Defendants' Second Amended Counterclaims were enjoined when it filed its Notice of No Opposition nor did BCBSNC have a duty to speak to that point. BCBSNC's Notice of No Opposition amounts to, at the very worst, a poor explanation of its litigation strategy, which it had no obligation to detail in full at that stage in the litigation.

This situation is quite different than BCBSNC's previous attempt to engage in split claims litigation for which it was already sanctioned. There, BCBSNC was litigating the same claims in different forums. As this Court's previous ruling notes, such split claims litigation was tantamount to a fraud on its opponents and on the two courts. On this occasion, not only was there no duty to speak, but BCBSNC made clear that although it did not oppose Defendants' request to file amended pleadings, it did contest the substance of those arguments. Further, at this point, all parties and both courts were well aware of the *Love* settlement's broad reach. Both parties had extensively litigated the effect of *Love*, and it should have come as no surprise to anyone that BCBSNC would again reassert the *Love* settlement as a defense. While BCBSNC may not have explicitly stated that it intended to challenge the amended counterclaims as enjoined, it certainly alerted Defendants and this Court that it felt that Defendants "fail[ed] to state claims upon which relief c[ould] be granted." Thus, BCBSNC made no misrepresentations to this Court in its Notice of No Opposition.

**B. Timing of BCBSNC's disclosure that Defendants' Second Amended Counterclaims were enjoined by the *Love* settlement**

Defendants next assert that BCBSNC's counsel misrepresented the timing of their discovery that Defendants' Second Amended Counterclaims were enjoined by the *Love* settlement in addressing this Court at the hearing related to BCBSNC's Motion to Stay, Doc. No. 305, held on February 11, 2014. On that occasion, BCBSNC had requested this Court stay further proceedings in the litigation pending a decision from the *Love* Court on whether Defendants' Second Amended Counterclaims were enjoined and also pending a decision from our District Court on its Motion to Withdraw Reference of this proceeding.

Defendants have attempted to support their argument by parsing out single sentences and phrases from BCBSNC's counsel's statements at that hearing. But, it is difficult to determine whether a statement is untrue without considering the context in which it was made. For background purposes, the two alleged misrepresentations were made as part of the following statements by Mr. Daniel Taylor, counsel for BCBSNC:

The *Love* release, as Your Honor knows, and the injunction is very broad and the Florida court was quite specific, I think three different times in its opinion, that the reason the defamation and tortious interference claims were not barred was because they were alleged to involve statements made to the North Carolina Medical Board and statements made to the Center for Disease Control, totally unrelated to billing or claim processing which was essentially the subject matter of the *Love* lawsuit.

Now the evidence developed in discovery reveals that there is absolutely no basis for either of those defamation claims, either the defamation claim or the tortious interference claim. That is, there were no improper statements made to either the medical board or to CDC.

Realizing those claims were lacking, Jemsek moved, and the court allowed, we did not oppose, Jemsek to file a second

amended counterclaim changing the basis of the defamation claim to communications to . . . patients.

As we were preparing Blue Cross's motion for summary judgment, we realized that Jemsek's new claims were identical to the claims found by the Florida court in . . . Kolbusz [and] are barred by the *Love* injunction pursuant to an Eleventh Circuit decision.

When we concluded that these claims, that is, the Jemsek claims were barred, we contacted Mr. Blakely and requested that he withdraw those claims. We advised him that we had no objection to his returning to the claims that were advanced in the, if you will, the first amended counterclaim. Now he respectfully declined and we filed the motion in Florida as I have previously described.

The Jemsek defendants contend that the second amended counterclaim does not change anything and that Blue Cross Blue Shield had somehow waived its right to raise lack of subject matter jurisdiction.

I respectfully suggest that those positions are both illogical and incorrect. If the second amended counterclaim did not change anything, there would have been no need to amend. Moreover, a casual reader can clearly discern that the second amended counterclaim can no longer contain allegations of defamation or tortious interference with regards to communications to the medical board or the Center for Disease Control.

Now, this is important because again the Florida court, in ruling on Jemsek's previous matter, was clear that the reason that the two claims, defamation and intentional interference with contractual relations, were not barred was because of the alleged communications to the North Carolina Medical Board and CDC.

Transcript of February 11, 2014 Hearing, at 5-6.

Specifically, Defendants contend BCBSNC's counsel's first misrepresentation as to the timing of their discovery that Defendants' Second Amended Counterclaims were enjoined was the statement to this Court that "[a]s we were preparing Blue Cross's motion for summary judgment, we realized that Jemsek's new claims were identical to

the claims found by the Florida court in . . . Kolbusz [and] are barred by the *Love* injunction pursuant to an Eleventh Circuit decision.” *Id.* at 6, ¶ 9-14. That accusation does not necessarily follow from what was said. As explained in BCBSNC’s response, it appears that its attorneys were working on a motion for summary judgment for several months—November 2013 through February 2014—during which BCBSNC also filed its Notice of No Opposition and Defendants tendered their Second Amended Counterclaims. Nothing in the record contradicts BCBSNC’s assertion that it realized Defendants’ new claims were enjoined during that same window of time. Moreover, when read in context of the argument as a whole, it is clear that Mr. Taylor was merely describing the general procedural history and recent developments in this action. Mr. Taylor’s casual, general references to dates were in keeping with the subject matter of that hearing at which these dates were of little importance.

Next, Defendants assert that Mr. Taylor further misrepresented the timing of BCBSNC’s realization that Defendants’ new claims were barred by *Love* when he said, “[w]hen we concluded that these claims, that is, the Jemsek claims were barred, we contacted [counsel for Defendants] and requested that he withdraw those claims.” *Id.* ¶ 15-17. BCBSNC contacted Defendants on January 30, 2014. According to Defendants, BCBSNC knew the Second Amended Counterclaims were enjoined prior to filing its Notice of No Opposition on January 6, 2014.

Again, this record does not support that conclusion. Regardless, like the previous alleged misstatement, Mr. Taylor’s remarks were generalized and vague. As previously discussed, Mr. Taylor was simply giving a quick recitation of the recent happenings in the case. It is doubtful that he intended to represent specific dates or to have this Court

calculate and then impute the precise timing of BCBSNC's realization based on these approximate statements in a hearing on an unrelated matter.

Defendants attempt to sever two vague sentences out of a lengthy argument to create a misrepresentation is simply a bridge too far. Even taken out of context, these statements do not rise to the level of untruth and certainly not to the level of conduct worthy of sanction under *Chambers* and its progeny.

## **II. Misrepresentations to the *Love Court***

Defendants next claim counsel for BCBSNC misrepresented the scope of discovery to the U.S. District Court in the Southern District of Florida. If so, Defendants should take the matter up with that court. The court in which the alleged misrepresentations were made is far better equipped to address any such wrong. Put bluntly, this bankruptcy court is not inclined to entertain this line argument, and its power to do so is questionable at best. *See Trulis v. Barton*, 107 F.3d 685, 694 (9th Cir. 1995) (“We do not consider the merits of [the defendants’ sanctions request] because the district court did not have power to sanction conduct that occurred in a different court in a different case.” (citations omitted)).

## **III. Misrepresentations to Defendants**

### **A. BCBSNC’s understanding of Defendants’ defamation claims as related to statements made to patients versus statements made to the CDC and the Medical Board.**

Defendant next asserts that counsel for BCBSNC made bad faith misrepresentations to them as opposing parties in a response to counsel for Defendants dated April 7, 2014. Again, Defendants attempt to parse out certain phrases and

sentences to support their position when the overall context in which the statements were made is necessary to determine whether a misrepresentation occurred.

Counsel for Defendants began the exchange, writing:

This short letter is to confirm your position on the 2nd Amended Counterclaims. I am filing today a Motion to Withdraw the 2nd Amended Counterclaims. I gather that you do not oppose that action, is that correct? Also, today I am filing a Motion to reinstate the First Amended Counterclaims. May I inform the Court that BCBSNC does not oppose this action, as well? Thank you.

Letter to Daniel R. Taylor of April 7, 2014, Doc. No. 399-4, Ex. 34. Counsel for BCBSNC, Mr. Taylor, responded the same day, indicating that BCBSNC would not oppose Defendants' Motion to Withdraw their Second Amended Counterclaims. Mr. Taylor then attempted to clarify some apparent points of confusion between the parties, one of which was BCBSNC's understanding of the basis of Defendants' defamation claims. Related to Defendants current accusations, Mr. Taylor wrote:

[W]e have always interpreted the claims as pled in the First Amended Counterclaims exactly as Judge Moreno initially interpreted them on September 4, 2008, and the magistrate judge before him, namely that the First Amended Counterclaims "turn on the falsity of the statements made to the Medical Board and Center for Disease Control, and the resulting immediate and future harm to Dr. Jemsek's medical practice." To the extent that you contend the First Amended Counterclaims include anything other than direct statements allegedly made by BCBSNC to the Medical Board and/or the CDC, we will oppose your motion.

Letter to William D. Blakely of April 7, 2014, Doc. No. 399-4, Ex. 35.

According to Defendants, BCBSNC knew as early as January 14, 2012 that Defendants' claims were based on statements made to patients. Thus, Defendants believe that Mr. Taylor misrepresented BCBSNC's understanding of the defamation claims in his April 7, 2014 letter.

This dispute illustrates the sheer breadth of this action and resulting confusion between the parties and by this court about the claims brought by the two sides. Throughout this case, BCBSNC and Defendants were clearly not in the same book, much less on the same page, when it came to each other's theory and litigation strategy. As far as to whom the alleged defamatory remarks were made, much of that confusion is attributable to Defendants' inartfully pled counterclaim. For defamation, Defendants asserted that "[t]hese statements were made to, *among others*, the Medical Board and the Centers for Disease Control." Defendants' First Amended Counterclaim, Doc. No. 124, at 7, ¶ 37 (emphasis added). Thus, it comes as no surprise that BCBSNC assumed throughout this case that the claim was about statements to the Medical Board and the CDC. During discovery, BCBSNC was taken back when Defendants grafted the idea that misstatements were made to patients based upon the phrase "among others," especially when its original claim for defamation is entirely void of any mention of these individuals. *Id.* at 7-8, ¶ 35-41.

Based upon the arguments presented to it by the two sides, even the *Love* Court believed that Defendants' defamation claims "turn[ed] on the falsity of the statements made to the Medical Board and Center for Disease Control, and the resulting immediate and future harm to Dr. Jemsek's medical practice." *Love*, 2008 WL 4097607, at \*8. This Court was confused as well. While Defendants quote bench remarks from previous hearings as indicating that at all times the patients were included, these references are pieced together responses to the parties' statements at hearings which were spread out over a period of eight years. From this Court's perspective, it was never clear and not decided whether statements to patients were part of the two counterclaims.

Confusion aside, the record is insufficient to find that Mr. Taylor's April 7, 2014 letter constituted sanctionable conduct. The filings put forth are, at best, inconsistent as to when BCBSNC knew Defendants intended to proceed on a theory that defamatory statements were made to patients instead of the governmental agencies. Moreover, even if Mr. Taylor's statements were untrue, it is unclear whether that negatively impacted Defendants in any way. By that point in the litigation, Defendants had essentially entered a blind canyon, having no alternative but to press ahead with their only remaining counterclaims or face final judgment in favor of BCBSNC. There is no reason to believe any actions or statements by BCBSNC would have altered Defendants' course of conduct at this late stage of the proceeding especially in light of the parties' complete breakdown in communication and inability to cooperate.

**B. BCBSNC's statement that it would not oppose Defendants' refiling their First Amended Counterclaims.**

Defendants contend that Mr. Taylor made further misrepresentations to them by email dated March 25, 2014. Defendants characterize that email as stating "if the Jemsek Defendants withdrew the Second Amended Counterclaims, BCBSNC would consent to the Jemsek Defendants refiling the First Amended Counterclaims 'exactly as previously pled.'" Memorandum of Law in Support of Defendants' Motion for Sanctions, Doc. No. 394, at 9. According to Defendants, BCBSNC made misrepresentations to Defendant by then opposing Defendants' refiling, noted in the letter of April 7, 2014 copied in part above.

Defendants have yet again attempted to create a misrepresentation by selectively quoting phrases out of context. Mr. Taylor's complete statement was as follows:



I had previously indicated that BCBSNC would consent to your withdrawing the Second Amended Counterclaims and proceeding with the First Amended Counterclaims (the specific pleading that was pending at the time the Jemsek Defendants moved to amend) but, given your argument before Judge Moreno that was rejected, our consent is limited to the extent that your arguments based on the First Amended Counterclaims do not violate the spirit and intent of Judge Moreno's most recent order. While I believe you will have to so move before the bankruptcy court, that offer is still on the table substantively, again, so long as you file the First Amended Counterclaims exactly as previously pled and you do not subsequently attempt to advance arguments that violate the spirit and intent of Judge Moreno's most recent order.

Email to William D. Blakely of March 25, 2014, Doc. No. 399-4, Ex. 31.

When Defendants subsequently attempted to advance arguments that were beyond the scope, or perhaps even inconsistent, with their First Amended Counterclaims and contrary to the *Love* injunction, BCBSNC refused to consent as Mr. Taylor indicated would occur in his email. Consequently, BCBSNC has not made a misrepresentation to Defendants.

#### **IV. Threatening Rule 11 Sanctions**

Defendants further contend each of five *threats* of Rule 11 sanctions made by BCBSNC constitute abuse entitling Defendant to sanctions. Of note, Defendants seek sanctions under this Court's inherent powers. They have not requested attorney's fees incurred as a result of prevailing on a Rule 11 motion presumably because BCBSNC never filed a motion with this Court for Rule 11 sanctions.

There appears to be little case law weighing whether a mere threat of Rule 11 sanctions is itself a sanctionable offense. Still, "[a] court may impose sanctions on its own initiative when the Rule is invoked for an improper purpose," *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 485 (3d Cir. 1987) (discussing Rule 11 in a case where sanctions

were requested by filed motion), and this Court is hesitant to say that repeated, baseless Rule 11 threats are never subject to sanction. Assuming for the moment that such threats might fall within the ambit of a court's power to sanction, we consider Defendants' assertions.

**A. Letter of April 19, 2013 related to Defendants' Motion to Compel**

On April 19, 2013, Defendants filed their Motion to Compel requesting BCBSNC produce and reproduce certain discovery materials. *See* Defendants' Motion to Compel, Doc. No. 252. By letter dated April 19, 2013, BCBSNC informed Defendants that it intended to file a motion for Rule 11 sanctions, asserting that Defendants' motion was frivolous and intended to drive up its litigation costs. *See* Draft Motion for Rule 11 Sanctions of April 19, 2013, Doc. No. 399-2, Ex. 19. Defendants claim BCBSNC's threat was improper for an alleged discovery violation and caused them to incur significant cost in responding. However, this Court later noted that Defendants' Motion to Compel was "essentially a proposal to undertake an eleventh hour fishing expedition in hopes to netting something more to support their theories." Order Denying Defendants' Motion to Compel, Doc. No. 278, at 27. That being the case, BCBSNC's threat of Rule 11 sanctions was not unfounded and certainly not worthy of sanction.

**B. Letter of December 5, 2013 related to Defendants' First Amended Counterclaims**

Next, Defendants point to Rule 11 threats made by BCBSNC on December 5, 2013 pertaining to Defendants' First Amended Counterclaim. In that letter, BCBSNC asserted Defendants' counterclaims were meritless because discovery failed to disclose any instances of defamatory statements being made to a third party. *See* Draft Motion for

Rule 11 Sanctions of December 5, 2013, Doc. No. 399-2, Ex. 17. According to Defendants, this Rule 11 threat was improper because a Rule 11 motion is not a proper vehicle for arguing the merits of a case. Yet, after receiving BCBSNC's letter, Defendants sought leave to file their Second Amended Counterclaim. Defendants stated this was to conform the pleading to discovery, mainly to aver that the alleged defamatory statements were made to patients and not the CDC or Medical Board as the First Amended Counterclaims asserted. By amending to cure the deficiencies noted in BCBSNC's letter, Defendants essentially conceded that the threat of Rule 11 sanctions was not baseless. Thus, sanctions against BCBSNC are not warranted in this instance either.

**C. Letter of December 31, 2013 concerning Defendants' Second Amended Counterclaims**

Defendants additionally claim that BCBSNC's threat of Rule 11 sanctions on December 31, 2013 were sufficient to justify sanctions against BCBSNC. That letter was closely tied to some of the issues related to BCBSNC's December 5, 2013 letter, which is more fully addressed above. On this occasion, BCBSNC asserted that Defendants' Second Amended Counterclaim for defamation was meritless because at least several of the alleged defamatory statements were admitted to be true by Dr. Jemsek. As for Defendants' claim of tortious interference with a business relationship, BCBSNC pointed out that Dr. Jemsek conceded that he had no contracts with his patients and that claim was therefore baseless.

The record provides little support to Defendants' claims that this particular threat is sanctionable. Much of BCBSNC's claims in this regard were indeed supported by

deposition testimony of Dr. Jemsek. Moreover, after the Rule 11 threat, BCBSNC sought assistance from the *Love* Court, which enjoined Defendants' claims, causing Defendants to withdraw their Second Amended Counterclaims.

**D. BCBSNC's Notice of No Opposition**

Defendants assert that a single sentence in BCBSNC's Notice of No Opposition rises to the level of sanctionable conduct. That sentence being that "[t]he proposed pleading is so devoid of merit that BCBSNC has placed counsel for the Jemsek Defendants on notice that they have violated their duties to the Court required by Rule 11 of the Federal Rules of Civil Procedure and Rule 9011 of the Federal Rules of Bankruptcy Procedure, and that BCBSNC intends to pursue a motion for sanctions after the running of the 'safe harbor' period." BCBSNC's Notice of No Opposition, Doc. No. 296, at 2.

However, beyond quoting a few select words from this sentence, Defendants seemingly fail to allege the threat was wrongful and certainly provide no support or argument for this Court to consider. *See* Defendants' Memorandum of Law in Support of Sanctions, Doc. No. 394, at 19. Even so, for the sake of completeness, the subsequent history of the case and the *Love* Court's enjoining Defendants' Second Amended Counterclaims, as more fully discussed above, leads this Court to conclude that BCBSNC's actions do not warrant sanctions for this particular threat.

**E. Letter of April 7, 2014 pertaining to Defendants' refiling their First Amended Counterclaims**

According to Defendants, Mr. Taylor's letter of April 7, 2014 contained a sanctionable Rule 11 threat. As previously detailed, that letter disclosed that BCBSNC

would not oppose Defendants' Motion to Withdraw their Second Amended Counterclaims and attempted to clarify several points of confusion between the parties. Letter to William D. Blakely of April 7, 2014, Doc. No. 399-4, Ex. 35. In addition, Mr. Taylor wrote:

[Y]ou will recall that on December 5, 2013, we served you with a Rule 11 Motion for Sanctions. As we explained in the Motion and our corresponding letter, your pursuit of the claims contained in the First Amended Counterclaims do not satisfy your Rule 11 obligations. You are well aware that there has never been any evidence that BCBSNC defamed or tortuously interfered with the Jemsek Defendants to anyone on the Medical Board or the CDC. Should you pursue claims relative to the Medical Board and CDC, we will proceed with filing this Rule 11 Motion for Sanctions with the court. Even if we do not oppose your filing of an amended counterclaim, it in no way means that we waive our right to seek Rule 11 sanctions should you be unsuccessful on those claims.

*Id.*

Defendants assert this threat was improper, but have not indicated on what basis. As already stated, the record indicates that Defendants had no evidence to support their assertion that BCBSNC defamed Defendants to the CDC or Medical Board. Given the events that have since transpired, including the *Love* Court enjoining Defendants' counterclaims, there are no grounds to sanction BCBSNC for this or any of the other aforementioned threats of Rule 11 sanctions.

As a final note regarding these Rule 11 threats, BCBSNC ultimately achieved the result it sought each time, in some instances by Defendants' change in position and in others by court order. In that light, it would be difficult to conclude that BCBSNC's conduct was wrongful. While there appears to be no grounds to sanction BCBSNC, the number of times BCBSNC lodged these threats is somewhat troubling. The Court is inclined to give BCBSNC the benefit of the doubt that perhaps it had tried other more

amenable methods and these threats were but a last resort. Nonetheless, it is worth repeating that the legal system unquestionably works most efficiently when parties are able to cooperate and work together rather than threatening Rule 11 sanctions, even if well-founded. By contrast, both parties' tactics in this case are far from best practices and both sides have exponentially driven up the cost of this litigation.

#### **V. Abuse of the Discovery Process**

Defendants claim that BCBSNC committed discovery violations related to BCBSNC's relationship with Jeanne Rhyne, M.D. and the limited information BCBSNC provided to Defendants about her. Defendants argue such information was responsive to one of its interrogatories that requested BCBSNC to:

Identify each communication between BCBSNC and any professional medical group; patient groups or government entities (including but not limited to the NC Medical Board, IDSA, CDC, and NIH) with regard to the Jemsek Clinic, Dr. Jemsek, or the treatment, diagnosis and coverage of Lyme Disease . . . .

Defendants' Motion to Compel, Doc. No. 400, Ex. 10, ¶ 7. According to Defendants, "BCBSNC failed to produce information relating to its relationship with a Medical Board member[, Dr. Rhyne,] who led the Medical Board's investigation and punishment of Dr. Jemsek, while at the same time working as a BCBSNC consultant."<sup>3</sup> Memorandum of Law in Support of Defendants' Motion for Sanctions, Doc. No. 394, at 20.

Well after the close of discovery, Defendants requested information regarding Dr. Rhyne specifically. BCBSNC replied to Defendants' request on December 12, 2013 with

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<sup>3</sup> Although Defendants make a passing reference to their Motion to Compel, Doc. No. 400, this sentence is essentially the entire argument that appears in Defendants' Memorandum of Law in Support of their Motion for Sanctions, Doc. No. 394. BCBSNC argues that Defendants have thus waived this claim by failing to develop it. The Court agrees with BCBSNC, but for the sake of creating a complete record, the merits of Defendants' claims will be evaluated anyway.

a detailed response fully explaining why the information sought was not discoverable. *See* Defendants' Motion to Compel, Doc. No. 400, Ex. 2. In that response, BCBSNC indicated that Defendants' requests were neither relevant nor responsive to Defendants' interrogatory quoted above. Furthermore, BCBSNC explained that Dr. Rhyne discontinued her review of medical policies in 2001 when she began to consult on appeals and grievances. *Id.* at 2. BCBSNC went on to write that several years later, in 2007, Dr. Rhyne began consulting on infectious diseases and did not provide input on Lyme disease until 2008, "long after BCBSNC terminated its provider contracts with the Jemsek Defendants." *Id.* Defendants, however, apparently never replied to BCBSNC's December 12 response, instead opting to wait approximately six months to file their Motion to Compel on May 12, 2014.<sup>4</sup>

For the purpose of weighing whether sanctions are appropriate, the Court adopts the timeline and characterization of Dr. Rhyne's employment presented by BCBSNC. By Defendants' own concession in their Motion to Compel, Dr. Rhyne did not begin consulting on infectious diseases until June 2007, which is *after* Defendants filed their original counterclaims. Defendants' Motion to Compel, Doc. No. 400, at 4. Given that the information was requested after the end of discovery, Defendants' failing to respond to BCBSNC's explanation of why this information was not discoverable, the considerable length of time it took for Defendants to file their motion to compel, and the lack of a developed argument on why sanctions would be appropriate in Defendants' current motion, sanctions are not warranted for BCBSNC's alleged discovery violations.

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<sup>4</sup> In keeping with their prior obstinance, the parties disputed the notice requirements and briefing schedule of this motion. This Court eventually ordered Defendants to notice a hearing on the Motion to Compel, Doc. No. 402, but Defendants never did. Given the current posture of the case, with Defendants having no remaining claims, that motion is now moot.

## **VI. Unnecessarily Protracting the Litigation**

Finally, Defendants believe BCBSNC should be sanctioned for unnecessarily protracting this litigation by failing to be candid with this Court and for failing to raise the *Love* settlement in a timely fashion. Many of Defendants' allegations harken back to those that resulted in this Court's previous order awarding sanctions entered on September 22, 2010. This Court will not sanction BCBSNC for the same, albeit wrongful, conduct yet again.

Defendants' remaining contentions on this issue have been fully discussed above. To briefly summarize those points, so far as the current Motion for Sanctions is concerned, BCBSNC did not engage in any sanctionable conduct to protract this litigation. Defendants' current allegations of misrepresentation are unfounded. Much of the delay in raising the *Love* settlement to attack the Second Amended Counterclaims is attributable to the parties' contrasting opinions as to the scope of Defendants' defamation claims. To be clear though, nothing in this order is to be construed to change or in any way alter this Court's order of September 22, 2010 in which it dismissed with prejudice BCBSNC's primary claims and taxed BCBSNC with a portion of Defendants' costs and attorney's fees as a sanction for, *inter alia*, BCBSNC's engaging in split claims litigation.

## **VII. BCBSNC's request for attorney's fees and costs pursuant to 28 U.S.C. § 1927**

BCBSNC moves in its own right for costs and attorney's fees incurred in replying to this motion under 28 U.S.C. 1927, which provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.



“Bad faith on the part of the attorney is a precondition to imposing fees under § 1927.”

*E.E.O.C. v. Great Steaks, Inc.*, 667 F.3d 510, 522 (4th Cir. 2012) (citations omitted).

Section 1927 “ ‘is indifferent to the equities of a dispute and to the values advanced by the substantive law.’ Instead, § 1927 ‘focuses on the conduct of the litigation’ and ‘is concerned only with limiting the abuse of court processes.’ ” *Id.* (citations omitted).

Viewed through the lens of the bad faith standard, the record does not support an award of attorney’s fees in favor of BCBSNC as Defendants’ motion does not approach the level of abuse of court process.

### **Conclusion**

The current dustup is indicative of the course this action has taken from the day it was filed. Neither side is blameless; in zealously seeking victory, both have skirted the edges of ethical conduct, discovery rules, and the duty of candor. Many of the antics by both sides are more befitting of a playground brawl than a federal court case. Even so, as far as Defendants’ current request for sanctions, the Court cannot find that a “fraud has been practiced upon it, or that the very temple of justice has been defiled.” *Chambers*, 501 U.S. at 46 (citations and quotation marks omitted). Defendants’ request, however, was not unreasonable or made in bad faith. Accordingly, both sides’ demands for sanctions are **DENIED**.

### **SO ORDERED**

This Order has been signed electronically. The Judge’s signature and Court’s seal appear at the top of the Order.

United States Bankruptcy Court