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3. Concerted action may be proved through circumstantial or direct evidence, and the evidence must be viewed as a whole. 42

A plaintiff may rely on either circumstantial or direct evidence so long as the evidence is not “equally consistent with independent conduct.” *Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999). In determining whether the defendants acted in concert, courts must evaluate the evidence as a whole. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004). *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56, 661-62 (7th Cir. 2002).

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

_____)	
)	Civil Action No. 1:05CV431
UNITED STATES OF AMERICA)	
Plaintiff,)	
)	Chief Judge Beckwith
v.)	
)	
FEDERATION OF PHYSICIANS AND)	United States Magistrate Judge Hogan
DENTISTS, et al.,)	
Defendants.)	
)	
_____)	

**PLAINTIFF UNITED STATES' MEMORANDUM SUPPORTING ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT OF LIABILITY AGAINST
THE FEDERATION OF PHYSICIANS AND DENTISTS AND LYNDA ODENKIRK**

The defendants violated § 1 of the Sherman Act when they orchestrated an antitrust conspiracy among more than 120 Cincinnati-area OB-GYNs in more than 40 practice groups and forced health insurers to pay higher fees to the doctors. From the beginning of the conspiracy in spring 2002, the doctors joined the Federation of Physicians and Dentists understanding that their plan would be ineffective if undertaken individually; they needed the participation of a substantial majority of the area's OB-GYNs to leverage their negotiations with the insurers. Then, in a coordinated effort that lasted more than a year, the conspirators targeted six insurers in sequence, threatened effectively in unison to terminate their contracts with the insurers, and succeeded in extracting higher rates from the insurers. An extensive record of incriminating and undisputed e-mail messages, letters, and testimony leaves no genuine dispute of material fact that the defendants acted in concert to leverage insurers to negotiate higher fees.

The five defendants named in this action are the Federation of Physicians and Dentists; one of its employees, Lynda Odenkirk, who acted as a cartel manager; and three Federation members who participated most prominently among the physicians in the conspiracy: Dr. Warren Metherd, then practicing in a two-physician group; Dr. Michael Karram, head of the large Seven Hills group; and Dr. James Wendel, head of the large Mt. Auburn group.

The Court has already entered a consent decree against the three physicians. Dkt. Entry 36. The United States now moves for partial summary judgment under Fed. R. Civ. P. 56 against the Federation and Ms. Odenkirk on the issue of liability. Should the Court adjudge these defendants liable, the United States will seek appropriate relief in a separate filing.

I. Introduction

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.” 15 U.S.C. § 1. To prove a violation of § 1, a plaintiff must satisfy three elements: First, there must be an agreement or concerted action involving more than one actor. *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005). Second, the restraint of trade imposed by the agreement or concerted action must be unreasonable. *Id.* Third, there must be an effect on interstate commerce, *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991), which defendants here have admitted.

On the first element, “it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.” *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966) (citations omitted); *accord Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996). The evidence need show only “a conscious commitment to a

common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation omitted). And in determining whether defendants acted in concert, the evidence must be viewed as a whole. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004).

On the second element, courts distinguish between restraints that are deemed *per se* illegal and those that are analyzed under the rule of reason. *See, e.g., Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1012-15 (6th Cir. 1999). *Per se* restraints, such as price fixing, are “conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.” *Id.* at 1012 (quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289 (1985)).

The *per se* rule applies to the conduct shown here. The law has firmly established that concerted action by competitors to raise prices is *per se* illegal, where, as here, the concerted action is not part of an efficiency-enhancing integration. *See, e.g., FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (boycott by lawyers to raise their fees was *per se* illegal); *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 344-45 (1982) (applying nearly a century of precedent prohibiting price-fixing and holding illegal efforts by an organization to set maximum fees for member physicians).

The undisputed evidence shows that the defendants and their conspirators were acting in concert, not independently, to raise fees paid by insurers. At the Federation’s first meetings, the many OB-GYNs present recognized the importance of collective action when they decided they needed 60-70% of the OB-GYNs in the Cincinnati area to join to have an impact on the insurance companies. This membership goal was exceeded, with 75-85% joining.

To guide members in obtaining higher fees from insurers, the Federation centrally coordinated the sequence and manner in which members should approach each significant insurer in the area. Implementing this plan, the Federation circulated analyses of members' contracts with each insurer and provided members with sample letters raising concerns about their contract with each insurer, which members sent to insurers in waves, threatening a boycott if their demands were not met. The Federation also created a mass e-mail notification system that informed members of the group's overall activities, including the status of their negotiations, and that frequently reminded members to attend to various matters, including, for example, to send the sample letters to insurers at close to the same time. On occasion, members also communicated with each other directly or through the Federation. When insurers resisted dealing with the Federation acting on its members' behalf, the members agreed on a strategy to increase pressure on the insurers to renegotiate their contracts and raise their fees. Once insurers began to negotiate, the Federation acted as a "consultant" to all members and employed its "collective knowledge" of members' negotiations to advise individual members on their negotiations with insurers. Through these actions, the defendants orchestrated the actions of many conspirators—more than 40 OB-GYN groups.

The concerted action forced the insurers to acquiesce in the doctors' demands for higher fees. The alternative of having a large share of their network's OB-GYNs terminate their contracts would have angered employers and patients and damaged the insurers' businesses.

In cases with far less evidence of concerted action, courts have assessed several factors to help determine whether an antitrust conspiracy exists. *See, e.g., Re/Max Int'l, Inc.*, 173 F.3d at 1009. Applying the factors identified by the Sixth Circuit in *Re/Max* leaves no genuine dispute that the defendants in this case acted in concert:

- *Communications*: The conspirators' many meetings, newsletters, and e-mail messages about negotiations with insurers—some direct and most indirect through the Federation—provide compelling evidence of the conspiracy.
- *Foregoing competition*: Federation members reassured each other they would not try to gain at each other's expense and would protect the collective interests of both large and small groups. These steps would have made no sense if Federation members were acting independently.
- *Uniform actions*: The defendants' year-long success in orchestrating about 40 groups to be "uniform in their actions," targeting six insurers in sequence, underscores that they acted in concert.
- *Common motive*: The obvious profitability of Federation members' concerted action to raise prices supports a finding of conspiracy.
- *Concealment*: Defendants' efforts to conceal their objectives and concerted action reinforce a finding of conspiracy.

Under settled law, competitors who accept an invitation to join in a plan that will lead to a restraint of trade have unlawfully conspired in violation of the Sherman Act. *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939); *James R. Snyder Co. v. Assoc. Gen. Contractors of America*, 677 F.2d 1111, 1121-22 (6th Cir. 1982). There can be no genuine dispute that the defendants violated this standard as a matter of law.

II. Statement of Facts

A. Background

1. Physician competition in insurer networks

During the relevant time in 2002 and 2003, six health insurers provided most health care coverage in the Cincinnati area: Anthem, Inc. (currently known as "Wellpoint Health Networks"), Humana Inc. (also known around Cincinnati as "ChoiceCare"), United HealthCare Insurance Company, Cigna Corp., Aetna U.S. Healthcare Inc., and Medical Mutual of Ohio. Dkt. Entry 1, 21 ¶ 16. Anthem, United, and Humana were the major private health insurers operating

in the Cincinnati area. Snyder Deposition (“Dep.”) 118:11-17 (PX 1); *see* PX 2; Karram Dep. 18:10–19:13 (PX 3); Wendell Dep. 16:22–17:20 (PX 4). To offer health care plans to employers, insurers contract with physicians, hospitals, and other providers to form a provider network (or panel). Dkt. Entry 1, 21 ¶ 18. These contracts establish the fees that the providers will accept for providing covered medical care to the insurer’s subscribers. *Id.*

Competition is important to consumers in health care just as in all other parts of the economy. To offer a marketable provider network, the insurers need a substantial number of OB-GYNs in the Cincinnati area. OB-GYNs are often perceived by the insurers’ customers as a foundation of a network—the most indispensable and sought-after specialty in a list of participating physicians. Snyder Declaration (“Dec.”) ¶ 3 (PX 5); Buckingham Dec. ¶ 4 (PX 6); Newman Dec. ¶ 4 (PX 7). The insurers consequently seek to maintain contracts with a broad array of area OB-GYN groups. Snyder Dec. ¶ 3 (PX 5); Buckingham Dec. ¶ 4 (PX 6); Newman Dec. ¶ 4 (PX 7). To make this broad access possible for subscribers and patients at reasonable fees, the insurers depend on competition among the OB-GYNs. Snyder Dec. ¶ 3 (PX 5); Buckingham Dec. ¶ 6 (PX 6). Thus, concerted action by the physicians posed a significant threat to the insurers. As Anthem explains, “If 43 OB-GYN groups terminated their Anthem contracts, Anthem enrollees would have had a significant problem in having access to OB-GYNs in the greater Cincinnati area, which would raise further problems with groups insured by Anthem.” Snyder Dec. ¶ 7, 16 (PX 5); *see* Newman Dec. ¶ 12 (PX 7). Federation members understood that together they had leverage against insurers. *E.g.*, PX 8 at HUM-01257; PX 9; PX 10.

2. The prior antitrust decree against the Federation

The Federation is no stranger to antitrust litigation. In August 1998, the United States sued the Federation in the United States District Court for the District of Delaware, alleging that

