

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ORCHESTRATE HR, INC. and
VIVATURE, INC.,

Plaintiffs,

v.

BLUE CROSS AND BLUE SHIELD
OF KANSAS, INC.,

Defendant.

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CASE NUMBER
5:19-cv-04007-SAC-TJJ

JURY TRIAL DEMANDED

DESIGNATION OF PLACE OF TRIAL

The designated place of trial is Topeka, Kansas.

PLAINTIFFS' SECOND AMENDED COMPLAINT

Plaintiffs **Orchestrate HR, Inc.** and **Vivature, Inc.** (collectively, “Vivature”) complain of Defendant **Blue Cross and Blue Shield of Kansas** (“BCBSKS”) showing the Court:

I. PARTIES

1. Plaintiff Orchestrate HR, Inc. is a Texas corporation organized and existing under the laws of Texas with its principal place of business at 5050 Spring Valley Rd., Dallas, Texas 75244.

2. Plaintiff Vivature, Inc. is a Texas corporation organized and existing under the laws of Texas with its principal place of business at 5050 Spring Valley Rd., Dallas, Texas 75244.

3. Defendant Blue Cross and Blue Shield of Kansas (“BCBSKS” or “Defendant”) is a corporation organized and existing under the laws of Kansas with its principal place of business at 1133 Topeka Ave., Topeka, KS, 66609 and has appeared and answered.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 28 § 1332(a) because this is an action for, *inter alia*, damages in excess of \$10,000,000.00, exclusive of costs, fees, interest, or other possible sources of award or relief, and there is complete diversity of citizenship. This Court has already found that it has jurisdiction over this dispute. See Doc. 69.

5. Venue is proper in this Court pursuant to U.S.C. 28 § 1391(b).

III. FACTS

6. Although BCBSKS repeatedly objected, this Court ordered BCBSKS to produce its own internal documents which BCBSKS had tried to avoid producing.¹ After reviewing these documents, it is painfully obvious why BCBSKS did not voluntarily produce them—**BCBSKS's own documents confirm that BCBSKS has been engaged in a campaign of fraud, defamation, and tortious interference against Vivature.** BCBSKS's documents show that BCBSKS planned to cause problems between Vivature and their clients so as to attempt to get Vivature's clients to end their business relationship with Vivature.

7. The documents produced on August 3, 2020 by BCBSKS, as a direct result of this Court's order which overruled BCBSKS's objections,² show that BCBSKS has made defamatory statements about Vivature to at least the following entities:

- The United States Department of Justice;
- The Federal Bureau of Investigation;

¹ See Doc. No. 125, Order, July 13, 2020; Doc. No. 174, Memorandum and Order, September 25, 2020.

² See Doc. No. 125.

- All other Blue Cross and Blue Shield entities via at least the Blue Cross and Blue Shield Association (specifically including but not limited to Anthem, Health Care Services Corporation, Blue Cross and Blue Shield of Kansas City, Blue Cross and Blue Shield of South Carolina, Blue Cross and Blue Shield of Texas and Blue Cross and Blue Shield of Nebraska);
- The Office of Inspector General, U.S. Department of Health and Human Services;
- The Kansas Department of Insurance;
- The United States Postal Service;
- The United States Office of Personnel Management;
- The National Health Care Anti-Fraud Association;
- The National Association of Insurance Commissioners;
- The Centers for Medicare & Medical Services;
- The Kansas Board of Healing Arts;
- United Healthcare; and
- Aetna.

8. Examples of these communications are contained in documents with starting Bates-label numbers BCBSKS_00001354, 1355, 1358, 1358.001, 1483, 1508, 1528, 1528.001, 1530, 1596 1662, 1663, 1673, 1673.001, 1738, 1741, 1786, 1809, 1809.001, 1844, 1860, 1936.001, 1947, 2019, 2049, 2183, 2183.001, 2247, 2338, 2338.01, 2377, 2424, 2424.001, 2451, 2454, 2462, 2494, 2538, 2538.001, 2546, 2549, 2580, 2636, 3227_001, 3233, 3271, 3277, 3285, 3292, 3296, 3305, 3311, 3227, 3228, 3277, 3318, 3326, 3302, 3333, 3338, 3343, 3347, 3353, 3357, 3362, 3377, 3886, 3888, 3890, 3892, 3894, 3897, 3904, 3907, 3909, 3911, 3912, 3917, 3919, 4021, 4022, 4033, 4052, 4285, 4508, 4519, 4524, 4527, 4530, 4533, 4535, 4536. BCBSKS has designated these documents as confidential, therefore Vivature is prevented from attaching all of them to this public pleading at this time.³

³ In Doc. No. 171 this Court ruled that certain of these documents (BCBSKS_00001354, BCBSKS_00001483, BCBSKS_00001530, BCBSKS_00001936.001, BCBSKS_00002183, BCBSKS_00003233, BCBSKS_00003318,

9. These communications are defamatory as they explicitly accuse Vivature of:

- Committing fraud;
- Providing false information;
- Filing false claims;
- Fraudulently billing;
- Overutilizing services;
- Billing for unlicensed trainers;
- Billing for unlicensed individuals;
- Billing for band-aids;
- Perpetrating a scheme;
- Hand writing or altering medical records; and
- Keeping different medical records than the universities.

10. Vivature also believes that these communications are implicitly defamatory as they imply that:

- Vivature committed fraud;
- Vivature made misrepresentations to BCBSKS;
- Vivature forged medical records or related information;
- Vivature provided false medical records;
- Vivature fraudulently billed;
- Vivature billed for illegitimate medical offices;
- Vivature provided false medical records;
- Vivature filed false claims;
- Vivature broke the law; and
- Vivature committed a crime.

11. Further, BCBSKS's witnesses have now admitted that BCBSKS knew it was accusing Vivature of committing fraud and crimes in communications sent to dozens of third

BCBSKS_00004519) were not entitled to be filed under seal and therefore those documents are already part of the public record in this case. Accordingly, Vivature attaches those documents to this 2nd Amended Complaint as Exhibits A-H.

parties and that there could and would be serious adverse consequences to Vivature as a result of these allegations made by BCBSKS.⁴

12. Vivature only discovered the existence of these defamatory statements, at the earliest, on August 3, 2020 as a direct result of the Court ordered discovery in this case and is of the opinion that BCBSKS fraudulently concealed the existence of these documents and statements. BCBSKS made many of these statements at a time when they were in direct communication with Vivature and while BCBSKS was claiming to be working with Vivature to get claims into the BCBSKS system so they could be processed and paid. Upon information and belief, Vivature believes that discovery will provide evidence of additional defamatory statements by BCBSKS.⁵

13. On April 1, 2020, also a result of another Court order forcing BCBSKS to produce documents, Vivature first became aware of the internal communication by BCBSKS which confirmed that BCBSKS was engaged in a scheme, to intentionally interfere with the relationship between Vivature and its clients,⁶ designed to cause those clients to terminate their relationship with Vivature.⁷

⁴ See Zimmerman Dep. 296:1 – 298:25, 164:22 – 165:3, 330:20 – 331:1, 342:23 – 343:11, 343:24 – 344:4, November 9, 2020; Holmes Dep. 114:25 – 115:12, 119:20 – 120:12, 132:7 – 16, November 10, 2020; Mzhickteno Dep. 64:5 – 7, 140:21 – 141:4, 227:13 – 22, November 19, 2020, collectively, attached as Exhibit I.

⁵ To the extent necessary, Vivature requests that it be allowed to conduct both written and deposition discovery in order to obtain further evidence to support its claims and overcome BCBSKS's defenses to these claims and also be able to properly and completely respond to any motion to dismiss or motion for summary judgment filed by BCBSKS.

⁶ Vivature has, or at least had, contracts with the following Kansas schools: Fort Hays State University, Emporia State University, Allen County Community College, Benedictine College, Pittsburg State University, Midamerica Nazarene University, Tabor College, Kansas Wesleyan University, Southwestern College, McPherson College, Baker University and Newman University. This is only a list of schools in the Kansas area which Vivature has/had contracts with.

⁷ Exhibit J, email from Marguerite Mzhickteno of BCBSKS to certain other BCBSKS employees, admitting to BCBSKS's automatic denial of claims and its intention to interfere with BCBSKS's contractual relationship with Washburn University, dated October 18, 2017, Bates label BCBSKS_00000846.

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