No. 18-5897

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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JOHN DOE,

*Plaintiff-Appellant*,
v.

BLUECROSS BLUESHIELD OF TENNESSEE, INC.,

*Defendant-Appellee*.

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# OPENING BRIEF OF PLAINTIFF - APPELLANT

On Appeal From The United States District Court
For The Western District Of Tennessee,
Case No. 2:17-cv-02793-TLP-cgc

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-5897 Case Name: John Doe v. BlueCross Blue Shield TN

Name of counsel: Alan M. Mansfield

Pursuant to 6th Cir. R. 26.1, John Doe
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on November 21, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Alan M. Mansfield
Alan M. Mansfield

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

**6th Cir. R. 26.1**
**DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST**

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

**(c) Form and Time of Disclosure**. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**

**Other Authorities**

**Rules**



**Regulations**

## I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellant John Doe (referred to herein as either "Appellant" or "John Doe") believes that in light of the novel and evolving issues of law presented on this appeal, oral argument would benefit the Court and the parties, particularly as the case law on several of these topics is continually developing.

## II. JURISDICTIONAL STATEMENT

This case is before the Court on appeal from a final order and judgment of the United States District Court for the Western District of Tennessee, a final appealable judgment pursuant to 28 U.S.C. § 1291.

The trial court entered its Memorandum Opinion and Order Granting Defendant's Motion to Dismiss (Order, R. 68, Page ID # 601-625) dismissing all of the claims asserted in the First Amended Complaint filed in this action with prejudice in favor of Appellee and Defendant Blue Cross Blue Shield of Tennessee, Inc. ("BCBST" or "Appellee") on July 30, 2018. The Judgment was entered on July 31, 2018. Judgment, R. 69, Page ID # 626. Appellant John Doe filed his Notice of Appeal on August 27, 2018. Notice of Appeal, R. 70, Page ID # 627-629. Thus, the order subject to this appeal disposed of all claims asserted in the operative Complaint before the trial court with prejudice, resulting in a judgment of dismissal being entered by the trial court. This appeal was timely filed within 30 days of the judgment of dismissal being entered by the trial court.

The trial court exercised jurisdiction over Appellant's federal statutory claims under the Affordable Care Act ("ACA") and Americans with Disabilities Act ("ADA") pursuant to 28 U.S.C. § 1331, and exercised supplemental jurisdiction over Appellant's Tennessee state law claims pursuant to 28 U.S.C. §

1367, in that Appellant's Tennessee state law claims were so related to his ADA and ACA claims that they formed part of the same case or controversy.

## III. STATEMENT OF THE ISSUES FOR REVIEW

1. Did the trial court err as a matter of law in dismissing the First Cause of Action asserted in the First Amended Complaint for violation of the Affordable Care Act (42 U.S.C. § 18001, *et seq.*) ("ACA") without leave to amend, by applying incorrect legal standards to the underlying anti-discrimination claims?

2. Did the trial court err as a matter of law in dismissing the Second Cause of Action asserted in the First Amended Complaint for violation of the Americans with Disabilities Act (42 U.S.C. § 12101, *et seq.*) ("ADA") without leave to amend by making an incorrect determination as to what was the applicable place of public accommodation?

3. Did the trial court err as a matter of law in dismissing Appellant's Third cause of action for breach of contract asserted in the First Amended Complaint as a matter of law without leave to amend by applying an unduly restrictive analysis of the types of conduct that can give rise to a breach of contract under the duty of good faith and fair dealing?

## IV. STATEMENT OF THE CASE

### A. Summary of Allegations in Operative Complaint

On appeal from an order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must "take as true all well-pleaded material allegations in the opposing party's pleadings, and affirm the district court's grant of the motion only if the moving party is entitled to judgment as a matter of law." *Florida Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 999-1000 (6th Cir. 2015). The facts described below are taken from Appellant's First Amended Complaint ("FAC") (FAC, R. 38, Page ID ## 265-348), which was the operative complaint at the time the trial court granted Defendant's Motion to Dismiss.

Patients with HIV and AIDS are a group that has historically faced discrimination throughout the American health care system. The ACA offered the promise of equality in health coverage. FAC, R. 38, Page ID # 319-320. A central premise of the ACA embodied in both its guaranteed issue (*i.e.*, no denial of coverage based on pre-existing conditions) and anti-discrimination provisions is to bar health insurers from imposing discriminatory coverage that undermines access to care for patients with conditions such as HIV and AIDS. *See, e.g.*, 42 U.S.C. §§300gg-4; 43 U.S.C. §18022(b)(4)(B); FAC, R. 38, Page ID # 319. Requiring health care insurers to offer coverage for patients with pre-existing conditions means little if the insurer can deter such patients from accessing and fully utilizing

benefits or enrolling in coverage by covering life-sustaining prescription drugs only through inferior programs that put these patients' health and privacy at risk.

Appellant, John Doe, is an adult resident of the State of Tennessee, and lives in the western portion of the state. FAC, R. 38, Page ID # 276.[1] Appellant has been diagnosed with HIV and takes medication to manage his symptoms. *Id.* R. 38, Page ID # 276. Appellant has been enrolled in a BCBST health plan since July 1, 2014 and has obtained HIV medication, specifically including the HIV drug Genvoya, through that health plan. *Id.* R. 38, Page ID # 276. At the time he first enrolled in his BCBST health plan and for several years following, Appellant received his HIV medication from a local community pharmacy of his choice. *Id.* R. 38, Page ID # 276.

At issue in this appeal is a particularly insidious form of discrimination that puts at risk the health and privacy of these HIV and AIDS patients. Sometime in 2017, Appellee BCBST adopted a program (the "Program") requiring enrollees in most of its individual, family and group health care plans to obtain medications for the prevention or treatment of HIV/AIDS ("HIV/AIDS Medications"), including many low cost generic versions, via either mail-order, drop-shipment pharmacies, or from a severely limited network of retail specialty pharmacies with limited

[1] Due to the sensitive nature of Appellant's allegations, John DOE Plaintiff sought leave from the trial court to proceed pseudonymously. Motion for Leave, R. 11, Page ID # 1-4. The trial court granted Appellant's motion. Order Granting Motion for Leave, R. 16, Page ID # 89-90.

available staff ("brick and mortar pharmacies"). FAC, R. 38, Page ID # 265, 267, 269, 272-273, 278. Making matters worse, BCBST disingenuously tells enrollees, falsely, that their only option for obtaining HIV/AIDS Medications is by mail. *Id.* Page ID # 265-269, 271, 273-274, 277. Without notice of the brick and mortar specialty pharmacy option, the Program is effectively a mandatory mail-order program. *Id.* Page ID # 265, 273-274. In fact, BCBST did not inform John Doe of the option of obtaining his HIV/AIDS Medications from this limited brick and mortar pharmacy network until after he retained counsel, even though John Doe had already raised the same concerns with BCBST on multiple occasions and been told he had no option but to use either mail order or a drop shipment location for pick up only. FAC, R. 38, Page ID # 271-274.

As a result of the implementation of Appellee's discriminatory Program, enrollees with HIV/AIDS face a potentially life-threatening and privacy-jeopardizing decision. They must either: (1) forego essential counseling from an expert pharmacist at a local community pharmacy and face risks to their privacy that are inherent in the Program as described below; or (2) pay significantly more out-of-pocket to receive their medications at their community pharmacy as an "out of network" benefit. *Id.* Page ID # 267-268. If enrollees subjected to the Program attempt to obtain their HIV/AIDS Medications from local community pharmacies where other BCBST members may access their medications, enrollees would be

required to pay, in many cases, thousands of dollars in out-of-pocket expenses each month to access their life-sustaining medications. *Id.* Page ID # 266. Yet these community pharmacies provide the essential services and consultations HIV/AIDS patients require, with pharmacists who know the enrollee and the enrollee's medical history. BCBST enrollees not suffering from HIV or AIDS can freely access these community retail pharmacies, but these HIV and AIDS patients cannot. *Id.*[2] BCBST has also failed to correctly classify certain HIV/AIDS Medications as generic or preferred brand drugs and has increased co-insurance charges on these medications, costing enrollees such as John Doe even more money. *Id*. Page ID # 266, 279.[3]

Appellant's FAC sufficiently alleges how the harm of BCBST's Program on HIV/AIDS patients is real, imminent, severe, and raises potentially life-threatening health and privacy concerns, including the following:

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[2] *See* 2018 Blue Cross Blue Shield of Tennessee Preferred Formulary Drug List, https://www.bcbst.com/docs/providers/RX-2018-Preferred_Formulary_and_Prescription_Drug_List_Web.pdf (last visited November 21, 2018).

[3] Appellee's unclear definition of what is a "specialty medication" subject to the Program (*see*, n. 6, *infra*) conflicts with 45 C.F.R. § 156.122(e), which provides: "[A] health plan providing essential health benefits must have the following access procedures: (1) A health plan must allow enrollees to access prescription drug benefits at in-network retail pharmacies, unless: (i) The drug is subject to restricted distribution by the U.S. Food and Drug Administration; or (ii) The drug requires special handling, provider coordination, or patient education that cannot be provided by a retail pharmacy." In addition, as discussed infra, several of the drugs listed by BCBST do not appear to fall within their own definition of what qualifies as a "specialty medication."

- Loss of face-to-face interactions with a pharmacist who can detect potentially harmful adverse drug interactions common with HIV/AIDS Medications and who can manage resistance issues, side effects, or dosing complications. *Id*. Page ID # 268-270, 274-275, 281-282;
- Interruptions due to shipment delays in HIV/AIDS Medications for which strict adherence is necessary to prevent serious health problems, since many of these medications must be taken at the same time every day. *Id*. Page ID # 270-271, 273, 277-278, 281, 284-285;
- Serious privacy concerns for HIV/AIDS patients who are forced to receive deliveries at their workplace and in their neighborhoods, many of whom have not disclosed their medical status to work colleagues, friends, families, or roommates. *Id*. Page ID # 269-270, 273, 285-286;
- Financial risk of lost or stolen shipments left at their door or in their mailbox or, if the recipient must be present when the package is delivered, forcing the patient to obtain needed medications on the schedule of the delivery person, or the potential for reduced efficacy of the medications if they are exposed to heat or sunlight for extended periods of time. *Id*. Page ID # 271, 276-277, 284-285, 326-327;
- Requiring members to interact with a bureaucratic process manned by poorly trained customer representatives over the phone who do not know the

patient or their medical history, sometimes requiring hours to fill a prescription navigating phone menus and long hold times. *Id*. Page ID # 270-271, 277, 282-283, 285, 324, 327;

- Enrollees like John Doe with other prescriptions that BCBST does not consider "specialty medications" may continue to obtain their medications at their local community pharmacy without penalty. FAC, Page ID # 266-267, 274. This splitting of prescription providers may also make it nearly impossible, and at a minimum highly impractical, for BCBST or the pharmacies to track potentially life-threatening drug interactions. *Id*. Page ID # 274-275.

Moreover, given the extremely limited network of brick and mortar pharmacies made available under the Program by BCBST, to the extent enrollees like John Doe even learn about this option, enrollees can spend hours traveling to and from a participating pharmacy to obtain their life-sustaining medications. *Id.* Page ID # 277. This is an untenable requirement for many chronically-ill patients. Making matters worse, BCBST has repeatedly scaled back its brick and mortar specialty pharmacy network, including a material reduction as recently as January 2018. *Id.* Page ID # 268-270, 272-273, 279, 326. Most of the pharmacies BCBST claims are available for in person consultation as brick and mortar pharmacies are CVS pharmacies. However, the personnel at these drop shipment locations have no

expertise in enrollees' HIV/AIDS Medications and these locations are purely used for delivery. CVS pharmacies thus suffer from many of the same delivery and privacy concerns as mail-order shipments. *Id*. Page ID # 272-273, 325.

The FAC alleges in detail why the discrimination inherent in the Program in terms of access to HIV/AIDS Medications is profit-motivated and not justifiable. *Id*. Page ID # 268-269, 275, 317-318. In addition to the potentially life-threatening health consequences of the Program, the Program also threatens the fundamental and inalienable rights to privacy of HIV/AIDS patients who are subject to the Program. *Id.* Page ID # 269-270, 285-286, 317-318. BCBST's Program thus has a particularly discriminatory impact on people with HIV and AIDS due to the ongoing stigma in today's society regarding those with HIV and AIDS, which materially differs and is unique from other disabilities. *Id.*, R. 38, Page ID # 269-270.

Due to the extremely limited number of brick and mortar pharmacies in the Program, even BCBST enrollees who learn of this option have no choice but to receive HIV/AIDS Medications delivered to their home or work place and face an increased threat that neighbors and co-workers, who do not know that the recipient has HIV/AIDS, will come to suspect that they do. *Id*. An improper disclosure of a person's HIV or AIDS status can often result in the denial of proper health care, poor treatment in educational and work settings, and many other collateral

consequences. *See, Activities Combating HIV Stigma and Discrimination*, HIV.gov, https://www.hiv.gov/federal-response/federal-activities-agencies/activities-combating-hiv-stigma-and-discrimination (last visited November 21, 2018). For the roughly one million Americans living with HIV/AIDS, this "painful stigma and discrimination continue to permeate their daily lives." *Eradicating Discrimination Against People Living With HIV/AIDS*, U.S. Dept. of Justice Archives, https://www.justice.gov/archives/opa/blog/eradicating-discrimination-against-people-living-hivaids (last visited November 21, 2018). FAC, R. 38, Page ID # 269-270. Roughly one in eight people living with HIV is denied health services because of such stigma and discrimination associated with the disease, and 90% of Americans recognize that people living with HIV and AIDS face prejudice and discrimination. *See* Henry J. Kaiser Family Foundation, the Washington Post/Henry J. Kaiser Family Foundation 2012 Survey of Americans on HIV/AIDS (July 2012), https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8334-f.pdf (last visited November 21, 2018); *see also HIV Stigma and Discrimination*, AVERT, https://www.avert.org/professionals/hiv-social-issues/stigma-discrimination (last visited November 21, 2018).

These are legitimate, real world concerns that cause concrete injury to individuals such as John Doe who are subjected to the Program and impose

significant hardship and harm that, if established at trial, would support various claims that would entitle him to relief. As noted above, the opportunity to interact on a face to face basis with pharmacists whom the patient has an established relationship is a critical component of HIV/AIDS wellness, since some side effects and adverse drug interactions are only identified through visual cues. FAC, R. 38, Page ID # 267-268, 280-285. Community pharmacists know patients' medical histories and, working directly with patients in face-to-face interactions, are best positioned to immediately provide new drug regimens as their disease progresses, and to provide essential advice and counseling that help HIV/AIDS patients and families navigate the challenges of living with a chronic and often debilitating condition. This face to face interaction is effectively denied under the Program. *Id.* Page ID # 267-268, 282.

This Program has been extremely stressful to John Doe, who has been advised by his doctor to do everything possible to reduce personal stress, as stress plays a significant role in undermining the human immune system. *Id.* Page ID # 326. John Doe has been willing to endure the discriminatory burdens placed on him that others obtaining medications from BCBST need not endure, in part so he can avoid the risks of delays and violations of his privacy inherent in the mail order program. *Id.* Page ID # 272-273, 276-278, 325.

John Doe repeatedly attempted to resolve his problems with the Program with BCBST prior to legal action, spending hours on the phone seeking an accommodation to opt-out of the Program and to return to using the same community pharmacies that other BCBST enrollees who do not have disabilities already do, and where he could obtain his non-HIV/AIDS Medications. *Id.* Page ID # 268-269, 277, 324-325. BCBST personnel refused his requests, repeatedly telling him that he could not opt-out of the Program or use another pharmacy. *Id.* They did not inform him of the option to obtain his HIV/AIDS Medication from an actual brick and mortar pharmacy, as compared to a vendor that operates by mail order, until after counsel for John Doe interceded on his behalf and informed BCBST he would pursue litigation if the shortcomings of the Program were not addressed. *Id.* Page ID # 271-274, 278, 325. Even then, John Doe was provided incorrect information regarding which brick and mortar pharmacies were available to him, and then he can only access a pharmacy that is an hour away from his home. *Id.* Page ID # 272-273. Appellant only filed this action after BCBST refused to provide a reasonable accommodation to enrollees with these unique HIV/AIDS-related medical and privacy needs.

**B. Procedural Background of Action**

After significant pre-litigation discussions, the original complaint in this action was filed on October 31, 2017. Original Complaint, R. 1, Page ID # 125-

127. BCBST filed its initial motion to dismiss on December 29, 2017. BCBST's Motion to Dismiss, R. 33, Page ID # 125-127. This motion was never ruled on because, pursuant to Fed. R. Civ. Proc. 15(a), Appellant filed the FAC as a matter of right on February 2, 2018. FAC, R. 38, Page ID # 265-348. Appellee filed another motion to dismiss on February 16, 2018. Motion to Dismiss FAC, R. 39, Page ID # 349-351. That motion was fully briefed. On July 30, 2018 the trial court granted BCBST's motion to dismiss. In Appellant's response to Defendant's Motion to Dismiss, Appellant requested that if the Court was inclined to grant Defendant's motion, that dismissal be without prejudice, so that Appellant could amend to address any issues raised by the Court in its Order. Resp. to Motion to Dismiss R. 52, Page ID # 532. However, the trial court denied that request and dismissed this case with prejudice. Order, R. 68, Page ID # 601.

## V. STANDARD OF REVIEW

Appellant appeals an order granting a judgment of dismissal in favor of Appellee pursuant to Federal Rule of Civil Procedure 12(b)(6). Order, R. 68, Page ID # 624 ("[T]he Motion to Dismiss the Amended Complaint (ECF No. 39) is GRANTED as follows: (1) Count I is DISMISSED WITH PREJUDICE; (2) COUNT II is DISMISSED WITH PREJUDICE; (3) Count III is DISMISSED WITH PREJUDICE; and Count IV is DISMISSED WITH PREJUDICE.")

The trial court's dismissal of the FAC without leave to amend for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010).

In engaging in this *de novo* review, in order to reverse the trial court this Court need only determine that the operative complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In conducting this review, the Court "must construe the complaint in the light most favorable to the plaintiff and accept all allegations as true." *Doe v. Miami University*, 882 F.3d 579, 588 (6th Cir. 2018) (*quoting Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012)).

The trial court's order denying Appellant's request for leave to amend the operative complaint is typically reviewed for abuse of discretion. *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000). However where, as here, the trial court denies leave to amend because it believes the complaint even as amended would not withstand a motion to dismiss under Rule 12(b)(6), that denial is reviewed *de novo*. *Seaton v. Trip Advisor, LLC*, 728 F.3d 592, 596 (6th Cir. 2013) (discussing standard for denial of leave to amend for "futility"); *U.S. ex rel. Sheldon v. Kettering Health Network*, 816 F.3d 399, 407 (6th Cir. 2016). As the

trial court claimed granting leave to amend was futile (Order, R. 68, Page ID # 624-625), this decision to deny leave to amend the FAC, despite the trial court having never previously ruled on the sufficiency of the pleadings, is also subject to *de novo* review. At a minimum, Appellant should have been granted leave to amend to address the issues regarding disparate treatment under the ACA and Rehabilitation Act raised by the trial court as discussed below.

## VI. SUMMARY OF THE ARGUMENT

The trial court committed at least six separate legal errors that compel this Court to reverse the Order.

First, the trial court did not correctly apply the law to determine the sufficiency of Appellant's discriminatory disparate impact claim under the ACA.

Second, the trial court improperly held in the Order that the appropriate standard for a discriminatory treatment claim under the ACA was that John Doe must allege that BCBST "enacted the Program to discriminate against HIV/AIDS patients because of their disability." Order, R. 68, Page ID # 609. This is not the appropriate standard for any form of discrimination claim under the ACA, whether based on discriminatory treatment or disparate impact.

Third, the trial court misapplied the law in holding BCBST was not liable under John Doe's claim for denial of "meaningful access" to his prescription

benefits, as he was not required to allege that BCBST "has completely deprived him of access to his HIV/AIDS medication." Order, R. 68, Page ID # 617.

Fourth, the trial court improperly concluded that the detailed allegations of harm that resulted in BCBST's denial of meaningful access to John Doe's HIV/AIDS Medications were nothing more than an "inconvenience" that did not give rise to a claim for violation of the ACA. Order, R. 68, Page ID # 616.

Fifth, the trial court incorrectly concluded as a matter of law that John Doe's "health plan" was the "place of public accommodation" that was the subject of Appellant's ADA claim rather than the community pharmacies effectively controlled by BCBST, despite Appellant's detailed allegations to the contrary. Order, R. 68, Page ID # 618.

Sixth, because the trial court erred in finding that BCBST, as a matter of law, did not violate John Doe's statutory rights, the trial court also erred in finding, again as a matter of law, that BCBST had not breached any contractual obligation that it owed to him. As a matter of Tennessee law, the scope and nature a party's obligations under a contract can be shaped by both the agreement of the parties and by applicable statutes. Accordingly, to the extent this Court finds Appellant has stated a claim for relief under either the ACA or ADA, this Court should also reverse and remand Appellant's breach of contract claim for further proceedings to determine whether any breach of the ACA or ADA by BCBST also amounted to a

breach of BCBST's contractual obligation to provide coverage for John Doe's HIV/AIDS Medications. Order, R. 68, Page ID # 622.

Each of these six errors of law would separately warrant the Court remanding this action to the trial court for reconsideration of the Order in light of the law that applies to each of these claims. Taken together, however, this Court should reverse the trial court's ruling and direct the trial court to issue a new decision overruling the motion to dismiss and directing BCBST to file an Answer.

## VII. ARGUMENT

### A. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S ACA CLAIM

The trial court made several errors of law in granting BCBST's Motion to Dismiss the ACA claim asserted as the First Cause of Action in the FAC. As discussed below, the trial court misconstrued the applicable standards governing both types of anti-discrimination claims in finding the FAC failed to state an anti-discrimination claim under Section 1557 of the ACA, ignoring both the plain language of the statute and the official comments of the Department of Health and Human Services ("HHS"), Office of Civil Rights ("OCR") interpreting Section 1557 of the ACA. The trial court misconstrued the U.S. Supreme Court's articulation of the "meaningful access" standard under Section 504 of the federal Rehabilitation Act, 29 U.S.C. § 794, (collectively, "Section 504"), and held John Doe to an inappropriately high burden at the pleading stage for this claim. The trial

court further erred as a matter of law in not permitting Appellant leave to amend the FAC to address the initial rulings of the trial court. Each of these rulings constitute reversible error as to the ACA claim in the FAC.

**1. The Affordable Care Act Provides New Anti-Discrimination Standards.**

Section 1557 of the ACA creates a sweeping new anti-discrimination standard providing that an individual shall not, on the "ground prohibited under title VI of the Civil Rights Act of 1964 [], title IX of the Education Amendments of 1972 [], the Age Discrimination Act of 1975 [], or section 504 of the Rehabilitation Act of 1973 [], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity…" 42 U.S.C. § 18116 (internal citations omitted).

The purposes of the ACA and Section 1557 are "to expand access to care and coverage and eliminate barriers to access." 81 Fed. Reg. 31376, 31377 (2016). As 42 U.S.C. § 18116 provides, "The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection." Claims brought under Section 1557 incorporate all of the enforcement mechanisms of the civil rights statutes mentioned in the statute; a violation of any of the above statutes, including Section 504 of the Rehabilitation Act, is therefore a violation of the ACA. *See*,

*e.g.*, *Rumble v. Fairview Health Services*, No. 14–cv–2037, 2015 WL 1197415, *12 (D. Minn. Mar. 16, 2015).

The protections of Section 1557 of the ACA were also specifically intended to protect those with HIV and AIDS. According to the federal Center for Disease Control and Prevention (the "CDC"), the ACA "is one of the most important pieces of legislation in the fight against HIV/AIDS in our history." CDC, The Affordable Care Act Helps People Living with HIV/AIDS, https://www.cdc.gov/hiv/policies/aca.html (last visited November 21, 2018). The ACA recognized that "[h]istorically, people living with HIV and AIDS have had a difficult time obtaining private health insurance and have been particularly vulnerable to insurance industry abuses." *Id*. Recognizing that HIV/AIDS patients "have suffered disproportionately from lack of health care access, Congress included a number of consumer protections [in the ACA] prohibiting health insurance providers from denying [HIV/AIDS patients] coverage." M. Bolin, The Affordable Care Act and People Living with HIV/AIDS: A Roadmap to Better Health Outcomes, 23 Annals Health L. 28, 29 (2014) (http://www.annalsofhealthlaw.com/annalsofhealthlaw/vol_23_issue_1?pg=36#pg36) (last visited November 21, 2018).

Statements by Congress further evidence a legislative intent to address discrimination abuses in the health insurance industry, including specifically

against HIV and AIDS patients. *See, e.g.*, 156 Cong. Rec. H1854-02 (2010) (https://www.gpo.gov/fdsys/pkg/CREC-2010-03-21/pdf/CREC-2010-03-21-pt1-PgH1854-2.pdf) (last visited November 21, 2018) (statement of Rep. Steny Hoyer, House Majority Leader) ("It is more control ... [f]or consumers, and less for insurance companies. It is the end of discrimination against Americans with preexisting conditions, and the end of medical bankruptcy and caps on benefits."); 155 Cong. Rec. S12153-02 (daily ed. Dec. 2, 2009) (https://www.gpo.gov/fdsys/pkg/CREC-2009-12-02/pdf/CREC-2009-12-02-pt1-PgS12153-2.pdf) (last visited November 21, 2018) (statement of Sen. Cardin) (the ACA "will help achieve the goals outlined by the theme of this year's World AIDS Day campaign of 'universal access and human rights.' First and foremost, the bill eliminates discrimination based on pre-existing conditions. Individuals with HIV will no longer be rejected from insurance coverage because of their disease"); *see also* Implementing the National HIV/AIDS Strategy for the United States for 2015-2020, Exec. Order No. 13703, 80 FR 46181 at *46182 (July 30, 2015) (https://www.gpo.gov/fdsys/pkg/FR-2015-08-04/pdf/FR-2015-08-04.pdf) (last visited November 21, 2018) ("In light of recent progress and continuing challenges, we must continue to improve our national effort to reduce new HIV infections, increase access to care for people living with HIV, reduce HIV-related disparities and health inequities…").

Despite the trial court's conclusion to the contrary at Page ID # 612 of the Order, the OCR also made clear in its comments on its most recent set of regulations promulgated under the ACA that Section 1557 is "not intended to apply lesser standards for the protection of individuals from discrimination than the standards under Title VI, Title IX, Section 504, the Age Act, or the regulations issued pursuant to those laws, *all of which are incorporated into Section 1557 by reference*." 81 Fed. Reg. 31376, 31381 (2016) (discussing 45 C.F.R. § 92.3 as adopted) (emphasis added). In promulgating 45 C.F.R. § 92.1 *et seq.*, HHS made this conclusion explicit and unambiguous: "OCR interprets Section 1557 as authorizing a private right of action for claims of *disparate impact* discrimination on the basis of any of the criteria enumerated in the legislation."[4] 81 Fed. Reg. 31376, 31440 (2016) (emphasis added).

The trial court was required to defer to the agency's interpretation that a disparate impact discrimination claim is a separate basis for recovery under the ACA based on the statute's incorporation of all relevant enforcement mechanisms. The trial court's decision runs counter to the Supreme Court's directive in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984),

[4] The trial court noted in a footnote that the OCR was responding to a comment seeking clarification that all enforcement mechanisms were available, because "[f]or example, it would not make sense for a Section 1557 plaintiff claiming race discrimination to be barred from bringing a claim for using a disparate impact theory but then allow a Section 1557 plaintiff alleging disability discrimination to do so." Order, R. 68, Page ID # 606.

that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *See also Rumble*, 2015 WL 1197415, at *10. The trial court committed reversible error in failing to do so.

Section 1557 of the ACA recognizes discrimination claims based on either disparate treatment (i.e., intentional discrimination) or disparate impact. The trial court committed legal error by calling this conclusion into question. The trial court's Order ignored the fact that Section 1557 establishes a new, health care-specific cause of action for discrimination incorporating all of the above referenced enforcement mechanisms, opting instead to limit its analysis to the Sixth Circuit's *pre*-ACA framework for disability discrimination claims brought under Section 504 of the Rehabilitation Act. As a result, by restricting its analysis to Section 504 of the Rehabilitation Act rulings pre-ACA and not separately analyzing John Doe's claim under a disparate impact theory grounded in the ACA, the trial court applied "lesser" standards for the protection of individuals such as Appellant than Congress intended.

The trial court did not engage in the proper analysis of John Doe's ACA discrimination claim in light of these provisions and statement of intent. While the trial court claimed to have considered Appellant's disparate treatment and "meaningful access" discrimination claims under the ACA, its cursory analysis on

this point misstated the law, misunderstood or misstated the relevant allegations in the FAC, and failed to consider this claim in light of the appropriate guidelines set out by the ACA and its accompanying regulations.

The FAC sufficiently alleges in detail how the Program discriminates against enrollees requiring HIV/AIDS Medications, results in several significant discriminatory disparate impacts on these enrollees, and denies these enrollees meaningful access to the prescription benefits they are entitled because the Program:

- *Excludes* HIV/AIDS patients from coverage based on their medical condition by effectively eliminating the ability to obtain their medications at in-network retail pharmacies with consultation by knowledgeable pharmacists (FAC, R. 38 Page ID # 267-271, 274-275, 280-318);
- *Denies* these patients essential benefits of their health care plans' drug benefit by denying access to essential in-network benefits, including direct face-to-face interaction with pharmacists of their choice (*id.*, Page ID # 266-269, 271-273, 281-285, 318); and
- *Discriminates* against these patients by forcing them to either pay full price for their HIV/AIDS Medications at a retail pharmacy or risk their privacy and health by obtaining these medications by mail,

> which is functionally no different than a rule that discriminates based on those patients' medical condition. The Program disproportionally impacts patients with HIV/AIDS due to serious privacy concerns specifically related to the mail delivery of HIV/AIDS Medications, both in terms of the Program being directed to these medications and the fact that other individuals can access these medications at the pharmacy of their choice, but these enrollees cannot do so (*id.*).

John Doe thus properly alleged a claim under Section 504 of the Rehabilitation Act and the ACA based on the detailed allegations that John Doe and other BCBST enrollees who suffer from HIV and AIDS have been discriminated against because of their disability and denied meaningful access to the prescription benefits they are entitled to, encompassing privacy, drug interaction, and logistical issues unique to individuals with HIV and AIDS. FAC, R. 38, Page ID # 266-273, 280-318. Specifically, John Doe alleged a disparate impact claim of discrimination under Section 504 by (1) identifying BCBST's "outwardly neutral" practice – the Program; and (2) alleging the myriad ways in which enrollees taking HIV/AIDS Medications suffer significant, disproportionately harmful impacts under this Program and are thereby denied meaningful access to this benefit because of their disability. *Id.* Such a claim is proper under Supreme Court precedent and in accord with case law in this Circuit.

### 2. Appellant Sufficiently Alleged a *Prima Facie* Case of Disparate Treatment Discrimination under Section 1557 of the ACA.

To state a *prima facie* claim for disparate treatment under Section 504 of the Rehabilitation Act (and thus a claim for discrimination under the ACA), a plaintiff must allege that "(1) the plaintiff is a 'handicapped' person under the [Rehabilitation] Act; (2) the plaintiff is otherwise qualified for participation in the program at issue; (3) the plaintiff is 'excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap;' and (4) the relevant program or activity is receiving Federal financial assistance." *Hill v. Bradley Cty. Bd. of Educ.*, 295 F. App'x 740, 742 (6th Cir. 2008) (internal citations omitted).

The trial court found Appellant properly alleged elements (1), (2) and (4) of this claim. *See* FAC, R. 38, Page ID # 331-342; Order, R. 68, Page ID # 607. However, the trial court started its analysis of John Doe's disparate treatment claim by stating that "a plaintiff must allege that the defendant *acted intentionally*, i.e., that the defendant engaged in discriminatory conduct intentionally . . ." Order, R. 68, Page ID # 607 (emphasis added). The trial court committed reversible error by then ruling that the "Amended Complaint fails to state a *prima facie* claim that Defendant *enacted the Program to discriminate* against HIV/AIDS patients *because of* their disability." Order, R. 68, Page ID # 609 (emphasis added).

As discussed below, numerous decisions discussing Section 504 provide a roadmap to this Court for determining the sufficiency of Appellant's ACA Section 1557 claim in the context of disability discrimination. The trial court's dismissal with prejudice of the First Cause of Action for failing to adequately allege discriminatory intent erred as a matter of law by holding John Doe and other BCBST enrollees who suffer from HIV or AIDS to a more stringent standard than the pleading requirements of a *prima facie* case alleging discriminatory treatment. As noted by the Supreme Court in *Alexander v. Choate*, 469 U.S. 287, 296-297 (1985), "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." In fact, "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference, of benign neglect, [or] apathetic attitudes." *Id*. at 295-296.

"[I]ntentional discrimination is not an element of a *prima facie* case [of discrimination under the Rehabilitation Act]." *Tanney v. Boles*, 400 F. Supp. 2d 1027, 1047 (E.D. Mich. 2005).[5] "[T]he Rehabilitation Act does not require a

[5] Claims brought pursuant to Section 504 of the Rehabilitation Act are analyzed in essentially the same way as claims under the ADA. *See Hicks v. Benton Co. Board of Education*, 222 F. Supp. 3d 613, 635 (W.D. Tenn. 2016) ("Because [the ADA and the Rehabilitation Act] are generally similar in scope and purpose, decisions analyzing either statute are applicable to both.").

plaintiff to prove discriminatory intent in order to make out a *prima facie* case of handicap discrimination." *Mayberry v. Von Valtier*, 843 F. Supp. 1160, 1166 (E.D. Mich. 1994). *See also I.L. through Taylor v. Knox Cnty. Bd. of Educ.*, 257 F. Supp. 3d 946, 969 (E.D. Tenn. 2017) ("There is nothing to indicate that a plaintiff must ever prove intentional discrimination—or deliberate indifference—under Title II or § 504.").

John Doe need only allege he was denied HIV/AIDS Medication benefits and/or subjected to discrimination under the Program "solely because of his" disability, which he did. *See* FAC, R. 38, Page ID # 266-271, 274-275, 280-318, 332. Appellant's allegations regarding BCBST's denial of any request to obtain HIV/AIDS medications from the same in-network community pharmacies from which other BCBST enrollees access these same medications, or even where he can access his non-HIV/AIDS Medications, were sufficient to state such discriminatory treatment. *Id.*

To the extent Appellant was also required to allege discriminatory intent, he sufficiently alleged BCBST's deliberate indifference. Even under the intentional discrimination standard, as is required to recover compensatory damages under Section 504 of the Rehabilitation Act, such a claim can be "inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights."

*Center v. City of West Carrollton*, 227 F. Supp. 2d 863, 871 (S.D. Ohio 2002) (quoting *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147,1153 (10th Cir. 1999)); *Tanney*, 400 F. Supp 2d at 1047 (same); *see also Reed v. Illinois*, 119 F. Supp. 3d 879, 885 (N.D. Ill. 2015) ("[T]he deliberate indifference standard is better suited to the remedial goals of the [Rehabilitation Act] and the ADA than is the discriminatory animus alternative.") (*quoting S.H. ex rel. Durrell v. Lower Merion Sch. Dist*., 729 F.3d 248, 263 (3d Cir. 2013)).

As further evidence of BCBST's discriminatory treatment, John Doe alleged that BCBST also did not inform him of the option of obtaining his HIV/AIDS Medications from a limited brick and mortar pharmacy network until after he retained counsel, even though John Doe had already raised the same concerns with BCBST on multiple occasions and been told he had no option but to use either mail order or a drop shipment location for pick up only. FAC, R. 38, Page ID # 271-274. John Doe's request to "opt-out" of the Program based on health and privacy concerns further put BCBST on notice of the deleterious impact of the Program on individuals with HIV, as well as his need for an accommodation from this policy, which BCBST then deliberately ignored. *Id.* at Page ID # 266-269, 271-274, 281-318.

These allegations are also sufficient to allege that John Doe was denied benefits and/or subjected to discrimination "solely because of his" disability. *See*

*Briscoe v. Health Care Service Corp*, 281 F. Supp. 3d 725, 733 (N.D. Ill. 2017) ((“Plaintiffs state[d] a plausible claim that Defendants violated the ACA by imposing administrative barriers that render full coverage for . . . services illusory”); *see also Condry v. UnitedHealth Grp., Inc.*, No. 17-CV-00183-VC, 2017 WL 7420997, *2 (N.D. Cal. Aug. 5, 2017) (“The Affordable Care Act requires plans to provide ‘coverage.’ There is no ‘coverage’ for a service if a patient can’t find the service or isn’t told that the service is available. Certainly there is no ‘coverage’ if a patient is told that a service is *not* covered, which is a reasonable inference about what allegedly happened to at least some of the plaintiffs in this case.” (emphasis in original) (internal citations omitted)).

Ignoring these allegations, the trial court gave great credence to BCBST’s inclusion of a small number of medications treating “allergic rhinitis” (or its far more common description “runny nose”) on its “specialty” formulary. The trial court referenced this fact to disregard Appellant’s allegation that this is a thinly veiled attempt at subterfuge to mislead the Court about BCBST’s discriminatory practices, and therefore failed to draw all reasonable inferences in Appellant’s favor in construing the Complaint. *See* FAC, R. 38, Page ID # 286-317. Moreover, the issue is whether the classifications made in the plan are rational ones or merely “a pretext designed to hide discrimination.” *Wexler v. White’s Fine Furniture, Inc.*, 317 F.3d 564, 576 (6th Circ. 2003). That was far beyond this motion. Even at the

summary judgment stage, a plaintiff can refute the legitimate, nondiscriminatory reason that a defendant offers to justify an adverse action "by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Id*.

Placing one or two such medications on a formulary and labeling them as "specialty"[6] ignores the totality of the listed drugs included on the specialty medication formulary set forth in the FAC. R. 38 at Page ID # 287-317. The inclusion of these non-disability treating, arguably non-specialty, drugs should not have been used to undermine the "solely because of" nature of John Doe's allegations as a matter of law, since otherwise a company could always defeat a claim of discriminatory treatment by simply including one or two such drugs on its formulary.

Sixth Circuit law in the context of both the ADA and Section 504 of the Rehabilitation Act is in accord. In *I.L. through Taylor v. Knox Cty. Bd. of Educ.*, 257 F. Supp. 3d 946 (E.D. Tenn. 2017), *aff'd on other grounds sub nom. I.L. by & through Taylor v. Tennessee Dep't of Educ.*, *supra*, the court found that a parent of

[6] According to BCBST's formulary, "specialty medications" "[i]nclude[] high-cost medication for chronic, serious diseases such as hepatitis C, multiple sclerosis, arthritis, hemophilia and other conditions." FAC, R. 38, Page ID # 286-317. It was beyond the scope of the motion to dismiss for the trial court to determine if these medications were properly listed as falling within this definition, which was another error of the court.

a disabled student sufficiently stated a claim against the State Department of Education based on allegations that gym-mat fencings, used by the school district to create an isolated area for a disabled student when she became especially agitated violated both the ADA and Section 504. The court held that the defendant's argument that the plaintiff failed to allege discrimination "solely on the basis of" plaintiff's disability was without merit, and that pleading "deliberate indifference" was not required. *Id.* at 967 ("[Taylor] need not show that the [Department of Education] acted with deliberate indifference to win damages. So she need not show it to win an injunction. Taylor has stated a plausible claim for an injunction under Title II and § 504."). Critically, for purposes here, the court in *I.L.* held that "[w]hile the Supreme Court has not outright said that § 504 covers unintentional discrimination, *it has rejected the idea that § 504 covers only intentional discrimination*." *Id.* (citing *Alexander*, 469 U.S. at 294-97 (1985) (emphasis added)).

In *Logan v. Corr. Corp. of Am.*, No. 1:12-CV-0003, 2012 WL 2131676, *2 (M.D. Tenn. June 12, 2012), the plaintiff was found to have sufficiently alleged the "solely on the basis of" element of a Section 504 claim based on assertions that the defendant failed to provide him access to the TDD/TTY system that was comparable to the phone system afforded hearing prisoners. Specifically, the plaintiff asserted that all inmates in the Tennessee prison system are allowed to

"use the phones to call their [families] any time throughout the day after counts," but deaf inmates must request an appointment to use the TTY. *Id.* at 7–8. The plaintiff further alleged that hearing-impaired inmates are "supposed to use the TTY phone anytime, not 1 time a week, not one time a day," (*id.*), and that his letter regarding an accommodation to allow access to the TTY was ignored by the defendants. Denying the defendants' motion to dismiss, the court concluded the plaintiff had sufficiently pled a plausible claim of discrimination in violation of Section 504. *Id.* at *5.

Similarly, in *Tanney v. Boles*, *supra*, 400 F. Supp. 2d at 1048, the court denied the defendant's motion to dismiss the plaintiff's Section 504 claim where the plaintiff alleged that the defendant knew that he was deaf and, therefore, knew that he required an accommodation. The court recognized that, based on allegations that defendant failed to provide a reasonable accommodation, it could infer from defendant's deliberate indifference that defendant's discriminatory actions were intentional for purposes of pleading a violation of Section 504.

Here, the trial court's reliance on *Jones v. Potter*, 488 F.3d 397 (6th Cir. 2007), and *Rios-Jimenez v. Principi*, 520 F.3d 31, 39 (1st Cir. 2008), does not change the result as the trial court applied a higher standard at the motion to dismiss stage than allowed under the law. It appears the trial court improperly conflated Appellant's evidentiary burden of proof with pleading requirements.

John Doe sufficiently alleged that he was denied benefits and/or subjected to discrimination "solely on the basis of [his] disability." *See* FAC, R. 38, Page ID # 332. Whether he can prove he ultimately was excluded from his full prescription benefits "solely by reason of the disability" is a factual inquiry beyond the scope of a motion to dismiss for purposes of this ACA claim. *See Mosier v. Kentucky*, 640 F. Supp. 2d 875, 877–78 (E.D. Ky. 2009) (*citing Persian Galleries, Inc. v. Transcontinental Ins. Co.*, 38 F.3d 253, 258 (6th Cir. 1994) (reversing trial court's granting of motion to dismiss because the absence of any allegation that defendants "intentionally" discriminated against plaintiff "solely" based on her disability was not fatal to her complaint); *see also Cook v. Hairston*, No. 90-3437, 1991 WL 253302 (6th Cir. 1991) (unpublished, discussed *infra*).

Appellant adequately pled a *prima facie* case of disparate treatment discrimination under section 1557 of the ACA based on violations of Section 504 of the Rehabilitation Act and the ADA. At a minimum, Appellant should have been granted leave to amend to address the issues raised by the trial court as to this cause of action. The trial court applied the wrong legal standard in dismissing this claim with prejudice.

### 3. The Trial Court Further Erred in Finding Appellant Had Not Adequately Alleged He Was Deprived of Meaningful Access to His Prescription Drug Benefits.

The trial court also applied the wrong legal test in dismissing Appellant's claim that he was denied "meaningful access" to his prescription drug benefits. Specifically, the trial court found that "the Amended Complaint stops short of alleging that Appellant's insurer *has completely deprived him* of access to his HIV/AIDS medication." Order, R. 68, Page ID # 617 (emphasis added). Applying a standard of "complete deprivation" contradicts the Supreme Court's articulation of the appropriate standard under Section 504 in *Alexander v. Choate*, 469 U.S. at 296-297. *See also Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D.C. Cir. 2008) (under Section 504, courts "need not define precisely the severity of the deprivation that a plaintiff must experience in accessing a program, benefit, or service to demonstrate a denial of meaningful access").

There is a considerable gap between what the Supreme Court described as "meaningful access" to a benefit under Section 504 and the trial court's conclusion that John Doe was required to allege a "complete deprivation" of his prescription benefit in order to meet the "meaningful access" standard. The Supreme Court has stated that the ultimate determination of whether a discrimination claim under Section 504 of the Rehabilitation Act (and thus under the ACA) is appropriate is whether an otherwise qualified handicapped individual is "provided with

meaningful access to the benefit that the grantee offers." *Alexander*, 469 U.S. at 301. "It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program." *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979). Moreover, "[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled. *Alexander*, 469 U.S. at 301. Therefore, "to assure meaningful access, *reasonable accommodations* in the grantee's program or benefit may have to be made." *Id.* (emphasis added). Whether that meaningful access has been denied involves a detailed factual inquiry, a determination the trial court could not properly reach as a matter of law in ruling upon a motion to dismiss.

The *Alexander* court discussed a number of examples showing whether "meaningful access" to a benefit either has or has not been provided. Discussing its earlier decision in *Southeastern Community College v. Davis*, *supra*, the Court found "under some circumstances, 'a refusal to modify an existing program might become unreasonable and discriminatory.'" *Alexander*, 469 U.S. at 300. The Court concluded that defendants "may be required to make 'reasonable' [modifications]"

in order to accommodate those with disabilities, or risk running afoul of Section 504 of the Rehabilitation Act. *Id.*

The "meaningful access" analysis by courts in this Circuit mirrors that of the Supreme Court. In *Cook v. Hairston*, No. 90-3437, 1991 WL 253302, at *1 (6th Cir. 1991) (unpublished), nursing home residents who were otherwise qualified to receive Medicaid benefits were denied this benefit due to application errors by the authorized representatives appointed for the purpose of preparing their Medicaid applications. Following the Supreme Court's analysis in *Alexander, supra*, this Court reversed summary judgment on a Section 504 claim, holding that a regulation, as implemented, had a disparate impact upon certain individuals with disabilities, and the State of Ohio had failed to make a reasonable attempt to accommodate the individuals' disability. *Id*. at *3–4. Applying the "meaningful access" analysis set forth above, this Court recognized the challenged portion of the regulation did not discriminate against handicapped persons on its face; rather it distinguished between applicants based on their status as nursing home residents. *Id.* at *3. Thus, the question whether the appointment of a representative was necessary to enable the plaintiffs to complete the application process, or was a reasonable or necessary accommodation of their disability, was a disputed issue of material fact not appropriate for determination on summary judgment. *Id*. at *4.

In *Karlik v. Colvin*, 15 F. Supp. 3d 700 (E.D. Mich. 2014), the court addressed whether an employer failed to accommodate the plaintiff by not restructuring his job duties or reassigning him to another position in violation of Section 504 of the Rehabilitation Act. The court recognized that a plaintiff's burden in an anti-discrimination action of articulating a reasonable accommodation for his disability "need not be onerous… For the purposes of a *prima facie* showing, the plaintiff must merely suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Id.* at 709 (internal quotation marks omitted). Ultimately the court determined the presence of disputed material facts as to this key issue precluded summary judgment. *Id.* at 710.

Other courts addressing these claims have similarly concluded such issues cannot properly be resolved as a matter of law, as it is a factual inquiry whether a failure to provide a reasonable accommodation denied a plaintiff meaningful access to a program or benefit in violation of Section 504. *See Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999) (reversing decision of trial court on the sufficiency of a Section 504 claim on a motion for summary judgment, finding meaningful access denied to hearing-impaired prisoner where he was unable to fully communicate with his medical providers or understand video-based educational programs due to his disability); *Access Living of Metro. Chicago v.*

*Chicago Transit Auth.*, No. 00-C-0770, 2001 WL 492473, at *7 (N.D. Ill. 2001) (denying summary judgment on Section 504 claim where plaintiff showed multiple examples of disabled riders being stranded, ignored, or injured while riding public transit and holding "plaintiff's evidence, if believed, would certainly show that CTA failed to make reasonable modifications . . . necessary to provide 'meaningful access' to persons with disabilities"); *Abney v. City of St. Charles, Mo.*, No. 14-cv-01330, 2015 WL 164040, *3 (E.D. Mo. 2015) (denying motion to dismiss Section 504 claim where plaintiff alleged defendants "failed to furnish appropriate auxiliary aids, such as a qualified interpreter . . . Whether Appellant can prove that she was denied effective communication and discriminated against requires further development of the record."); *J.D. v. Nagin, et al.*, No. 07-cv-9755, 2008 WL 2522127, at *8 (E.D. La. 2008) (denying motion to dismiss complaint asserting Section 504 claim alleging failure of staff to allow access to medical practitioners qualified to address mental health problems, failure to provide formal psychiatric care, and denial of special education and related services).

Here, the trial court improperly held at the Motion to Dismiss stage that Appellant's allegations of the severe negative effects of the Program in terms of denying meaningful access were merely an "inconvenience," which the court found "particularly compelling when considering whether Appellant has stated a claim for disparate impact under the Rehab Act." Order, R. 68, Page ID # 617. The

trial court's holding, however, ignored Appellant's allegations to the contrary. FAC, R. 38, Page ID # 320, 331. In applying a different standard to this meaningful access determination, the trial court opined that, "Although the Court understands the inconvenience facing that [sic] HIV/AIDS patients like Plaintiff as a result of Defendant's policy, interpreting Section 504 of the Rehab Act to reach the claims in the Amended Complaint would flout the Supreme Court's cautionary instructions in *Alexander*." Order, R. 68, Page ID # 616 (emphasis added). The trial court's holding, however, ignored Appellant's allegations to the contrary summarized above and minimized the severity of Appellant's factual allegations.

Thus, rather than following the instruction of this Circuit in *Columbia Nat. Res., Inc.*, 58 F.3d at 1109, that the trial court must "construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief," the trial court did the opposite.

It is hard to imagine what type of discriminatory effect would satisfy the trial court's standard. The effects suffered by John Doe and those similarly situated to him under the Program are alleged to be serious and life-threatening, not merely an "inconvenience." The FAC is replete with allegations of unique, serious, and potentially life-threatening health and privacy consequences that flow directly from the Program to enrollees with HIV/AIDS. John Doe alleged in detail how BCBST

has deprived both him and others of "meaningful access" to his HIV/AIDS Medications by, *inter alia*, denying them full and/or equal enjoyment of the benefits, services, facilities, privileges, and advantages available under their health care plans' prescription drug benefit and refusing to provide HIV/AIDS patients a reasonable accommodation to this "separate and unequal" Program. *See, e.g.*, FAC, R. 38, Page ID # 267-271, 274-275, 280-318. The trial court erred as a matter of law in discounting, minimizing or simply ignoring these allegations and in holding that Appellant did not allege sufficient facts to plead a denial of meaningful access to these life-saving medications.

Appellant's allegations regarding how BCBST has denied him meaningful access to prescription benefits are bolstered by the fact that the Program's use of the term "specialty pharmacy" for purposes of denying John Doe access to the community pharmacy he would otherwise use (*see* n.6) conflicts with 45 C.F.R. § 156.122(e), a regulation adopted by federal administrative agencies implementing the ACA. The regulation specifically addresses access to prescription drugs and the deleterious impact of mail-order programs by barring such programs unless two narrow exceptions apply, neither of which is relevant here: "[A] health plan providing essential health benefits must have the following access procedures: (1) A health plan must allow enrollees to access prescription drug benefits at in-network retail pharmacies, unless: (i) The drug is subject to restricted distribution

by the U.S. Food and Drug Administration; or (ii) The drug requires special handling, provider coordination, or patient education that cannot be provided by a retail pharmacy." *Id.*

To be clear, Appellant does not seek any particular special access that other BCBST enrollees who do not have disabilities already enjoy. *Compare Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017) (reversing judgment on the pleadings where plaintiff alleged absentee voter system violated the ADA and defendant failed to provide a reasonable accommodation) *with Jones v. City of Monroe*, 341 F.3d 474 (6th Cir. 2003) (affirming summary judgment against plaintiff and holding city did not deny meaningful access to free parking in denying a resident with a physical disability the "special privilege" to park near her office.) The reasonable accommodation Appellant seeks here as alleged in the FAC is simply to be allowed the ability to access his HIV/AIDS Medications at the same in-network pharmacies where other BCBST enrollees obtain their other medications.[7] The trial court erred in concluding otherwise based on the court's opinion that the legitimate concerns raised in the FAC merely alleged an "inconvenience." *Accord Helen L. v. DiDario,*

[7] That Appellant has the option of paying full-price to use the community pharmacy of his choice to obtain his HIV/AIDS Medications does not change this result, as "[t]he courts have recognized that the mere ability of [individuals with disabilities] to spend substantial sums of money to overcome obstacles attendant to a government benefit or program does not eliminate a denial of meaningful access under section 504." *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1270 (D.C. Cir. 2008). The FAC, R. 38, Page ID # 266 contains such allegations.

46 F.3d 325, 335 (3d Cir. 1995) (Pennsylvania Department of Public Welfare violated ADA by requiring that resident, who had contracted meningitis and was paralyzed, receive required care services in nursing home rather than through attendant care program in her own home, for which she was qualified); *Am. Council of the Blind*, *supra*, 525 F.3d at 1273 (blind and visually impaired individuals lacked meaningful access to United States currency due to their inability to distinguish between denominations without assistance).

Appellant has identified several obstacles that impede his access to a benefit that others are not subjected to. He is not, as in *Jones*, attempting to obtain a substantively different benefit than is already provided by BCBST to other enrollees. Therefore, the trial court erred in finding as a matter of law that John Doe had not and never would be able to plead that he has been deprived of meaningful access to his prescription drug benefit.

Even the trial court's own cited authorities do not support its conclusion. For example, the trial court cited to *Ruskai v. Pistole*, 775 F.3d 61, 78–79 (1st Cir. 2014), and its discussion of meaningful access. The trial court's reliance on *Ruskai* underscores the legal error committed in this case in that the trial court failed to apply the appropriate standard for determining whether the FAC appropriately alleged a *prima facie* case of discrimination under the ACA based on violations of Section 504. In denying the plaintiff's disparate impact claim, the court in *Ruskai*

found that "any unpleasant effects, such as dollar impact, waiting time, or lack of quality," "neither connected to any denial of access nor motivated by discriminatory intent," are outside the scope of a Section 504 claim under *Alexander*. Here, in addition to the fact that the allegations of "unpleasant effects" are far more severe than "waiting time," the harmful effects of the Program are alleged to be connected to a denial of access to Appellant's life-sustaining prescription drug benefits (*see* FAC, R. 38, Page ID # 267-271, 274-275, 280-318) and, as discussed above, are accompanied by allegations of discriminatory treatment.

The trial court's reliance on *Hale v. Johnson*, 245 F. Supp. 3d 979 (E.D. Tenn. 2017), was similarly misplaced. *Hale* did not involve whether defendant's policy denied a plaintiff "meaningful access" to benefits; rather, the court ruled that an issue of material fact precluded summary judgment as to the request for a reasonable accommodation and the potential burden imposed on the defendant by the accommodation. While the court in *Hale* reasoned that declarations provided by plaintiff in that case did not "constitute sufficient evidence to support his disparate impact claim," no analysis was provided as to the pleading requirement for a Section 504 claim where the plaintiff alleged the denial of meaningful access to a benefit. Again, the trial court here appears to have conflated the evidentiary burden for *proving* discrimination under Section 504 with pleading requirements

(Order, R. 68, Page ID # 615), and then assumed that Appellant could not either amend the FAC or introduce evidence to show disparity between BCBST enrollees who suffer from HIV/AIDS and other enrollees in BCBST's Program, despite allegations to the contrary.

Finally, as noted above, the trial court cited to the fact that the list of medications subject to the Program included a handful of drugs that treat conditions that are not considered disabilities under either the ADA or the Rehabilitation Act, and thus could not form a basis for pleading an ACA violation. Order, R. 68, Page ID # 616. The trial court concluded that "BCBST plan enrollees who are not disabled yet take specialty medications subject to the Program must endure the same procedural and logistical hurdles that HIV/AIDS patients face." Order, R. 68, Page ID # 616. The trial court's conclusion on this point ignores other allegations that, regardless of the harms faced by other enrollees as a result of the Program, the negative impact the Program has on enrollees with HIV/AIDS is disproportionately severe. *See* FAC, R. 38, Page ID # 266-273, 280-318. *See also* n. 2, *supra*.

The trial court also erred by misconstruing the crux of Appellant's discrimination claim. By providing a benefit in a manner that disparately affects and impacts those with HIV or AIDS, BCBST has failed to provide meaningful access to these life sustaining medications. The FAC's allegations are sufficient to

satisfy John Doe's obligations at the pleading stage. This Court must reverse the trial court's ruling to the contrary.

## B. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S ADA CLAIM BASED ON ITS MISSTATEMENT OF THE CORRECT PLACE OF PUBLIC ACCOMODATION IN QUESTION.

For the same reasons set forth in Section VII.A. *supra,* the FAC alleged in detail how the Program as implemented by BCBST results in an inability of John Doe and others to avail themselves of the goods and services offered by a place of public accommodation in terms of providing reasonable access to and full enjoyment of the goods and services of community pharmacies as required under the ADA. FAC, R. 38, Page ID # 265-269, 274. Such pharmacies are "places of public accommodation" under the ADA. 42 U.S.C. § 12181(7)(f). In comparison to the Sixth Circuit rulings cited by the trial court, Appellant has alleged a sufficient nexus between BCBST's discriminatory conduct and this place of public accommodation. Accordingly, this Court must also reverse the trial court's order dismissing Appellant's ADA claim with prejudice.[8]

The trial court acknowledged John Doe's contention that BCBST effectively controls and thereby "operates" community pharmacies by determining which medications can be filled under an "in network" pharmacy benefit and which

[8] As set forth above, the case law setting forth many of the same reasons that Appellant sufficiently alleges violations of the ACA are based on decisions also interpret the ADA. Appellant will not restate that law but rather incorporates such discussion by reference.

cannot, and that in so doing BCBST is responsible if it unlawfully denies an individual access to the goods or services of a public accommodation. Order, R. 68, Page ID # 618. Despite this recognition, the trial court concluded that the public accommodation Appellant was seeking was "to Plaintiff's health plan, not a pharmacy." Order, R. 68, Page ID # 619. That is not what Appellant alleged, however. The central issue under the Second Cause of Action was whether BCBST can legitimately deny individuals prescribed HIV/AIDS Medications access to places of public accommodation (*i.e.*, community pharmacies) despite the essential nature of the services provided by such community pharmacies. FAC, R. 38, Page ID ## 274, 281-285.

As the FAC properly alleges that BCBST effectively operates community pharmacies by controlling who can access prescription drugs there and who cannot under the terms of the Program, the ADA precludes BCBST from discriminating "in the full and equal enjoyment of goods [and] services" offered by those pharmacies as places of public accommodation. 42 U.S.C. § 12182(a). The trial court short-circuited this inquiry by ignoring the FAC and incorrectly holding that the ADA claim was foreclosed by Sixth Circuit precedent, citing *Parker v. Metro. Life. Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1084 (1998), *Kolling v. Blue Cross & Blue Shield of Michigan*, 318 F.3d 715, 716 (6th Cir. 2003), and *Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453, 457 (6th Cir.

1998). Order, R. 68, Page ID # 617-620. These decisions are not determinative of the relevant standard as to the "place of public accommodation" for ADA purposes.

This Court did not negate in any of these decisions the finding that the ADA's explicit prohibition against discrimination applies to a private entity that operates a place of public accommodation, which in this case is a pharmacy. To the contrary, this Court affirmed dismissal of the ADA claims in those rulings because the plaintiffs failed to establish any "nexus" between the alleged discrimination and any place of public accommodation. For example, as the Court stressed in *Lenox*, the plaintiffs (unlike here) "were not complaining about . . . [their] ability to avail [themselves] of the goods and services offered at a place of public accommodation." *Lenox*, 149 F.3d at 457. *See also Parker*, 121 F.3d at 1011 (recognizing the plaintiff "did not seek the goods and services of a public accommodation" and "the good that plaintiff seeks is not offered by a place of public accommodation"); *Kolling*, 318 F.3d at 716 (holding benefit plans are not themselves "goods offered by a place of public accommodation" and finding no "nexus between the disparity in benefits" and a public accommodation); *Brintley v. Aeroquip Credit Union*, 321 F. Supp. 3d 785, 792 (E.D. Mich. 2018) ("Ultimately, the Court [in *Parker*] held that the disability plan was not a 'good offered by a

public place of accommodation,' emphasizing that 'a public accommodation is a physical place[.]'").

Here, the trial court committed error as to the ADA claim because it found the place of public accommodation at issue was the health plan, even though Appellant alleged in the FAC that it was the community pharmacies. FAC, R. 38, Page ID # 332-334, 336-337. To the extent this could have been clarified by amending the FAC, the trial court erred in denying Appellant leave to do so.

Because John Doe alleged a deprivation of goods and services offered by a place of public accommodation, under the authorities the trial court cited it should have, but did not, consider whether Appellant sufficiently alleged the requisite nexus between BCBST's discriminatory conduct and the community pharmacies that are places of public accommodation.

Neither the trial court in dismissing the ADA claim nor this Court in previous opinions has addressed this issue. However, the court in *Zamora-Quezada v. HealthTexas Med. Grp. Of San Antonio*, 34 F. Supp. 2d 433 (W.D. Tex. 1998), considered this question in a remarkably similar factual context. In *Zamora*, the plaintiffs "allege[d] the Humana defendants [insurance companies] delayed or denied them full and equal enjoyment of medical treatment and services in violation of the ADA." *Id.* at 439. As the court observed, "The term operates for the purposes of the ADA means a right to control the allegedly discriminatory

conditions." *Id.* Accordingly, "[t]he relevant inquiry is whether Humana had control over the actions alleged to have resulted in the discrimination charged." *Id.* The plaintiffs alleged how the "financial arrangements . . . fueled the system, which controlled the delivery of health care and caused the acts of alleged discrimination about which plaintiffs complain." *Id.* at 444. The court concluded the plaintiffs' allegations of delayed and denied access to care resulting from Humana's control over healthcare providers, and thus the terms of the plaintiffs' health plan, were sufficient to state a Title III claim. *Id.*

Appellant similarly alleged in the FAC that BCBST through financial incentives as well as contractual arrangements and control over community pharmacies has likewise eliminated his access to and enjoyment of the goods and services of community pharmacies. FAC, R. 38, Page ID # 327, 336. Accordingly, Appellant sufficiently alleged a nexus between BCBST's conduct and a place of public accommodation as required under Sixth Circuit precedent.[9] Appellant has also alleged why and how denial of access to these community pharmacies particularly harmed him. FAC, R. 38, Page ID # 327, 336. While BCBST has not physically barred Appellant from access to his community pharmacy, this is irrelevant for ADA purposes. *See Rendon v. Valleycrest Productions, Ltd.*, 294

[9] At a minimum, Appellant should have been permitted an opportunity to amend the FAC to clarify BCBST's control over community pharmacies and the requisite nexus issue.

F.3d 1279, 1283 (11th Cir. 2002) (holding the ADA applies to both "intangible barriers" as well as physical barriers). *See also Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (noting that "the purpose of the statute is broader than mere physical access – seeking to bar actions or omissions which impair a disabled person's 'full enjoyment' of services or goods of a covered accommodation"). The Court in *Parker* specifically left open the question of "whether a plaintiff must physically enter a public accommodation to bring suit under Title III, as opposed to merely accessing, by some other means, a service or good provided by a public accommodation." *Parker*, 121 F.3d at 1011, n.3. *See also Brintley v. Belle River Community Credit Union*, 17-13915, 2018 WL 3497142, at *5 (E.D. Mich. July 20, 2018), *appeal docketed*, No. 18-105 (September 10, 2018) (noting the Sixth Circuit in *Parker* left open the question of whether actual access is required).

As the trial court erred in its determination over what was the place of public accommodation in question in terms of being Appellant's health plan rather than community pharmacies as John Doe alleged throughout the FAC, this Court must reverse the dismissal of his claims under the ADA.

### C. THIS COURT SHOULD ALSO REVERSE THE TRIAL COURT'S DISMISSAL OF APPELLANT'S BREACH OF CONTRACT CAUSE OF ACTION

Based on the above analysis, if this Court reverses the trial court either outright or remands for further proceedings on either the ACA or ADA claims, this Court should also reverse the trial court's dismissal of Appellant's claim for breach of contract under the common law of Tennessee. In its motion to dismiss and supporting brief, BCBST did not appear to dispute that it is obligated through its contract with John Doe to treat Genvoya as a covered drug. Memo in Support of Motion to Dismiss, R. 40, Page ID # 369. If this Court finds the FAC adequately alleges, or could be amended to allege, that BCBST violated either the ACA or the ADA, then such statutory violations should, at the very least, be a relevant consideration in determining whether BCBST breached its duty of good faith and fair dealing in the way that it "covered" Appellant's HIV/AIDS Medications.

The thrust of John Doe's breach of contract claim is that BCBST imposed unreasonable and unlawful burdens on both Appellant and other similarly situated enrollees in obtaining medically necessary HIV/AIDS Medications. FAC, R. 38, Page ID # 339. As set forth in detail above, these burdens include severely and unreasonably restricting access to pharmacists to discuss these HIV/AIDS Medications, potential drug interactions, and side-effects; failing to provide a geographically adequate network of brick and mortar pharmacies for those who

want to interact directly with a pharmacist; and providing insufficient and misleading information about how and where enrollees subject to the Program can obtain their HIV/AIDS Medications. *Id*. R. 38, Page ID # 266-274, 282-285, 318, 339.

The trial court dismissed John Doe's breach of contract claim, just as it dismissed his ACA and ADA claims. The court held, in relevant part, that "[t]he Amended Complaint fails to identify a specific provision of the health plan that Defendant has breached," and further stated that "there is nothing in the Amended Complaint suggesting that Defendant violated the terms of its contract with Plaintiff when it denied his request to fill his Genvoya prescription at his local community pharmacy." Order, R. 68, Page ID # 621.

This is not what Appellant argued. Appellant has never claimed that there is an express term in BCBST's contract with John Doe that obligates BCBST to cover Genvoya prescriptions that are filled at a local pharmacy. Rather, Appellant alleges that cumulatively, these burdens were so severe that they rose to the level of a violation of BCBST's duty of good faith and fair dealing in truly "covering" these HIV/AIDS Medications under the Program. *See, e.g., Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996) ("[T]he common law imposes a duty of good faith in the performance of contracts."); *see also Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM Inc.*, 395 S.W.3d 653, 667 (Tenn. 2013)

("Tennessee courts have imposed a standard of reasonableness in the performance of an agreement when the circumstances have warranted such a construction."). Courts in Tennessee have also recognized that the scope of contractual obligations can, in some circumstances, be shaped by "applicable federal and state law." *See, e.g.*, *Vargo v. Lincoln Brass Works, Inc.*, 115 S.W.3d 487, 491 (Tenn. Ct. App. 2003) (analyzing the enforceable terms in an employment contract); *Abadeer v. Tyson Foods, Inc.*, 975 F. Supp. 2d 890, 914 (M.D. Tenn. 2013) (citing *Vargo* for the same proposition).

While *Vargo* and *Abadeer* addressed employment contracts, there is no reason why their reasoning should not apply with equal force to the present dispute in light of the long-standing rule that Tennessee courts will not "enforce contractual conditions that are contrary to law." *Abadeer*, 975 F. Supp. 2d at 914 (citing *Baugh v. Novak*, 340 S.W. 3d 372, 385 (Tenn. 2011)). If requiring an HIV/AIDS patient to obtain access to "covered" drugs through either mail order, drop shipment or a tiny number of brick and mortar pharmacies is statutorily unacceptable, such requirements likewise do not constitute good-faith "coverage" under BCBST's contract. As both the ACA and ADA can, and in this case do, set minimum standards of performance for what it means to provide "coverage" of a drug, such as John Doe's Genvoya, to the extent this Court determines that BCBST has violated either the ACA or the ADA, this Court should also reverse the trial

court's holding that BCBST, as a matter of law, did not breach its contractual coverage obligations to John Doe.

## VIII. CONCLUSION

For all the reasons set forth above, this Court must reverse the decision of the trial court and either order the trial court enter a new order denying the motion to dismiss and direct Appellee to file an Answer to the operative Complaint, or grant Appellant leave to amend to file a Second Amended Complaint consistent with the decision of this Court.

DATED: November 21, 2018

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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Dated: November 21, 2018

## CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25 and 6th Cir. R. 25, I hereby certify that on this 21st day of November, 2018, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. I certify that I am a registered CM/ECF user and that all parties have registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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# ADDENDUM:

## DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS