Application for an Award of Advocacy and Witness Fees

Entity Name:	Michael Johnson
Proceeding:	Material Modification concerning the acquisition of Care1st Health Plan by Blue Shield
Date Submitted:	12/2/2015 1:12:54 PM
Submitted By:	Michael Johnson
Application version:	Original App

1. For which proceeding are you seeking compensation?

   Material Modification concerning the acquisition of Care1st Health Plan by Blue Shield

2. What is the amount requested?

   $39,480.00

3. Proceeding Contribution:

   Provide a description of the ways in which your involvement made a substantial contribution to the proceeding as defined in California Code of Regulations, Title 22, Section 1010(b)(8), supported by specific citations to the record, your testimony, cross-examination, arguments, briefs, letters, motions, discovery, or any other appropriate evidence.

   Statement of Substantial Contribution I made a substantial contribution to the proceeding in the following ways:--By letter of March 20 to Ms. Rouillard, I was the first consumer advocate to raise concerns about the use of nonprofit assets for the acquisition and to request a public hearing. I also requested disclosure of the price Blue Shield had agreed to pay for Care1st. The DMHC subsequently scheduled a public hearing and the purchase price was disclosed.--By letter of May 31 to Ms. Rouillard, I argued that Article 11 applies to the transaction, DMHC has wide-ranging authority to enforce the charitable trust obligations of nonprofit health plans and that Blue Shield has a charitable trust obligation. According to Ms. Rouillard's statements to the media and consumer advocates at the time the approval to the acquisition was announced, the DMHC carefully considered the question of Blue Shield's charitable trust obligation.--By letter of June 3 to Mr. Ravel, I pointed out inconsistencies in statements made by Blue Shield to the DMHC and FTB. I also addressed this issue and provided additional information in my letter of September 30 to Ms. Rouillard. The DMHC questioned Blue Shield about those apparent inconsistencies in an August 20 letter to Blue Shield. In addition, Undertaking 18 includes a requirement that Blue Shield refrain from making statements to the DMHC that are "misleading or inconsistent in any material respect with any statements made by Blue Shield to any state or federal agency…"--By letter of June 22 to Mr. Ravel, I provided a rebuttal to arguments by Blue Shield General Counsel Seth Jacobs that Article 11 does not apply and Blue Shield has no charitable trust obligation.--By letter of July 14 to Ms. Rouillard, I provided information regarding the legitimacy of Blue Shield's status as a mutual benefit corporation, which Blue Shield had made a cornerstone of its argument that it had no charitable trust obligation.--By letter of September 23 to Ms. Rouillard, I provided a detailed and comprehensive rebuttal to arguments in Blue Shield's "White Paper on Charitable Trusts." My letter included significant information about California case law regarding charitable trust obligations and about Blue Shield's activities that had not yet been presented to the DMHC.--By letter of October 5 to Ms. Rouillard, I pointed out how the post-acquisition relationship between Blue Shield and Care1st would subsume the interests of Care1st's enrollees to those of Blue Shield's enrollees. In sum, I provided to the DMHC, a multitude of arguments and evidence that appear to have been seriously considered and that resulted in the Director having additional information available to her that was credible, relevant, and non-frivolous.

Document Name	Date Uploaded	Uploaded By	
Letter of March 20	12/2/2015 12:54:14 PM	Michael Johnson	View
Letter of May 31	12/2/2015 12:54:59 PM	Michael Johnson	View
Letter of June 3	12/2/2015 12:55:40 PM	Michael Johnson	View
Written comments for Public Meeting	12/2/2015 12:56:59 PM	Michael Johnson	View
Letter of July 16	12/2/2015 1:01:37 PM	Michael Johnson	View
Letter September 23	12/2/2015 1:02:23 PM	Michael Johnson	View
Letter of October 1	12/2/2015 1:02:56 PM	Michael Johnson	View
Letter of October 5	12/2/2015 1:03:23 PM	Michael Johnson	View

4. Please attach your Time and Billing Record in the "Add Attachment" box below. If you do not have your own Time and Billing Record, please use the DMHC template.

Document Name	Date Uploaded	Uploaded By	
Time and Billing Records	12/2/2015 1:08:42 PM	Michael Johnson	View

I am authorized to certify this document on behalf of the applicant. By entering my name below, I certify under penalty of perjury under the laws of the State of California that the foregoing statements within all documents filed electronically are true and correct and that this declaration was executed at

Los Angeles (City), CA (State), on December 02, 2015 .

Enter Name: Michael Johnson

From: Michael Johnson <mikemsj@gmail.com>
Subject: Re: meeting times
Date: March 20, 2015 at 3:07:12 PM PDT
To: Sherrie Lowenstein <Sherrie.Lowenstein@DMHC.CA.GOV>
Cc: Gabriel Ravel <Gabriel.Ravel@DMHC.CA.GOV>

Thanks, Sherrie. Yes, let's plan to talk on April 1 at 11:30. However, I'm a little unsure about whether I'll be in Sacramento that day. If not, we could always talk by phone. Thanks.

FYI, I just sent the following to Shelley, copying Marta, Nancy Wong, and Gabriel.

Dear Ms. Rouillard:

I am writing regarding Blue Shield of California's proposed acquisition of Care1st to request that the department (1) require Blue Shield to immediately disclose to the public the terms of the deal and (2) hold a public hearing on the proposed acquisition well before taking action on it.

Several aspects of the planned transaction raise questions about whether it would serve the public interest.

First and foremost is the lack of public disclosure. In announcing the deal, Blue Shield and Care1st insisted on keeping its terms secret, including how much Blue Shield has agreed to pay for Care1st. Without knowing the price, it is impossible for the public to know whether it is fair—and that matters greatly because the funds that Blue Shield proposes to spend are nonprofit assets belonging to the community.

If the price Blue Shield has agreed to pay is excessive, then

completion of the deal would result in community assets being used improperly to enrich private parties—the present owners of Care1st. The refusal of Blue Shield and Care1st to publicly disclose the terms suggests that this could well be the case.

Even if the price agreed to by Blue Shield were a reasonable reflection of Care1st's market value, the transaction would still work against the public interest if the proposed expenditure of community assets did not result in a commensurate increase in the community benefit provided by Blue Shield. Given the recent revocation of Blue Shield's tax exemption, presumably for failing to provide sufficient community benefit, it seems highly doubtful that the acquisition would produce any significant increase in benefit to the community.

Another important question raised is, what benefit would come to consumers by transferring control of Care1st to Blue Shield? Care1st's dominant business is serving Medi-Cal enrollees. Blue Shield has no experience or expertise with this highly specialized line of coverage. Transferring control of Care1st to Blue Shield would clearly entail some risk to Medi-Cal enrollees.

Given these and other issues of critical public importance raised by the proposed acquisition, the public deserves full and immediate disclosure of the transaction and a public hearing in which key issues relating to the deal's impact on the community can be aired.

Thank you very much for your consideration.

Sincerely,

Michael Johnson

Michael Johnson
323-466-0380
mikemsj@gmail.com
www.makeitrightblueshield.org

On Mar 20, 2015, at 12:03 PM, Lowenstein, Sherrie@DMHC <Sherrie.Lowenstein@DMHC.CA.GOV> wrote:
Hi Michael. Shelley's calendar is totally booked but Gabriel Ravel or General Counsel and I can meet with you -probably on April 1 at 11:30 if that works.

-----Original Message-----
From: Michael Johnson [mailto:mikemsj@gmail.com]
Sent: Thursday, March 19, 2015 3:13 PM
To: Lowenstein, Sherrie@DMHC
Subject: meeting times

Sherrie-

I'm available next March 23th from 2-5 pm and 25th 10-6. Also available March 30 11-5 and April 1 10-6.

Thanks.

/Michael

Michael Johnson
323-466-0380
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www.makeitrightblueshield.org

From: Michael Johnson <mikemsj@gmail.com>
Subject: meeting times
Date: March 19, 2015 at 3:12:33 PM PDT
To: Sherrie Lowenstein <sherrie.lowenstein@dmhc.ca.gov>

Sherrie-

I'm available next March 23th from 2-5 pm and 25th 10-6. Also available March 30 11-5 and April 1 10-6.

Thanks.

/Michael

Michael Johnson
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Michael Johnson
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May 31, 2015

Shelley Rouillard, Director
Department of Managed Health Care
980 Ninth Street
Sacramento, CA 95814

Re: Blue Shield of California's Proposed Acquisition of Care1st

Dear Director Rouillard:

The Franchise Tax Board revoked Blue Shield of California's tax exemption last year because it found that the nonprofit was failing to meet its obligations to serve the public good. Blue Shield is now proposing to spend $1.2 billion to acquire another health plan. Would this substantial expenditure of nonprofit assets benefit the public? Certainly, there's reason for skepticism.

The Department of Managed Health Care has not made clear, however, whether its review of the acquisition will even consider that question. Blue Shield has argued in its filing with the DMHC that it should not. As described below, I believe the DMHC has both the legal authority and duty to condition approval on a robust showing that the deal would be good for the public.

I. The proposed acquisition is a "restructuring" under Article 11 of the Knox-Keene Act, which imposes myriad public benefit requirements.

Under Article 11 a nonprofit plan proposing a transaction deemed to be a restructuring of the plan must submit to the DMHC a report on its public benefit activities, including the expenditures incurred on those activities.[1] In addition, it is required to submit a plan specifying its public benefit activities and expenditures for the coming year.[2] The law also authorizes the Director of the DMHC to require a health plan to provide "any additional information as the director deems necessary to ascertain *whether the plan's assets are appropriately being used by the plan to meet its nonprofit obligations* [emphasis added]."[3]

Article 11 defines a health plan restructuring as "the sale, lease, conveyance, exchange, transfer, or other similar disposition of a substantial amount of a nonprofit health care service plan's assets, as determined by the director, to a

[1] Health and Safety Code Section 1399.70(b)
[2] Health and Safety Code Section 1399.70(c)
[3] Health and Safety Code Section 1399.70(d)

business or entity carried on for profit."[4] Spending $1.2 billion certainly qualifies as a "disposition of a substantial amount" of Blue Shield's assets. The recipients of these assets would be the profit-seeking owners of Care1st.

While Article 11 excludes certain sales or purchases from being deemed restructurings, even if they involve substantial assets, the purchase of Care1st clearly fails to meet at least one of the requirements for exclusion: "Any profit from the sale will not inure to the benefit of any individual."[5] The individual owners of Care1st, as a result of the purchase, would reap very large profits.

Moreover, an additional requirement for exclusion is that the "purchase is fundamentally consistent with and advances the public benefit, charitable, or mutual benefit purposes of the plan."[6] So, in order for the DMHC to exclude this transaction from the review required for restructurings, it would still have to consider whether the purchase advances the mutual benefit purpose of Blue Shield, which is the "promotion of social welfare."[7]

II. The DMHC has extensive, additional authority to safeguard nonprofit health plan assets under the California Corporations Code, which assigns the DMHC responsibility for enforcing the charitable trust obligations of nonprofit health plans.

A key, if obscure, feature of California law on nonprofits is that authority and responsibility for enforcing the charitable trust and other public obligations of nonprofit health plans has been transferred from the Attorney General to the Director of the DMHC. Under California Corporations Code Section 10821, the Director has the same powers and duties with respect to nonprofit health plans that the Attorney General has over other nonprofit corporations.

This includes the power to conduct an "examination" of a nonprofit health plan at any time "to ascertain to what extent, if at all, it has failed or is failing to comply with trusts it has assumed."[8] The FTB's revocation of Blue Shield's tax exemption is by itself more than ample reason for an examination into whether Blue Shield is failing to meet its obligations as a nonprofit. With Blue Shield now applying for DMHC approval of a transaction involving a $1.2 billion expenditure of nonprofit funds, it would be remiss of the DMHC not to examine whether that expenditure is consistent with Blue Shield's social welfare mission.

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[4] Health and Safety Code Section 1399.71(d)(1)
[5] Health and Safety Code Section 1399.71(e)(2)(A)
[6] Health and Safety Code Section 1399.71(e)(2)(B)
[7] Blue Shield of California Articles of Incorporation
[8] Corporations Code Section 7340. Note that under Section 10821 all references to the Attorney General in the provisions of the Corporations Code dealing with nonprofits are "deemed to refer to the Director of the Department of Managed Health Care."

III. Despite Blue Shield's declaration that it has no legal obligation to benefit the public, in fact, it does.

In its filing with the DMHC Blue Shield states that it "does not currently hold and has not previously held assets subject to a charitable trust obligation," and is therefore not subject to the public benefit-related requirements applying to restructurings. But for purposes of determining any waiver from those requirements, it is not up to Blue Shield to declare what its charitable trust obligations are. Under California Health and Safety Code Section 1399.75(a), the Director of the DMHC must make that determination.[9]

Given the repeated promises to serve the public good that Blue Shield has made while accumulating the assets it now holds, those assets are clearly subject to a charitable trust obligation. Examples of such promises include:

- Blue Shield's articles of incorporation, which state: "The specific purpose of this corporation is the promotion of social welfare."
- Blue Shield's commitment, as a condition of tax exemption, to operate "*exclusively* for the promotion of social welfare [emphasis added]."[10]
- Blue Shield's description of itself on Facebook, Twitter and Instagram as: "Not-for-profit. For community."[11]
- Board of Directors Member Leon Panetta's statement, which was publicized in a press release: "As a major not-for-profit health plan, Blue Shield is focused on the long-term welfare of the entire community, not just its members."[12]
- Blue Shield's declaration in a presentation to members of CalPERS, Blue Shield's biggest customer: "As a California-based not-for-profit health plan, we're accountable to you and the communities we serve, not shareholders."[13]

Blue Shield collected the premiums that account for its billions of dollars in assets while making these types of claims about its mission. As a result, these assets are subject to a charitable trust obligation and cannot be used in ways that are inconsistent with the community benefit promises Blue Shield has made.

With the shift of authority from the Attorney General no one but you can enforce the charitable trust obligations of nonprofit health plans. In the case of Blue Shield you have a nonprofit plan, which another state agency has found violated its duty to

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[9] Health and Safety Code Section 1399.75(a)
[10] Revenue & Taxation Code Section 23701(f) and USC 26 501(c)4.
[11] https://www.facebook.com/BlueShieldCA?fref=ts, https://twitter.com/BlueShieldCA and https://instagram.com/blueshieldofca/
[12] Blue Shield press release issued May 30, 2000.
[13] Video posted on CalPERSNetwork on YouTube September 3, 2014.

operate for social welfare purposes, now planning a $1.2 billion expenditure of nonprofit funds. Without your leadership, the public has no protection against the misuse of these assets. Please require that Blue Shield, as a condition of approval, demonstrate that the acquisition would deliver more public benefit than it would it cost in nonprofit resources.

Thank you for your consideration.

Sincerely,

Michael Johnson
Former Director of Public Policy,
Blue Shield of California

Michael Johnson
mikemsj@gmail.com
www.makeitrightblueshield.org

June 3, 2015

Gabriel Ravel
Deputy Director, General Counsel
Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, California 95814

Dear Mr. Ravel:

A key issue in the Department of Managed Health Care's review of Blue Shield of California's acquisition of Care1st Health Plan is the question of what is Blue Shield's duty, or charitable trust obligation, to the community. In a letter to you dated April 20, 2015, which I recently obtained through a Public Records Act request, Blue Shield General Counsel Seth Jacobs presents an argument to support Blue Shield's claim that it has no charitable trust obligation. The argument has a number of flaws, which I plan to detail in a forthcoming letter.

My reason for writing now is to alert you that a key point Mr. Jacobs makes in his letter contradicts what Blue Shield told the Franchise Tax Board during the recent audit of its tax-exemption.

In his letter to you Mr. Jacobs writes that Blue Shield, as a mutual benefit corporation, may distribute assets upon dissolution to its members. The authority to do this, he argues, materially distinguishes Blue Shield from nonprofits that have a charitable trust obligation since such nonprofits are barred by law from providing private gain to any person.

> At the outset, it is critical to recognize the fundamental difference between charitable nonprofit (public benefit) corporations and non-charitable nonprofit (mutual benefit) corporations. With respect to the former, California law expressly requires that they be "not organized for the private gain of any person" and be "organized for public or charitable purposes." (Cal. Corp. Code §5130). In contrast, mutual benefit corporations—like Blue Shield—may be organized "to engage in any lawful act or activity, other than credit union business, for which a corporation may be organized under such law." (Cal. Corp. Code §7130). Moreover, upon dissolution, mutual benefit corporations may make distributions of gains, profits or dividends to any member (Cal. Corp. Code §7141), while such distributions are barred as "private gain" and expressly prohibited under the Nonprofit Public Benefit Corporation Law (Cal. Corp. Code §5410).

In responding to issues raised by the FTB, Blue Shield said the opposite—that it could *not* distribute assets upon dissolution to any private person because, as a social welfare organization, it was legally prohibited from doing so.

This particular point was a significant issue in the FTB's audit. California law provides that in order for a nonprofit to be tax-exempt as a social welfare organization, as Blue Shield was, its assets must be irrevocably dedicated to social welfare purposes. This includes a requirement that the organization's articles of incorporation provide that upon dissolution the assets of the organization would be distributed to another organization operated for charitable or social welfare purposes.

The FTB pointed to the lack of such a clause in Blue Shield's articles of incorporation and the provision in its bylaws providing for the distribution of its assets to its enrollees upon dissolution as evidence of noncompliance with this requirement.

In its response, Blue Shield noted that its articles of incorporation include a provision designating social welfare promotion as the specific purpose of the corporation and prohibiting any activities not in furtherance of the corporation's purpose. Blue Shield went on to argue that since federal law, which on this topic is incorporated into California law, prohibits social welfare organizations from making distributions to private persons, Blue Shield's articles of incorporation effectively include the required dissolution provision.

In a nutshell, Blue Shield, in defense of its social welfare tax exemption, assured the FTB that its organizational structure obligates it to benefit society and prohibits it from distributing private gains. Now, as it seeks to fend off the imposition of any public benefit requirement by the DMHC in connection with its proposed acquisition, Blue Shield maintains that its organizational structure authorizes the distribution of private gains and that this precludes any obligation to benefit the public.

Since Blue Shield has in their possession their written exchange with the FTB, there's an easy way to determine exactly how much what Blue Shield told them differs from what they are telling you. Blue Shield should publicly release their written communications with the FTB, including the audit findings.

If Blue Shield wont do so voluntarily, the DMHC should demand the records since they contain information material to an issue at the heart of the DMHC's review of the proposed acquisition. Once obtained, the records should be made public since they relate to a matter of legitimate public interest and contain no business secrets.

Thank you for your consideration.

Sincerely,

Michael Johnson
Former Public Policy Director, Blue Shield of California

Cc: Jozel L. Brunett, Legal Division Chief Counsel, Franchise Tax Board

Comments of Michael Johnson

Department of Managed Health Care Public Meeting
On the Proposed Acquisition of Care1st by Blue Shield of California
June 8, 2015

Thank you for holding this public meeting.

My name is Michael Johnson. Until March 13, I was Director of Public Policy for Blue Shield of California, where I had worked for 12 years. I resigned over deep disagreements with senior management about Blue Shield's nonprofit responsibilities.

One of the key questions before you as you review the proposed acquisition of Care1st by Blue Shield is whether Blue Shield's assets are subject to a charitable trust obligation, which would require that the acquisition be deemed beneficial to the public before it could be approved. Blue Shield says no charitable trust obligation exists, and a cornerstone of their argument is that Blue Shield's organizational structure permits it upon dissolution to distribute assets to private persons.

However, Blue Shield told the Franchise Tax Board the exact opposite in connection with the audit of its tax exemption. Blue Shield's lawyers assured the FTB, in writing, that Blue Shield could *not* make any distribution of assets to private persons, including upon dissolution. I know this because I saw Blue Shield's letter on this to the FTB.

Blue Shield is lying to you or they lied to the FTB. Given how important this issue is to your review, I urge you to require that Blue Shield submit as part of their application their communications with the FTB, including the audit findings. Blue Shield has denied making inconsistent claims to you and the FTB, but in the face of their refusal to disclose what they told the FTB, that denial is empty.

With regard to the acquisition's public benefit, neither Blue Shield nor Care1st has presented any evidence that this would be a good deal for the community. Blue Shield maintains that because the purchase would result in its entrance to the Medi-Cal market it would serve the public. But purchasing control of an existing Medi-Cal plan would do nothing to increase capacity or competition in that market.

Moreover, there is no indication that transferring control of Care1st to Blue Shield, which has no experience with Medi-Cal coverage, would do anything to improve the quality of services provided to Medi-Cal enrollees. Indeed, Care1st has stated in its filing with the DMHC: "The Proposed Transaction will have no effect on the Plan's members/subscribers, with respect to products and benefit designs, provider network, quality management, or other member/subscriber related functions."

The lack of any apparent benefit to the public in this acquisition is not surprising. I can tell you, based on my experience at Blue Shield while this deal was being put together and after it was announced, that it is not about benefiting the public. I never heard talk about that. Instead, the discussion was all about the strategic business value to Blue Shield of buying its way into the booming Medi-Cal market.

This acquisition is a prime example of the underlying problem with Blue Shield. The people running it are looking to build careers as business, not nonprofit, executives. So they run Blue Shield like a business, focusing on revenue and membership growth, profits, and other commercial accomplishments that will help move them up the corporate career ladder.

The FTB revoked Blue Shield's tax exemption for this very reason—because Blue Shield operates like a for-profit insurance company, and in doing so, fails to deliver the social welfare benefits required of it. The FTB's action, which comes on the heels of years of criticism from consumer groups about excessive reserves, lavish CEO pay, and exorbitant rates, raises substantial doubt that Blue Shield is fulfilling its duties to the public as a nonprofit health plan.

Under Corporations Code Section 7340, the DMHC has authority to conduct an "examination" of any nonprofit health plan at any time "to ascertain to what extent, if at all, it has failed or is failing to comply with" its duties to public. I urge you to perform such an examination of Blue Shield before you make a decision on whether to allow it to spend $1.2 billion of nonprofit funds to make this acquisition.

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Michael Johnson
mikemsj@gmail.com
www.makeitrightblueshield.org

July 16, 2015

Shelley Rouillard
Director
Department of Managed Health Care
980 Ninth Street
Sacramento, CA 95814

Dear Ms. Rouillard:

In connection with the review of its proposed acquisition of Care 1st Health Plan, Blue Shield of California has claimed that its assets are free of any charitable trust obligation because it is a nonprofit mutual benefit corporation organized for the benefit of its enrollees. A coalition of consumer groups and I have pointed out in separate letters to the DMHC why, despite the plan's corporate status, a charitable trust obligation nevertheless applies.

I am writing now to call your attention to Blue Shield's failure to comply in good faith with the sole provision of its bylaws giving enrollees a voice in how the plan is run—conduct that adds to doubts already raised about the legitimacy of its incorporation as a mutual benefit corporation.

Blue Shield, unlike most mutual benefit corporations, gives its beneficiaries no corporate voting rights. The plan's only provision for enrollee representation in its governance is the requirement in its bylaws that subscribers comprise a majority of the membership of its board of directors.[1]

This requirement also serves as a means of Blue Shield's compliance with Health and Safety Code Section 1369, which requires that healthcare service plans establish procedures for participation by subscribers and/or enrollees in developing a plan's public policy. Under the law's implementing regulations, subscribers and/or enrollees must constitute one-third of a plan's governing board or a majority of the members of a special committee established to address public policy.[2] Blue Shield, which has no such committee, has given notice that at least one-third of its board members are subscribers.

Conveyed through its evidence of coverage documents, this statement appears to be the only information Blue Shield provides to subscribers or enrollees about the subscriber composition of its board. Blue Shield gives no indication on its website or in mailers to subscribers, of which I am one, that subscribers make up a majority of

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[1] Section 1 of Chapter 5 of the Bylaws of Blue Shield of California, revised January 1,
[2] Cal. Code Regs. tit. 28, §1300.69.

the board, as required in the bylaws. It is also silent about which board members are subscribers, which is information critical for subscribers to have if the requirement for subscriber representation is to have any real meaning. Even if Blue Shield is not outright violating its own subscriber representation requirement, it clearly is giving it short shrift.

This is yet another instance in which Blue Shield's actions belie its identification as a mutual benefit corporation. As you know, Blue Shield has claimed to the DMHC that its bylaw provision for distribution of assets to enrollees upon dissolution is a critical feature distinguishing it from public benefit corporations. Yet it has also argued to the Franchise Tax Board, in defense of its tax exemption, that this same provision is inoperative.

With its behavior, Blue Shield has raised significant doubt that its incorporation as a mutual benefit corporation was for the benefit of its enrollees or subscribers, underscoring the need for the DMHC to conduct a full examination of Blue Shield pursuant to Corporations Code Section 7340 in addition to its review of the proposed acquisition.

Thank you for your consideration.

Sincerely,

Michael Johnson

Michael Johnson
mikemsj@gmail.com
323-466-0380

September 23, 2015

Shelley Rouillard, Director
Department of Managed Health Care
980 Ninth Street
Sacramento, CA 95814

By Email

Re: Blue Shield of California's Proposed Acquisition of Care1st

Dear Ms. Rouillard:

Blue Shield submitted to the DMHC on July 15, 2015, a document entitled "White Paper on Charitable Trusts," which sets forth Blue Shield's arguments that Article 11 does not apply to the plan's acquisition of Care 1st and Blue Shield holds no assets subject to a charitable trust obligation. I obtained the document last month through a Public Records Act request. Contrary to Blue Shield's claims, Article 11 *does* apply and Blue Shield's assets *are* subject to a charitable trust obligation.

Before getting into the details, it's important to note the implications of the radical position Blue Shield has taken, that its nonprofit status imposes no obligation whatsoever to the community and the plan "operates only for the benefit of its policyholders and not the public at large."[1] If you allow Blue Shield's interpretation of its duties to the community to stand, billions of dollars in assets—the total net worth of Blue Shield—will be lost to the community. Regardless of the ultimate decision you make about the proposed acquisition, it is imperative that you forcefully refute Blue Shield's claim that it has no obligation to the community.

I. Article 11 Applies to the Proposed Transaction

Article 11 applies to the proposed acquisition because the transaction is of a type subject to the law and does not meet the law's requirements for exclusion.

A. The proposed acquisition meets the definition of a restructuring.

Article 11 defines a health plan restructuring as "the sale, lease, conveyance, exchange, transfer, or other similar disposition of a substantial amount of a nonprofit health care service plan's assets, as determined by the director, to a business or entity carried on for

[1] *White Paper on Charitable Trusts*, Attachment 1 to Exhibit E-1, DMHC File No: 933-004, Amendment No. 5 to No. 3202 Notice of Material Modification, July 15, 2015, p. 16.

profit."[2]

On the face of it, transferring $1.2 billion to the profit-seeking owners of Care 1st in exchange for their health plan seems clearly to constitute a restructuring. Blue Shield argues, however, "the Proposed Transaction does not involve any sale, lease, conveyance, exchange, transfer, or other similar disposition of Blue Shield's assets to a for-profit entity. Instead, the proposal involves Blue Shield's purchase of an asset, Care 1st, for a price of $1.20B and the conversion of Care 1st from a for-profit to a nonprofit entity."[3]

The fact that the transaction would entail the conversion of Care 1st from for-profit to nonprofit status is immaterial. The question before the DMHC is not whether the transaction involves a conversion of Care 1st, but rather whether it constitutes a restructuring of Blue Shield. Article 11 neither exempts nor prescribes special treatment for restructurings that also entail conversion of a for-profit to a nonprofit, so this fact should make no difference in your review.

As to Blue Shield's suggestion that the transaction does not qualify as a restructuring because it involves the "purchase of an asset" rather than its sale, the law makes clear its application to both. Firstly, even though the word "purchase" is not included in the definition of restructuring, the expansive description of the types of transactions covered ("sale, lease, conveyance, exchange, transfer, or other similar disposition of a substantial amount of a nonprofit health care service plan's assets…") leaves little doubt that purchases are meant to be included. Secondly, two other provisions of the law exclude certain "sales or purchases" from the definition of a restructuring, making it clear that purchases not excluded by those provisions are to be treated as restructurings.[4]

<u>B. The acquisition does not meet the requirements for exclusion from the definition of a restructuring.</u>

As noted above, Article 11 excludes two types of sales or purchases from consideration as restructurings. The first are sales or purchases "undertaken in the normal and ordinary course of plan business," which not even Blue Shield argues describes the proposed acquisition. The second are sales or purchases that "involve a substantial amount of a

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[2] Health & Safety Code Section 1399.71(d)(1).
[3] *White Paper on Charitable Trusts*, p. 4.
[4] See Health & Safety Code Section 1399.71(d)2 ("For the purposes of this section, a "restructuring" or "restructure" by a nonprofit health care service plan shall not include any sales or purchases undertaken in the normal and ordinary course of plan business.") and Section 1399.71(e)2 ("Notwithstanding that a transaction or consolidated transactions involve a substantial amount of a nonprofit health care service plan's assets and are not in the normal and ordinary course of plan business, a "restructuring" or "restructure" by a nonprofit health care service plan shall not include any of the following transactions: Sales or purchases of plan assets . . . in which all of the following occur . . .").

nonprofit health care service plan's assets and are not in the normal and ordinary course of plan business" but meet a series of specific requirements.

Those requirements, all of which must be met for a sale or purchase to be excluded, are discussed below. As illustrated, the proposed acquisition falls well short of satisfying them all.

1) "Any profit from the sale will not inure to the benefit of any individual."[5]

The transaction will inarguably generate profit for the owners of Care1st. Blue Shield does not dispute this. Instead, the plan argues that this is "no different than any owner of an asset receiving the proceeds of an investment or purchase made by a nonprofit health plan."[6] Blue Shield further maintains:

> The argument that receipt of sale proceeds by individual owners of an asset purchased by a nonprofit health plan constitutes prohibited personal inurement would preclude all acquisitions and investments by nonprofit health plans unless the sellers of assets being purchased are other nonprofits. This result would be absurd and represents a perversion of the policy underlying Article 11.[7]

Blue Shield misconstrues the provision. It does not prohibit personal inurement resulting from sales or purchases. It simply requires that sales or purchases, when they are not in the normal and ordinary course of business and when they produce profits for private individuals, be subject to review in accordance with the law's requirements for restructurings.

2) "The sale or purchase is fundamentally consistent with and advances the public benefit, charitable, or mutual benefit purposes of the plan."[8]

As previously noted, Blue Shield asserts that it has no charitable trust obligation and "operates only for the benefit of its policyholders and not the public at large." Given Blue Shield's interpretation of its duties, it should be expected that Blue Shield would operate Care1st consistent with that interpretation, and thus, not for the benefit of the public or even Care1st's enrollees, but for the exclusive benefit of Blue Shield's own enrollees. That would be fundamentally inconsistent with the purposes of the plan if you determine that they include providing benefit to anyone other than Blue Shield's enrollees (i.e., that Blue

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[5] Health & Safety Code Section 1399.71(e)(A).
[6] *White Paper on Charitable Trusts*, p. 5
[7] *Ibid.*
[8] Health & Safety Code Section 1399.71(e)(B).

Shield has a charitable trust obligation).[9]

Despite its insistence that it has no duty to the public, Blue Shield nevertheless claims that the acquisition would be "good for the State of California."[10] It maintains that the acquisition would provide Care1st and its members the advantages of Blue Shield's resources and expertise. However, Blue Shield has cited no specific benefits Care1st members would derive from the transaction. Indeed, Care1st has stated to the DMHC: "The Proposed Transaction will have no effect on the Plan's members/subscribers, with respect to products and benefit designs, provider network, quality management, or other member/subscriber related functions."[11]

3) "The plan receives all proceeds from the sale."[12]

Blue Shield is correct that insofar as this requirement has any applicability in this instance, the transaction satisfies it.

4) "No officer or director of the plan has any financial interest constituting a conflict of interest in the sale or purchase."[13]

Blue Shield asserts:

> No individual associated with Blue Shield will benefit personally from the investment by Blue Shield in Cumulus or by Cumulus' purchase of Care 1st. Specifically, no individual associated with Blue Shield is a shareholder of Care 1st or Cumulus (which has no shareholders), or holds, directly or indirectly, any other form of ownership interest, profit participation, security or interest the value of which is derived from or tied to the value of Cumulus or Care 1st, or participates in any compensation, bonus, or other plan, right or benefit derived from or tied to the value of Cumulus, Care 1st or the Proposed Transaction.[14]

[9] Because Blue Shield proposes to operate Care1st as a subsidiary, the interests of Care1st members would be secondary to those of Blue Shield members. For example, in the event of the dissolution of Care1st, its remaining assets would go to Blue Shield, and in the event of Blue Shield's dissolution, all remaining assets would be distributed to Blue Shield's enrollees. I plan to address this issue in greater detail in a forthcoming letter.

[10] *White Paper on Charitable Trusts*, p. 6.

[11] Exhibit E-1, DMHC File No. 933-0326, Amendment to Notice of Material Modification, April 1, 2015.

[12] Health & Safety Code Section 1399.71(e)(C).

[13] Health & Safety Code Section 1399.71(e)(D).

[14] *White Paper on Charitable Trusts*, p. 5. (Cumulus is a subsidiary corporation Blue Shield plans to establish that would then receive a $1.25 billion transfer from Blue Shield to be used to purchase Care1st.)

In fact, officers of Blue Shield do have a financial interest in the transaction. Entering into an agreement to purchase a Medi-Cal plan was a significant factor in determining bonus compensation for officers and other Blue Shield employees for 2014.[15] The personal stake that Blue Shield officers had in reaching an agreement on an acquisition before the end of 2014 (the deal was signed in December) constitutes a conflict of interest since the bonus was conditioned only on completion of an agreement and not on whether the purchase price represented good value for Blue Shield. It may well be that provisions exist for additional bonus compensation to be paid to officers in the event that the deal is approved and closes. The DMHC should require Blue Shield to disclose the details of all bonuses already paid and any prospective bonuses tied in any way to approval or close of the transaction.

5) "The transaction is conducted at arm's length and for fair market value."[16]

The conflict of interest noted above is just one reason for skepticism that the purchase price negotiated reflects fair market value. Another is the massive surplus, in excess of $4 billion, that Blue Shield has accumulated. For officers of Blue Shield, expanding the operations under their control, which would bolster their resumes, is undoubtedly a more enticing option than retaining a level of surplus that has become a lightening rod for criticism by consumer advocates and the media.

I understand that the DMHC has retained an independent expert to assess the fairness of the purchase price. Given the considerations noted above, such an assessment is essential to determine whether $1.2 billion is fair market value for Care1st.

6) "The sale or purchase does not adversely impact the plan's ability to fulfill its public benefit, charitable, or mutual benefit purposes."[17]

Blue Shield is correct that its surplus is sufficiently large that purchasing Care1st would not impair its ability to meet the Tangible Net Equity requirements for operation of the resulting combined entity. However, the transaction would, nonetheless, impair the plan's ability to meet any charitable purposes that you determine exist since it would result in the expenditure of $1.2 billion in charitable assets to expand a business operation that Blue Shield asserts "operates only for the benefit of its policyholders and not the public at large." As long as Blue Shield remains in denial about its community benefit obligations, any expenditure of capital assets for business expansion would adversely impact its future ability to fulfill its charitable purposes.

II. Blue Shield holds assets subject to a charitable trust obligation

[15] Based upon personal knowledge gained while I was an employee of Blue Shield.
[16] Health & Safety Code Section 1399.71(e)(E).
[17] Health & Safety Code Section 1399.71(e)(F).

A. You have broad authority to make such a determination and it is essential that you do.

The question of whether Blue Shield holds assets subject to a charitable trust obligation has arisen in connection with the proposed acquisition because Article 11 applies only to the extent that the plan holds such assets. However, your authority to examine this question and make a determination is not limited to the authority granted to you under Article 11, as Blue Shield contends.

Under Corporations Code Section 7240, a nonprofit health care service plan "is subject at all times to examination by the [Director of the Department of Managed Health Care], on behalf of the state, to ascertain to what extent, if at all, it has failed or is failing to comply with trusts it has assumed. In case of any such failure the [Director of the Department of Managed Health Care], in the name of the state, may institute against any person or persons the proceedings necessary to correct the failure."[18]

Implicit in this provision is the authority to investigate and determine whether a nonprofit plan holds assets subject to a charitable trust obligation. The provision would be rendered meaningless if interpreted to require the regulator to accept at face value a nonprofit's assertions about whether it has assumed charitable trust obligations.

Given the claims Blue Shield is making, it is vital that you investigate and make a determination of Blue Shield's charitable trust obligations regardless of whether you determine that the transaction is a restructuring. If you let stand Blue Shield's declaration that it holds no assets subject to a charitable trust obligation and has no duty to operate for the benefit of the public, Blue Shield will be free to act accordingly. Indeed, as it seeks to buttress its legal position that it has not assumed any charitable trust obligations, it is likely to act with even less regard for the public benefit going forward than it has in the past.

B. Blue Shield's incorporation as a mutual benefit corporation has no bearing on whether its assets are subject to a charitable trust obligation.

The cornerstone of Blue Shield's argument that it does not hold assets subject to a charitable trust obligation is its incorporation as a mutual benefit corporation that provides for distribution of its assets to its enrollees upon dissolution:

> California statutes and the Secretary of State clearly recognize Blue Shield as the type of nonprofit corporation that does not hold its assets subject to charitable

[18] Corporations Code Section 7240 vests authority in the Attorney General to take the actions described in the provision. However, pursuant to Corporations Code Section 10821 all references to the Attorney General in the Corporations Code, as they relate to nonprofit health care service plans, are "deemed to refer to the Director of the Department of Managed Health Care."

> obligations, because Blue Shield's governance documents have never stated that such assets are irrevocably dedicated to public purposes and have always allowed such assets to be distributed to Blue Shield's members.[19]

Blue Shield CEO Paul Markovich reiterated this point in his comments at the public meeting on June 8: "The law says this kind of a nonprofit is not allowed to be a public charity."[20]

What the law actually says is that an entity whose assets are subject to a charitable trust may not incorporate as a mutual benefit corporation.[21] The fact that Blue Shield has so incorporated is not evidence that Blue Shield does not hold charitable assets. Indeed, California law specifically recognizes the possibility that the assets of a a mutual benefit corporation may be subject to a charitable trust: "Nothing in Section 7130 or 7131 or in any provision of the articles of a mutual benefit corporation shall be construed to limit the equitable power of a court to impress a charitable trust upon any or all of the assets of a mutual benefit corporation or otherwise treat it as a public benefit corporation."[22]

Similarly, the fact that Blue Shield's bylaws provide for distribution of assets upon dissolution to private persons does not establish that its assets are not charitable just because charitable assets cannot be so distributed. Firstly, Corporations Code Section 1735, cited above, makes clear that the organization could be deemed to hold assets subject to a charitable trust obligation regardless of "any provision of the articles of a mutual benefit corporation," which would include a provision for distribution of assets to private persons upon dissolution.

Secondly, as I noted in my June 3, 2015, letter to DMHC General Counsel Gabriel Ravel, Blue Shield has claimed to the Franchise Tax Board that its provision for distribution of assets upon dissolution is rendered inoperative by the federal prohibition against private inurement involving the assets of a social welfare organization.[23] Indeed, Blue Shield maintained to the FTB that if its board of directors were to make such a distribution they would be violating their fiduciary duties.

The California statutes regarding nonprofit corporate form and distribution of assets cited by Blue Shield establish merely that Blue Shield's incorporation as a mutual benefit corporation and provision for distribution of assets upon dissolution are improper (and will need to rectified) if it is determined that Blue Shield's assets are subject to a charitable trust obligation. They do not establish that Blue Shield's assets are free of any charitable trust obligation just because Blue Shield has incorporated as a mutual benefit corporation

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[19] *White Paper on Charitable Trusts*, p. 1.
[20] DMHC Transcript, Public Meeting on the Acquisition of Care1st Health Plan by Blue Shield of California, June 8, 2015, p. 26.
[21] Corporations Code Section 7111.
[22] Corporations Code Section 1735
[23] Michael Johnson letter to Gabriel Ravel, June 3, 2015.

and has a bylaw provision for distribution of assets upon dissolution to private persons.

A. The common law on charitable trusts.

In order to determine whether Blue Shield holds assets in charitable trust it is necessary to look to the common law. Blue Shield argues that it is "not a common law charity."[24] However, in making its argument Blue Shield relies on two California Supreme Court cases, one from 1903 and the other 1941, and ignores the comprehensive body of case law on charitable trusts that has developed in California since then.

Adler & Colvin, a widely respected San Francisco-based law firm specializing in nonprofit law, offers this description of the common law on charitable trusts:

> Common law, dating back to Elizabethan England, has evolved a "charitable trust" doctrine. Even though most nonprofit law is statutory and the enforcement powers of the California Attorney General are set forth in the Law, the substantive charitable trust rules that the AG enforces are largely creatures of case law.
>
> In *Pacific Home v. County of Los Angeles*, 41 Cal.2d 844, 852 (1953), the California Supreme Court announced the charitable trust doctrine:
>
>> All the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation's purposes, and notwithstanding the absence of any express declaration by those who contribute such assets as to the purpose for which the contributions are made. In other words, the acceptance of such assets under these circumstances establishes a charitable trust for the declared corporate purposes as effectively as though the assets had been accepted from a donor who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes. (Emphasis added.)
>
> As initially formulated in Pacific Home, the charitable trust doctrine looked to language in Articles of Incorporation and other formal manifestations of declared corporate purposes. The court reasoned that donor intent and donor restrictions need not be express but could be inferred from donee representations that are written and formal.
>
> Eleven years later, the California Supreme Court took the next step in expanding the charitable trust doctrine when it dropped the requirement that donee representations be written and formal and accepted them as equivalent to express donor restrictions even where they were oral and informal. Thus, a college of

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[24] *White Paper on Charitable Trusts*, p. 13.

osteopathic medicine could not change to become a college of allopathic medicine when it had "held out to the public" that it was a college of osteopathic medicine and "solicited and received donations for use in teaching . . . osteopathy." *Holt v. College of Osteopathic Physicians and Surgeons*, 61 Cal. 2d 750 (1964).

Then, in *Queen of Angels Hospital v. Younger*, 66 Cal. App. 359, 368 (1977), the court broadened the application of the charitable trust doctrine to encompass a wide array of donee acts and representations. The court considered the language of the Articles of Incorporation, which included the name "Queen of Angels Hospital" and a hospital purpose clause. The court also noted that Queen had operated a hospital since 1927 and stated (p.368):

> Queen also represented to the public that it was a hospital. In its statement to the Franchise Tax Board, it stated that it was in the "business of running a hospital." Similar statements were made to the Internal Revenue Service and Los Angeles county tax authorities. Funds were solicited from the public for the hospital or hospital purposes. Such acts further bind Queen to its primary purpose of operating a hospital.

The result, in *Queen of Angels*, was that a charitable organization that operated a hospital and raised funds based on its representations as a hospital, was prevented from abandoning the operation of a hospital and operating a medical clinic instead. See also In Re *Metropolitan Baptist Church of Richmond, Inc.*, 48 Cal. App. 3d 850 (1975) (representing itself as a fundamentalist Baptist church located in Richmond, California, the church was prohibited from distributing its assets on dissolution to distant Baptist churches and required to distribute them to fundamentalist Baptist churches nearest geographically to Richmond). [25]

These cases cited by Adler & Colvin clearly establish that what is in a nonprofit's articles of incorporation and other governing documents is just one factor in determining whether its assets are held in charitable trust. Equally important are the other representations, formal and informal, it makes to the public and government agencies about its purposes.

Addler & Colvin make an important additional observation about the charitable trust case law established by *Queen of Angels* that is relevant to your review of Blue Shield: "These restrictions apply not only to contributions and donations received and accepted by a nonprofit corporation but also to revenues generated by it from the performance of its charitable activities."[26] Hence, representations made by Blue Shield to purchasers of its health plans are as important in determining trust obligations as are representations made

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[25] "What Every Nonprofit Board Member Should Know," Robert A. Wexler and Sheila Warren of Adler & Colvin, September 20, 2007, p. 9. Available on the Web.
[26] *Ibid*., p. 11.

by a nonprofit to its donors.

In addition to these California cases, it is also important to consider the definition of charitable purpose that has developed under the common law. The "Model Protection of Charitable Assets Act," which follows the Restatement (Third) of Trusts § 28 (2003) in defining "charitable purpose," states it as such: "'Charitable purpose' means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community."[27]

In their discussion of the definition, the drafters of the model act, the National Conference of Commissioners on Uniform State Laws, note that not all purposes beneficial to the community are charitable. In order to be considered charitable, an activity must satisfy two additional requirements: "An activity with a charitable purpose is one that benefits a sufficiently large and indefinite class of persons—the community and not just a fortunate few—and the earnings from the activity cannot be distributed to private persons."[28]

B. The facts clearly support a determination that Blue Shield is a common law charity.

It is indisputable that Blue Shield's purposes fall within one or more of the categories included in the common law definition of charitable purpose, specifically "promotion of health" and/or "beneficial to the community." In addition, as discussed below, Blue Shield's purpose is consistent with the two additional essential features of a charitable purpose; they are beneficial to a large and indefinite class of persons and not a source of earnings distributed to private persons.

i) Blue Shield's purpose is to benefit a large and indefinite class of persons

As the California case law establishes, it is necessary to look not just to Blue Shield's organizing documents to determine whether its purposes are charitable, but to other formal and informal representations it has made about its purposes, as well. Considering as a whole what Blue Shield has said to regulators, the public, and health plan purchasers, it is clear that the broader California public, and not just Blue Shield's enrollees, are identified as intended beneficiaries of its purposes. Evidence to support this conclusion includes the following:

- **Statement of purposes upon establishment of Blue Shield, as reflected in the original governing documents.** As detailed to you in a letter by a coalition of consumer groups, the original articles of incorporation make clear that "the

[27] "Model Protection of Charitable Assets Act," National Conference of Commissioners on Uniform State Laws, 2011, p.11.
[28] *Ibid.*

organization was established to provide quality, affordable health care to low-income Californians".[29] The California Supreme Court has similarly described Blue Shield's purpose: "The corporation was organized by the medical profession in 1939 to meet the need of persons in the lower income groups for medical care and surgical service."[30] At the time, as the Court noted, "Only persons whose compensation is less than $3,000 per annum may enroll." The population Blue Shield declared upon its founding that it would assist in obtaining medical care, lower income groups, clearly constitutes "a large and indefinite class of persons."

- **Statement of purpose in the current governing documents.** The current articles of incorporation identify just one purpose: "promotion of social welfare."[31] No suggestion is provided that "social welfare" is narrowly defined within the articles as the welfare only of Blue Shield's policyholders. Moreover, the preamble to the current bylaws speaks of the benefit of Blue Shield to "the people of the State of California."[32]

- **Claims made to qualify for tax exemption.** Blue Shield applied for and received exemption from the state corporation tax as a "social welfare organization" in the early 1950s.[33] Revenue and Taxation Code Section 23701f, which provides for the exemption, relies on Section 501(c)4 of the Internal Revenue Code in defining "social welfare organization."[34] Federal regulations implementing that provision of the code state: "An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the *common good and general welfare of the people of the community*." [emphasis added][35]

  Until 1987, Blue Shield was also exempt under IRC Section 501(c)4 from federal corporate income taxes. As long as Blue Shield maintained exemption as a "social welfare organization" from either state or federal taxes, it was effectively representing to tax authorities and the public that it operated to promote the "common good and general welfare of the community." In addition, in defending its exemption during the recent audit by the Franchise Tax Board, Blue Shield made explicit claims that its pursuit of its social welfare mission benefits all Californians.[36]

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[29] CalPIRG, et al., letter to Shelly Rouillard dated May 29, 2015.
[30] *California Physicians' Service v. Garrison*, 28 Cal.2d 790 (1946).
[31] Certificate of Amendment of Articles of Incorporation of California Physicians' Service, June 15, 1995.
[32] Bylaws of California Physicians' Service, revised January 1, 2013.
[33] Approximate date is based on personal knowledge. This information could be confirmed by inspecting Blue Shield's tax exemption application and the state's notice granting exemption.
[34] Revenue and Taxation Code Section 23701f(a).
[35] 26 CFR § 1.501(c)(4)-1
[36] Based on personal knowledge of the correspondence between Blue Shield and the Franchise Tax Board.

- **Statements to the public and prospective customers about its mission.** In a previous letter to you I cited Board Member Leon Panetta's description of Blue Shield's mission, which he offered in a press release issued by Blue Shield in 2000: "As a major not-for-profit health plan, Blue Shield is focused on the long-term welfare of the *entire community*, not just its members [emphasis added]."[37] This description is consistent with others put forth by Blue Shield. These include Blue Shield's public statement of its mission—"To ensure *all Californians* have access to high-quality health care at an affordable price [emphasis added]"[38]—and its description of itself on its social media pages as "For community. Not-for-profit."[39] In the discussion of its mission on its website, Blue Shield offers what it describes as a defining example of the mission in action: "Our mission and values are embodied in our proposal to guarantee health coverage for *all Californians*...[emphasis added]"[40]

  In sales presentations to prospective public sector and labor union large group purchasers and in open-enrollment pitches to the members of these employer-sponsored plans, Blue Shield has routinely represented itself as devoted to the community at-large.[41] A typical example of this is the video presentation made by Blue Shield to CalPERS members during the 2015 open enrollment period, in which Blue Shield representative Sonya Wade provided this description of the organization: "As a California-based, not-for-profit health plan we're accountable to you *and the communities we serve*, not shareholders [emphasis added]. In fact, our mission is to ensure that *all Californians* have access to high-quality care at an affordable price [emphasis added]."[42]

  Equally important is what Blue Shield does not say publicly about its mission. Nowhere in the discussion of its mission on its website is there any indication that it is limited to providing benefit only to its own enrollees. Similarly, an exhaustive search of the Web

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[37] "Panetta Named to the Blue Shield Board," Blue Shield of California press release, May 30, 2000.
[38] https://www.blueshieldca.com/bsca/about-blue-shield/corporate/values.sp
[39] See Blue Shield's Facebook, Twitter and Instagram pages.
[40] https://www.blueshieldca.com/bsca/about-blue-shield/corporate/values.sp
[41] Based on personal knowledge gained during my employment at Blue Shield. Little documentation of this is available from public sources such as the Web, however it could be easily confirmed by obtaining from Blue Shield copies of its standard sales presentations to prospective labor union and public sector large group customers. Copies of such presentations could also be obtained from public agencies that have contracted with Blue Shield for health plan benefits.
[42] The video of this presentation, which had been posted to You Tube when I first described it to you in my letter of May 31, 2015, has since been removed. However, a transcript is available here: https://www.myvideo.reviews/review-UDL9e3ZNhVF/blue-shield-of-california-presentation

turns up no signs that Blue Shield has ever publicly described its mission that way. In fact, Blue Shield's assertions to you in connection with your review of the proposed acquisition appears to be the first and only time that Blue Shield has described its purpose as being to benefit its enrollees only.

- **Publicly pledging a portion of excess profits to the community.** Blue Shield has publicized its "2% Pledge" as a defining example of its mission. On its website, it describes the program as follows: "Blue Shield of California's 2% Pledge reflects our commitment to our not-for-profit mission to provide all Californians with access to quality care at an affordable price. We pledge to limit our annual net income to 2 percent of revenue. In any year in which Blue Shield earns more than 2 percent, we will return the difference to our customers and the community…"[43]

  The stated beneficiaries of the "pledge," which Blue Shield itself describes as reflecting its mission, are its customers *and the community*. Indeed, the last distribution of excess profits made by Blue Shield went exclusively to an enterprise identified by Blue Shield as serving the community.[44] Also worth noting is the fact that the vast of majority of Blue Shield's enrollees or "beneficiary members," who Blue Shield's lawyers now say are the sole intended beneficiaries of the organization's mission, are left on the sidelines. Most enrollees are covered under group plans (as discussed in greater detail in the section below), and so do not receive from Blue Shield the return of any excess profits, which are paid out to purchasers.

ii) Blue Shield's purposes do not envision generating profit for any private individuals.

Blue Shield has based much of its argument that its assets are not subject to a charitable trust obligation on the fact that throughout its history either its articles of incorporation or bylaws have provided for distribution of its assets upon dissolution to its "beneficiary members." Considering all of the facts regarding this provision, it is quite clear that generating potential profits for these individuals was never a purpose of the corporation and that, in fact, no such result is possible.

The original articles of incorporation say the following about the property rights of "beneficiary members," who are elsewhere defined as enrollees:

> No beneficiary member shall have the right to vote or acquire or hold or possess any property right or right, title, or interest in or to any property or assets of the

[43] https://www.blueshieldca.com/bsca/about-blue-shield/health-reform/our-involvement/healthcare-quality-value/our-pledge.sp
[44] In a press release on August 5, 2014, Blue Shield reported that it "provided $35.6 million in funding from its 2% Pledge program to create the California Integrated Data Exchange (Cal INDEX) . . . an independent, not-for-profit organization that is developing a statewide, next-generation health information exchange (HIE)."

> corporation nor shall any beneficiary member have any rights or privileges other than as are provided herein and in the by-laws and in the certificate of beneficiary membership.[45]

These rights (or lack of rights) remain unchanged under the organization's current governing documents. Both the original articles of incorporation and current bylaws also provide that in the event of dissolution all remaining assets, after the return of unearned premiums and payment of debts to physicians and others, are to be distributed to beneficiary members. However, it is apparent that neither the incorporators nor successive leaders of the organization ever considered the prospect of actual distribution of assets to enrollees to be real.

This is reflected in part by the fact that Blue Shield does not, and appears never to have, informed enrollees of the dissolution provision. At least for the last twelve years during which I was an employee, Blue Shield withheld from public disclosure its bylaws. Were the prospect of a distribution of assets to enrollees upon dissolution real, Blue Shield would undoubtedly have informed existing and prospective enrollees of that in order to differentiate itself from its competitors and highlight its nonprofit purpose of benefiting its enrollees.

Moreover, as discussed earlier, Blue Shield has maintained to the Franchise Tax Board that the provision is inoperative as a matter of law and that making such a distribution would be breach of fiduciary duty by its board of directors.

In addition, the wording of the provision is so careless and flawed that it is has been rendered inoperative for that reason, as well. The dissolution provision, as contained in the current bylaws, states: "Any assets or property then remaining shall be distributed to the beneficiary members in proportion to the amount of dues contributed by each thereof."[46] The provision is defective because, in fact, only a small fraction of beneficiary members pay any dues, or premiums, to Blue Shield. The vast majority of beneficiary members are covered under group health plans purchased from Blue Shield by their employers.

If applied as drafted, the dissolution provision would limit distribution of assets exclusively to individual plan subscribers. Based on enrollment data reported by Blue Shield in its latest quarterly financial report to the DMHC, the plan has 2,454,075 enrollees, of which 587,646 are individual plan enrollees.[47] That would mean that less than one-quarter of the beneficiary members would share in any distribution of assets. Nowhere in Blue Shield's founding documents, the account of its founding given by the lawyers who assisted with it, or in any subsequent governing documents is there any indication of any intent to favor

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[45] Articles of Incorporation of California Physicians' Service, February 2, 1939, Art. 5(3)(b).
[46] Blue Shield bylaws, revised Jan 1, 2013, Chapter 12, Section 3.
[47] *Quarterly Statement as of June 30, 2015*, California Physicians' Service, Filed with the DMHC. The enrollment figures cited exclude ASO enrollees.

this subset of beneficiary members. The outcome that strict implementation of the dissolution provision would produce is so arbitrary and unfair that it could not possibly have been intended or ever effectuated.

III. Blue Shield must be held accountable for its charitable trust duties

Given Blue Shield's clearly established charitable trust obligations under the common law and Article 11's clear application to transactions such as Blue Shield's proposed $1.2 billion acquisition of Care 1st, the DMHC is required to ensure that Blue Shield is meeting its nonprofit obligations.[48] In addition, Blue Shield's bald assertion that it has absolutely no obligation to the public as a nonprofit makes it imperative that you take decisive and forceful action in this regard. Whatever authority you may lack under Article 11 to force Blue Shield to acknowledge and fulfill its duties to the public you have as part of your general authority to enforce the charitable trust obligations of nonprofit healthcare plans.

With their formal rejection of Blue Shield's charitable trust obligations, Blue Shield's leaders are attempting to privatize billions of dollars worth of community assets. Only you have the authority to stop them. The public is relying on you to protect their decades-long investment in Blue Shield and see to it that the nonprofit operates for the benefit of the community.

Thank you for your consideration.

Sincerely,

Michael Johnson

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[48] Health & Safety Code Sections 1399.70(a), 1399.70(b), 1399.70(c) and 1399.70(d).

Michael Johnson
mikemsj@gmail.com
323-466-0380

October 1, 2015

Shelley Rouillard, Director
Department of Managed Health Care
980 Ninth Street
Sacramento, CA 95814

By Email

Re: Blue Shield of California's Proposed Acquisition of Care1st

Dear Ms. Rouillard:

Blue Shield filed responses on August 27th and September 3rd to questions posed by the DMHC about apparent contradictions in what Blue Shield has said to the Franchise Tax Board (FTB) and the DMHC about its ability to distribute assets to enrollees upon dissolution. I am writing to you regarding Blue Shield's responses.

Examining any inconsistencies in what Blue Shield has said on this point is critical because Blue Shield maintains that language in its bylaws providing for such distribution establishes that its assets are not subject to a charitable trust obligation.

In its response to the DMHC's inquiries, Blue Shield acknowledges that it argued to the FTB that it was prohibited by federal law from making distributions to private persons and that the "Plan's Bylaws should be read to contain this prohibition."[1] Blue Shield also notes that it offered to change its bylaws to make the prohibition explicit. Blue Shield asserts, however, that you should ignore its arguments because they were rejected by the FTB: "Legal arguments made by the Plan that were rejected long ago are not relevant to the proposed acquisition."[2]

Despite their rejection, Blue Shield's arguments to the FTB, which were made less than two years ago, are highly relevant to your review for these reasons:

1. **Blue Shield's arguments to the FTB may indeed be correct.** The FTB is hardly

   the final judge of Blue Shield's legal arguments that federal law would prohibit it from implementing the dissolution provision in its bylaws. Indeed, Blue Shield is challenging the revocation of its tax exemption, so Blue Shield, itself, is disputing legal conclusions reached by the FTB.

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[1] Exhibit E-1, DMHC File No. 933-0043, Amendment to Notice of Material Modification, August 27, 2015.
[2] *Ibid*.
[3] Based upon personal knowledge of the communications between Blue Shield and the FTB.

Furthermore, Blue Shield asserted to the FTB that distributing assets upon dissolution would not only be contrary to federal law, but also a violation of its board members' fiduciary duties.[3] Given this legal opinion, Blue Shield's board members would be unlikely to implement a distribution to enrollees. Blue Shield does not say in its response to the DMHC that it has reversed that legal opinion, much less explain why board members would now feel they could make such a distribution without risk of violating their fiduciary duties.

2. **The opposing arguments Blue Shield has made to the DMHC and FTB indicate that Blue Shield has been or is being disingenuous.** In its response to the DMHC, Blue Shield has provided no explanation of the complete about-face in its legal reasoning. It simply notes that the FTB rejected its initial arguments, and declares that the DMHC should therefore ignore them. But that hardly constitutes an explanation for how Blue Shield came to believe the exact opposite of a position it had taken just 18 months earlier. Absent an adequate explanation for that, it is impossible to know whether Blue Shield's current arguments are genuine.

3. **Blue Shield's offer to the FTB to explicitly prohibit distribution of assets to enrollees upon dissolution is further evidence that the provision for such distribution is not serious.** Blue Shield has claimed to you that its bylaw provision for distribution of assets to enrollees is a defining attribute of the corporation, distinguishing it from nonprofits that hold their assets in charitable trust. However, the offer to the FTB shows that Blue Shield, in fact, regards the provision as expendable.

   As I noted to you in my letter of September 23rd, the dissolution provision in Blue Shield's bylaws is fatally flawed because it provides for distribution to enrollees based on the premiums they have paid when only a small minority of enrollees (individual plan subscribers) actually pay premiums to Blue Shield. Blue Shield's disclosure of the offer they made to the FTB only adds to the evidence that Blue Shield does not take seriously the possibility of any distribution of assets to enrollees.

When Blue Shield was first confronted with allegations that it had made contradictory statements about the distribution of its assets upon dissolution, CEO Paul Markovich told you and the public, "Blue Shield's bylaws say that if the company seeks to do business and dissolve any money that remains after the repayment of debts would be distributed to members. That's what we've told everybody consistently because it's true."[4]

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[3] Based upon personal knowledge of the communications between Blue Shield and the FTB.
[4] DMHC Transcript, Public Meeting on the Acquisition of Care1st Health Plan by Blue Shield of California, June 8, 2015, p. 28.

What Blue Shield now acknowledges it told the FTB is very different than what it has told the DMHC. Clearly, you cannot take Blue Shield at its word. Even in its purported explanation of the inconsistencies, Blue Shield continues to withhold important information, such as the fact that it argued to the DMHC that distributing assets to enrollees upon dissolution would violate its board members' fiduciary duties. Unless and until Blue Shield releases its communications with the FTB, you should not give its arguments on this point any credence. Only when you have those documents in hand will you have all of the information you need to assess Blue Shield's current arguments.

Thank you for your consideration.

Sincerely,

Michael Johnson

Michael Johnson
mikemsj@gmail.com
323-466-0380

October 5, 2015

Shelley Rouillard, Director
Department of Managed Health Care
980 Ninth Street
Sacramento, CA 95814

By Email

Re: Blue Shield of California's Proposed Acquisition of Care 1st

Dear Ms. Rouillard:

I am writing to raise concerns about the corporate structure under which Blue Shield would operate Care 1st Health Plan following the proposed acquisition. That structure would subordinate the interests of Care 1st members, who are primarily Medi-Cal enrollees, to those of Blue Shield's own enrollees.

Blue Shield's arrangements for the operation of Care 1st are complex. Instead of purchasing Care 1st directly and integrating it into its own operations, Blue Shield has established a subsidiary holding company that would acquire and operate Care 1st as a separate, indirect subsidiary of Blue Shield.

Blue Shield's reasons for this complex arrangement are unclear, but appear to include tax avoidance. Regardless, the effect would be to make the legal status of Care 1st enrollees within the post acquisition combined corporate entity inferior to that of Blue Shield enrollees.

The post-acquisition corporate structure would obligate Care 1st to operate for the benefit of Blue Shield and its enrollees.

Under the post-acquisition legal structure described by Blue Shield and Care 1st in their filings with the DMHC, Care 1st would be established as a nonprofit mutual benefit corporation with a single corporate member, Cumulus Holding Company.[1] Cumulus, which was incorporated soon after the acquisition deal was signed, is also a nonprofit mutual benefit corporation with just one corporate member, which is Blue Shield.[2]

As a mutual benefit corporation, Care 1st would be required to operate for the benefit

[1] *Proposed Amended and Restated Bylaws*, Care 1st Health Plan, Exhibit F-I-a-ii,
[2] *Cumulus Holding Company, Inc. Bylaws*, Exhibit E-1 Attachment 2 to Amendment to Notice of Material Modification, June 2, 2015, DMHC File No: 933-0043.

of its sole corporate member in the same way that, for example, a trade association or homeowners association is required to operate for the benefit of its members. Since only Cumulus, and not enrollees of Care 1st, would be members of the mutual benefit corporation, Care 1st would be obligated to operate exclusively for the benefit of Cumulus. Similarly, Cumulus would have a duty to operate exclusively for the benefit of its sole corporate member, Blue Shield.

Blue Shield, itself, is also incorporated as a nonprofit mutual benefit corporation. While Blue Shield has no corporate members, it has asserted in a previous filing with the DMHC that "it operates only for the benefit of its policyholders."[3] Because Care 1st would be absorbed as a separate corporate entity, its enrollees would not become Blue Shield policyholders (enrollees) following the acquisition. Under the corporate structure described in the filings, each entity would be obligated to operate for the benefit of Blue Shield enrollees.

A clear example of how the structure would subordinate the interests of Care 1st enrollees to those of Blue Shield enrollees is the provision for distribution of assets upon dissolution. In the event of the dissolution of all three entities, the governing documents of the three organizations, as described to the DMHC by Blue Shield, provide that the remaining assets of Care 1st would go to Cumulus, which would pass along its remaining assets to Blue Shield, which, in turn, would distribute its remaining assets to Blue Shield enrollees.[4]

Pursuant to the governing documents for the three entities, the interests of Blue Shield enrollees would reign supreme. This is not to say that Care 1st would have no obligations at all to its enrollees. Care 1st would be obligated to them as customers of the plan, just as for-profit plans are to their enrollees. But Care 1st's fiduciary duty would be to its sole owner, Blue Shield, which has declared to the DMHC that its exclusive duty is to benefit Blue Shield's enrollees.

What impact would this have on operational decisions such as the deployment of resources or the pricing of Care 1st coverage and the amount of profit Blue Shield would demand of Care 1st? Care 1st's fiduciary duty to Blue Shield would dictate that those decisions be guided by what best serves the interests of Blue Shield enrollees.

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[3] *White Paper on Charitable Trusts*, Attachment 1 to Exhibit E-1, DMHC File No: 933-004, Amendment No. 5 to No. 3202 Notice of Material Modification, July 15, 2015, p. 16.

[4] *Narrative Description of Filing*, Exhibit E-1, DMHC File No. 933-0043, Amendment to Notice of Material Modification, June 2, 2015, p.2. As you know, Blue Shield's ability to distribute assets to enrollees is a matter of contention. I do not intend here to suggest that Blue Shield has the ability to make such a distribution. My purpose is simply to address the implications of the post-acquisition corporate structure as Blue Shield has described that structure.

By happy coincidence, Care 1st enrollees may also benefit at times, but the post-acquisition corporate structure would make Blue Shield enrollees the exclusive beneficiaries of the combined entity.

One reason for the planned corporate structure is tax avoidance.

Why would Blue Shield propose a corporate structure for the control of Care 1st that would disadvantage Care 1st enrollees in this way? Blue Shield and Care 1st have offered vague explanations in response to inquiries from the DMHC about the structure. However, the proposed post-acquisition bylaws for Care 1st make it clear that one objective is tax avoidance.

Two versions of those bylaws have been filed with the DMHC. The first, which was filed January 30, 2015, included a provision directing that "the corporation shall not directly or indirectly carry on any activity that would prevent it from obtaining or maintaining exemption from Federal income tax exemption as an organization described in section 501(c)(4) of the Internal Revenue Code of 1986, as amended, or section 23701f of the California Revenue & Taxation Code."[5]

After obtaining that document through a Public Records Act request, I blogged about it in May, pointing to the provision as evidence of a ploy by Blue Shield to avoid having to pay corporate incomes taxes on this new business despite the recent revocation of its own tax exemption. On June 1, 2015, Care 1st filed a revised version of the proposed bylaws that deleted the above provision.[6]

Care 1st also filed, a few days later, a response to a question from the DMHC about whether Care 1st would apply for state and federal tax exemption following the acquisition. Care 1st stated:

> The Plan has been informed by Blue Shield that it has no current intention to cause the Plan to apply for tax exempt status under California or federal tax law, but reserves the right to evaluate, on a continuous basis, applicable federal and state tax laws, regulations and policies, including applying for tax exempt status under federal and/or state law.[7]

In a filing with the DMHC on June 2, 2015, Blue Shield gave this response to the

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[5] *Proposed Amended and Restated Bylaws*, Care 1st Health Plan, Exhibit F-I-a-ii, Notice of Material Modification, January 30, 2015, DMHC File No. 933-0326.
[6] *Proposed Amended and Restated Bylaws*, Care 1st Health Plan, Exhibit F-I-a-ii, Amendment to Notice of Material Modification, June 1, 2015, DMHC File No. 933-0326.
[7] "Narrative Description of Filing," DMHC File No. 933-0326, Exhibit E-1, Amendment to Notice of Material Modification, June 4, 2015, p.3.

DMHC's inquiry about the reasons for the post-acquisition corporate structure:

> Blue Shield created Cumulus to make the purchase (which results in Care 1st being a direct subsidiary of Cumulus and an indirect subsidiary of Blue Shield) in order to: (a) maintain separation between Blue Shield's and Care 1st 's lines of business and their distinct legal and regulatory frameworks and requirements; and (b) provide organizational flexibility for possible future acquisitions using Cumulus as a holding company (however, no acquisitions besides Care 1st are contemplated at this time). There are no tax benefits of using Cumulus to acquire Care 1st.[8]

However, Blue Shield and Care 1st neglected to mention that the revised bylaws for Care 1st filed on June 1 include a new provision written for the specific purpose of making Care 1st eligible for exemption from the federal tax imposed on health insurers under the Affordable Care Act. The new bylaw provision states:

> No net earnings of the corporation shall inure to the benefit of any private individual. No substantial part of the activities of the corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in section 501(h) of the Internal Revenue Code of 1986, as amended). The corporation shall not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office.[9]

The provision matches, virtually word-for-word, the requirements specified in IRS regulations for exemption from the new federal tax on insurers.[10] While using Cumulus to acquire Care 1st may not confer any tax benefits, establishing Care 1st as a separate corporate entity certainly does, and Blue Shield is clearly intent on exploiting that advantage.

Whatever are Blue Shield's true reasons for structuring the combined corporate entity as described in the filings—whether its tax avoidance, facilitating future acquisitions, or simplifying regulatory compliance—Blue Shield needs to explain how those reasons justify the disadvantaged position in which that entity would put the mostly Medi-Cal enrollees who make up the membership of Care 1st.

DMHC should make clear to Blue Shield its obligation to benefit the community.

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[8] "Narrative Description of Filing," DMHC File No. 933-0043, Exhibit E-1, Amendment to Notice of Material Modification, June 2, 2015.
[9] *Proposed Amended and Restated Bylaws,* June 1, 2015.
[10] 26 CFR §57.2(b)(2)(iii).

In previous filings Blue Shield has argued that it has no obligation as a nonprofit to benefit the community. Along with over a dozen consumer groups, I have argued to you that Blue Shield does have such an obligation by virtue of the community benefit claims and promises it has made over its history and the tax exemption it held until the FTB revoked it last year.

The complex corporate structure Blue Shield is proposing in connection with the proposed acquisition is a continuation of the corporate shell game Blue Shield has been playing for decades to avoid accountability for its duty to the public. The DMHC should make clear to Blue Shield that no matter its structure, it has a charitable trust obligation to benefit the community, including, on an equal basis, all enrollees under its corporate umbrella.

Thank you for your consideration.

Sincerely,

Michael Johnson

Michael Johnson Time & Billing Records

Rate: $420/hour*

Date	Activity	Time in hours	Amount billed
3/19/15	Draft 3/20/15 letter to Ms. Rouillard requesting disclosure of purchase price and a public hearing.	2.5	$1,050
3/20/15	Edit 3/20/15 letter to Ms. Rouillard.	0.5	$210
4/1/15	Discussion w/ Mr. Ravel and Ms. Lowenstein re factors to be considered in the review of the acquisition.	0.5	$210
4/2/15	Submit PRA request for acquisition-related documents.	0.5	$210
4/6/15	Read email response from Mr. Ravel re my request for public hearing. Review CCR, title 28, section 1002.4, which Mr. Ravel cited.	0.5	$210
4/20/15	Review acquisition-related documents obtained through PRA, with special attention to: CPS Narrative Description of Filing; Affiliated Company Services Agreement; Stock Purchase Agreement; Care1st Narrative Description of Filing; Care1st post-closing Articles of Incorporation; Care1st post-closing Bylaws; post-closing organization charts.	3.5	$1,470
5/13/15	Submit PRA for acquisition-related documents dated 4/1/15 or later.	0.5	$210
5/14/15	Review Article 11 statutory language, legislative history and implementing regulations (Rule 1300.52.1).	2.5	$1,050
5/15/15	Review CA Corporations Code provisions pertaining to nonprofit mutual benefit and public benefit corporations. Also review Van de Kamp v. Gumbiner (1990) re AG/DMHC authority to regulate charitable trust obligations of nonprofit health plans.	3.5	$1,470
5/18/15	Examine Blue Shield's website and conduct web searches for examples of Blue Shield representing its mission as aiming to benefit all Californians and not just its enrollees.	2.5	$1,050
5/28/15	Draft 5/31/15 letter to Ms. Rouillard re Article 11 applicability, DMHC authority to enforce charitable trust obligation, and Blue Shield's charitable trust obligation.	4.5	$1,890
5/29/15	Revise and edit 5/31/15 letter to Ms. Rouillard.	1.0	$420
5/29/15	Review acquisition-related documents obtained through PRA, with special attention to: Letter from S. Jacobs to Mr. Ravel re applicability of Art. 11 and Blue Shield charitable trust obligation; Care1st 4/1 amendment responding to DMHC questions; Escrow	2.5	$1,050

	Agreement		
6/2/15	Draft 6/3/15 letter to Mr. Ravel re inconsistencies between Blue Shield statements to the DMHC and FTB	2.5	$1,050
6/3/15	Revise and edit 6/3/15 letter to Mr. Ravel	0.5	$210
6/4/15	Draft written comments for June 8 public meeting	2.5	$1,050
6/4/15	Submit PRA for acquisition-related documents dated 5/15/15 or later	0.5	$210
6/5/15	Revise and edit written comments for public meeting and draft version for oral presentation	1.5	$630
6/8/15	Travel to public meeting from Los Angeles	2.0	$420**
6/8/15	Attend public meeting	2.0	$840
6/8/15	Travel from public meeting to Berkeley	2.0	$420**
6/20/15	Draft 6/22/15 letter to Mr. Ravel rebutting arguments by S. Jacobs in letter to Mr. Ravel re applicability of Article 11 and Blue Shield charitable trust obligation.	2.5	$1,050
6/21/15	Revise and edit letter to Mr. Ravel.	1.0	$420
6/25/15	Submit PRA for acquisition-related documents dated 6/4/15 or later	0.5	$210
7/6/15	Review acquisition-related documents obtained through PRA, with special attention to: CPS June 2 amendment responding to DMHC questions; Bylaws of Cumulus Holding Co.; Amended Bylaws and Articles of Incorporation for Care1st post-acquisition	1.5	$630
7/7/15	Review additional documents obtained through PRA: Blue Shield original Articles of Incorporation and 40 versions of Blue Shield bylaws adopted over the course its history. Track amendments to bylaws regarding disposition of assets upon dissolution and role of enrollees in corporate governance.	4.5	$1,890
7/14/15	Draft 7/16/15 letter to Ms. Rouillard re the legitimacy of Blue Shield's incorporation as a mutual benefit corporation, which Blue Shield made a cornerstone of its argument that it had no charitable trust obligation	3.0	$1,260
7/15/15	Revise and edit letter to Ms. Rouillard.	1.0	$420
7/16/15	Submit PRA for acquisition-related documents dated 6/25/15 and later.	0.5	$210
8/7/15	Review acquisition-related documents obtained through PRA, with special attention to: Blue Shield "White Paper on Charitable Trusts"; Blue Shield 7/15/15 amendment responding to DMHC questions; Care1st 6/4/15 amendment responding to DMHC questions;	2.5	$1,050
8/10/15	Submit PRA for acquisition-related documents dated 7/16/15 or later	0.5	$210
8/25/15	Review cases cited in Blue Shield's "White Paper": Estate of Henderson, 17 Cal. 2d 853, 857 (Cal. 1941);	3.0	$1,260

	Brown v. La Societe Francaise De Bienfaisance Mutelle; Abbott v. Blue Cross and Blue Shield of Texas, Inc.; and BC for Health, Inc. v. Commissioner of Insurance		
8/26/15	Research case law on charitable trusts	3.5	$1,470
9/1/15	Research history of medical service plans, including corporate status and tax treatment of Blue Shield	2.5	$1,050
9/1/15	Submit PRA for acquisition-related documents dated 8/10/15 or later	0.5	$210
9/16/15	Work on draft of 9/23/15 letter to Ms. Rouillard rebutting arguments in Blue Shield "White Paper" re applicability of Art. 11 and Blue Shield's charitable trust obligation	4.0	$1,680
9/17/15	Work on draft of 9/23/15 letter to Ms. Rouillard	3.0	$1,260
9/18/15	Work on draft of 9/23/15 letter to Ms. Rouillard	4.0	$1,680
9/21/15	Work on draft of 9/23/15 letter to Ms. Rouillard	4.0	$1,680
9/22/15	Revise and edit 9/23/15 letter to Ms. Rouillard	2.5	$1,050
9/18/15	Submit PRA for valuation analysis of Care1st commissioned by DMHC	0.5	$210
9/27/15	Review acquisition-related documents obtained through PRA, with special attention to: Blue Shield 8/27/15 and 9/3/15 amendments responding to DMHC questions.	1.0	$420
9/30/15	Draft, revise and edit 10/1/15 letter to Ms. Rouillard regarding Blue Shield response to DMHC questions about disposition of assets upon dissolution.	3.0	$1,260
10/2/15	Assemble and examine all versions of Cumulus and Care1st articles of incorporation and responses to the DMHC addressing corporate structure. Review IRS regulations on ACA insurer tax.	1.5	$630
10/2/15	Draft 10/5/15 letter re post-acquisition corporate structure.	4.5	$1,890
10/4/15	Revise and edit 10/5/15 letter	1.0	$420
11/2/15	Complete application for Award of Advocacy Fees	3.0	$630**
	Total	97.5	$39,480.00

* Hourly rate determined based on range adopted by California Public Utilities Commission for non-attorney experts in 2015 and the $400-$800/hour rates at which I have billed and been paid for private consulting services this year.

** Billed at one-half the normal hourly rate as allowed by the PUC and noted in the Decision Granting Award of Advocacy and Witness Fees to Health Access in connection with timely access regulations.