

The proposed defendants, New Jersey Citizen's Action, Joy Schulman, Joseph Broderick, Ben Peck and the many other individuals named in Exhibit A of the Certification of Renée Steinhagen (the "Applicants"), hereby move this Court for leave to intervene in this in this action as a right pursuant to R. 4:33-1, or for permission to participate as full intervenor parties in this action pursuant to R. 4:33-2.

#### STATEMENT OF FACTS

In October 1996, Blue Cross and Blue Shield of New Jersey ("BCBS of NJ") filed with the Commissioner Banking and Insurance (the "Commissioner") two related applications: one to convert to a domestic mutual insurer ("New Jersey Mutual") pursuant to N.J.S.A. 17:48E-45 et seq., and one to merge with Anthem Insurance Companies, Inc. ("Anthem") pursuant to N.J.S.A. 17B:18-61. Anthem is an Indianapolis-based, for-profit, mutual insurance company doing business in all 50 states. This two-step transaction represents a significant conversion from a nonprofit, charitable corporation to a for-profit entity.

On February 13, 1997, BCBS of NJ filed a Verified Complaint in lieu of prerogative writs action in the Superior Court, which was amended on February 24, 1997, to include a Seventh Count (the "Amended Complaint"). In this action, BCBS of NJ requests that the court declare, inter alia, that BCBS of NJ is not a

charitable corporation, and that the Commissioner must approve its application to convert to a for-profit mutual insurer without imposing any charitable trust settlement on its successor.

The individual Applicants are all subscribers to, or consumers of, BCBS of NJ's nonprofit health service plans. For example, Ben Peck receives his health care benefits from BCBS of NJ as an individual policyholder, Affidavit of Ben Peck at ¶1 ("Peck Aff. at ¶\_\_"); Joy Schulman receives her benefits from BCBS of NJ through her employer, Communications Workers of America, who is a BCBS of NJ policyholder, Affidavit of Joy Schulman at ¶1 ("Schulman Aff. at ¶\_\_"); and Joseph Broderick uses BCBS of NJ's services because his employer the State of New Jersey contracts BCBS of NJ as the administrator of its self-funded employee health plan. Affidavit of Joseph Broderick at ¶1 ("Broderick Aff. at ¶\_\_").

New Jersey Citizen Action ("NJCA"), itself a policyholder, represents 60,000 individual and family members who receive health care services from BCBS of NJ either as individual subscribers or through their employers or as residents of the communities serviced by BCBS of NJ plans. Affidavit of Anthony Wright at ¶3 ("Wright Aff. at ¶\_\_"). Moreover, NJCA is the state's largest, independent citizen's coalition that works on

behalf of the public interest, and engages in specific advocacy work related to health care issues. Id. at ¶4.

At this time, NJCA is the lead organizer in a statewide coalition of 75 organizations concerned with the issue of nonprofit health care conversions. Id. at ¶6. Each of such organizations has signed a Statement of Concern regarding the mutualization of BCBS of NJ and its merger into Anthem. Id. A primary goal of NJCA, in its capacities as policyholder, representative of its members who receive health care benefits from BCBS of NJ, and participant in the aforementioned coalition is to protect and ensure the redistribution of the charitable assets that BCBS of NJ has accrued over its 65-year history as a nonprofit corporation organized for charitable and benevolent purposes. Id. at ¶7.

NJCA and all individual Applicants now move for permission to intervene for the reasons set forth below.

I. APPLICANTS' MOTION TO INTERVENE AS A DEFENDANT MUST BE GRANTED UNDER R. 4:33-1.

R. 4:33-1 states:

Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject

of the action and is so situate that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It is clearly established under New Jersey law that applications for intervene in an existing action are treated liberally. State v. Lanza, 39 N.J. 595, 600 (1963); Atlantic Employers v. Tots & Toddlers, 239 N.J. Super. 276, 280 (App. Div. 1990), certif. denied 122 N.J. 147 (1990).

In deciding whether to allow an applicant to intervene, the court must use a four-prong test that is derived from the face of the statute: (1) The applicant must claim "an interest" that is related to the property or the transaction which is the subject of the action; (2) He/She must show that the disposition of the action may "as a practical matter" impair his/her ability to protect said interest; (3) The applicant must demonstrate that his/her interest is not "adequately represented" by the existing parties; and (4) The court must find that the application is timely. See Chesterbrooke Ltd. v. Planning Bd. of Tp. of Chester, 237 N.J. Super. 118, 124 (App. Div. 1989), certif. denied 118 N.J. 234 (1989). Once these standards are

satisfied, the decision is not discretionary. See id.; see also Vincendese v. J-Fad, Inc., 160 N.J. Super. 373 (Ch. Div. 1978) (citing 7A Wright & Miller, Federal Practice and Procedure, §1902 at 467).

A. Applicants Are Beneficiaries of BCBS of NJ's Operation and Have a Special Interest in Questions Relating to Its Status as a NonProfit Corporation With Charitable Purposes.

Applicants have a direct interest relating to the existing litigation insofar as they are all beneficiaries of BCBS of NJ's operations, and thus have a special interest in questions relating to its status as a charitable corporation.

Pursuant to BCBS of NJ's 1986 Restated Certificate of Incorporation, its primary purpose is to :

to inaugurate, operate and maintain a [nonprofit] health service plan whereby various coverages may be provided for under contract with such [members] of the public. . . who become subscribers to said plan to safeguard their health or in event of ailment, illness or accidental injury.

Its charter also mandates that the corporation "negotiate, aid and assist in the development of a health program for the community served by [the] health service plan."

In accordance with this broad public mission, each of the Applicants is a beneficiary of BCBS of NJ. Either as a current subscriber or as recipient of health insurance coverage through their employer, Applicants are among the many members of the public who are the intended beneficiaries of BCBS of NJ's operations. Moreover, NJCA also represents the broader general public, who may become subscribers, currently reside in communities served by BCBS of NJ, and constitute taxpayers who have contributed to BCBS of NJ's public mission by virtue of the tax and regulatory benefits BCBS has received over its 65-year history. See Wright Aff. at ¶3.

As beneficiaries of BCBS of NJ's operations, each of the Applicants has an interest in ensuring that the directors of BCBS of NJ comply with their fiduciary duty to protect the corporation's charitable assets by ensuring that they are used only for the purposes for which they were intended: to provide nonprofit, affordable health insurance for a large number of New Jersey citizens. See BCBS of NJ's Amended Complaint at ¶9. Applicants also have particular concerns as to the effect of the proposed mutualization and merger into Anthem upon their ability to remain policyholders, and thus, have a direct interest in ensuring that BCBS of NJ is not able to evade its charitable trust obligations upon its conversion. See e.g., Peck Aff. at

¶¶5-6; Schulman Aff. at ¶¶6-7. Specifically, Applicants seek to ensure the proper evaluation of such assets and the transfer thereof to an independent foundation once BCBS of NJ operates as a for-profit mutual. In this way, Applicants' motion to file an answer can be characterized as a suit for the enforcement of a charitable trust. Under New Jersey law, each of the Applicants has standing to bring such action. It has long been established that in New Jersey members of a "general benefitted class" are able to bring suits to compel the enforcement of a charitable trust. Township of Cinnaminson v. First Camden Nat'l Bank & Trust, 99 N.J. Super. 115, 125 (Ch. Div. 1968). In Township of Cinnaminson, citizens and taxpayers of the township were the ultimate beneficiaries of a library created by a testamentary trust and thus had standing to sue for the construction of the trust instrument. See also Horsemen's Ass'n v. New Jersey Racing Com'n, 251 N.J. Super. 589, 602 (App. Div. 1991) (finding that beneficiaries of funds statutorily allocated for horsemen's benevolence programs--i.e., owners, trainers and their employees-- have a "special interest" in the fund sufficient for standing); Paterson v. Paterson General Hospital, 97 N.J. Super. 514, 527 (Ch. Div. 1967) (individual city residents and taxpayers found to have standing to seek to prevent nonprofit hospital from changing its location); Larkin v. Wikoff, 75 N.J. Eq. 462,

474 (Ch. Div. 1909), aff'd 77 N.J. Eq. 589 (E & A 1910) (residents of the immediate vicinity of church found to have standing to challenge proposed sale thereof). In this way, all the individual Applicants as well as NJCA, in its capacity as policyholder and representative of both its members and the public, are beneficiaries of BCBS of NJ's charitable mission and thus have a direct, "special" interest in this action.

B. Applicants' Ability to Protect Their Interests  
May Be Impaired if They Are Not Permitted to  
Intervene.

The Court's disposition of BCBS of NJ's Amended Complaint may, as a practical matter, impede Applicants' ability to protect their aforementioned health care interests. By proposing the conversion of nonprofit, charitable assets to a for-profit use, without contemplating that New Jersey Mutual will make the requisite charitable trust settlement, the directors of BCBS of NJ are violating their fiduciary duty to its policyholders, other recipients of its health care services, and the general public. If this Court holds that BCBS of NJ is not a "charity" under applicable New Jersey law, the Applicants will be precluded from litigating this issue and invoking the jurisdiction of the Chancery Court to enforce BCBS of NJ's charitable obligations under the doctrine of cy pre once its assets are transferred to New Jersey Mutual or Anthem. Cf.



Atlantic Employers, supra, 239 N.J. Super. at 280 (finding that a ruling in favor of Atlantic would render any judgment entered into in favor of the proposed intervenors

C. Applicants' Interests Are Not Adequately  
Represented By Existing Parties.

Applicants' interest are not adequately represented by the Commissioner or the Attorney General, who may present positions on various issues arising in this action that differ from those presented by the Applicants. Both the Commissioner and the Attorney General are executive officers of the State, who are sensitive to the interests of a wide range of groups and sectors in the State, not only the interests of health care consumers such as Applicants. Their ultimate goal is to achieve an overall equitable resolution of this matter taking into consideration the interests of the business community, BCBS of NJ as well as residents of the State.

Although there is no indication at this time that Applicants and such parties do not hold similar positions on whether BCBS of NJ is a charitable corporation under applicable law, their positions may well diverge at some later point in the litigation. For example, Applicants' concerns about BCBS of NJ directors' violation of fiduciary duties may not be shared by the State, who has appointed four of its directors. Wright Aff.

at ¶14. Cf. City of Paterson, supra, 97 N.J. Super. at 527 ("sporadic" supervision of charities by Attorney General makes liberal standing rule in the public interest). In addition, the Commissioner and the Attorney General may take the position that not all of BCBS of NJ's assets are charitable. Applicants fundamentally disagree with that position, and believe that such different views may influence the parties' positions on matters involved in this litigation. Schulman Aff. at ¶8.

D. Applicant's Motion is Timely.

When assessing the issue of timeliness, the amount of time that may have elapsed since the institution of the action is not the sole consideration. Clarke v. Brown, 101 N.J. Super. 404, 410-11 (Law Div. 1968). The court must also consider whether granting the motion would prejudice the other parties or the court, and at what stage in the total proceedings the motion to intervene is made. Id.

In the present matter, the Verified Complaint was filed by plaintiff and an Order to Show Cause was signed by Judge Weiss on or about February 13, 1997. Pursuant to the Order, the Commissioner's response papers are due March 12, 1997, and plaintiff's request for summary judgement will be heard on March 24, 1997.

Applicants have filed their motion to intervene in accordance with the New Jersey Rules so that their motion can also be heard on March 24, 1997. At the same time, they are submitting their memorandum of law in opposition to plaintiff's Order to Show Cause and motion for summary judgment in the event that this motion is granted. Accordingly, Applicants' motion will not cause undue prejudice to the parties or the court and must therefor be considered timely.

II. APPLICANTS' MOTION TO INTERVENE AS DEFENDANTS SHOULD BE GRANTED UNDER R. 4:33-2

R. 4:33-2 provides in pertinent part:

Upon the timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common. . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Similar to R 4: 33-1, the language of this Rule requires that an applicant demonstrate a question of law or fact in common with the existing action. Once this is established, the test becomes "whether the granting of the motion will unduly

delay or prejudice the rights of the original parties." See Looman Realty Corp. v. Broad Street Nat'l Bank of Trenton, 74 N.J. Super. 71, 81 (App. Div. 1962), certif. denied 37 N.J. 520 (1962).

The Applicants' interests are directly related to the existing action, and arise out of the same set of facts and concern common questions of law. See Point IA, supra. New Jersey Courts have a policy that favors joining all related matters in controversy in a single proceeding for just and expeditious disposition. See Korff v. G and G Corp., 21 N.J. 558, 567 (1956); Monsanto Co. v. Alden Leeds, Inc., 130 N.J. Super. 245, 251 (Law Div. 1974). Accordingly, this factor weighs heavily in favor of granting Applicants' motion. As noted in Point ID, supra, Applicants' motion to intervene is also timely and will not delay or prejudice the rights of the original parties.

In considering whether to grant a motion to intervene, the court may also consider the public interest involved. Evesham Tp. Zoning Bd. v. Evesham Tp. Council, 86 N.J. 295, 299 (1981); Ocean Cablevision Assoc. v. Hovbilt, Inc., 210 N.J. Super. 626 (Law Div. 1986). In this case, Applicants are acting on behalf of themselves and members of the general public, because they are acting to safeguard BCBS of NJ's charitable

assets and are concerned about the potential impact of the mutualization and merger on the future cost of health care in the State of New Jersey.

CONCLUSION

For the foregoing reasons, the Applicants request that their Motion to Intervene as defendants be granted.

Respectfully submitted,

Dated: March 8, 1997

Renée Steinhagen, Esq.

