UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and STATE OF MICHIGAN, *Plaintiffs*, v. W.A. FOOTE MEMORIAL HOSPITAL, D/B/A ALLEGIANCE HEALTH, *Defendant*.	Case No.: 5:15-cv-12311-JEL-DRG Judge Judith E. Levy Magistrate Judge David R. Grand

Plaintiffs' Opposition to Defendant's Motion for a Continuance of the Trial Date and for Referral to a Magistrate for Mediation

To Plaintiffs' surprise, on January 19, 2018, Defendant Henry Ford Allegiance Health filed a motion asking this Court to delay the trial currently scheduled for March 6, 2018, and refer the matter to a Magistrate Judge for another mediation. Plaintiffs oppose both of these requests and respectfully ask that this Court, instead, reaffirm the March 6 trial date.

1. Contrary to Allegiance's assertion, further delay in this matter will significantly prejudice Plaintiffs and Michigan residents. In enforcing the antitrust laws, Plaintiffs' fundamental goal is to protect consumers by preserving the competitive process. Plaintiffs filed their complaint in June 2015, alleging an unlawful agreement spanning back at least to 2009. In August 2017, Allegiance

confirmed that it continues to implement the terms of its unlawful agreement with HCHC.[1] This means that, for at least the last nine years, consumers have been deprived of the benefits of competition, and they continue to be deprived of those benefits today.

2. Additionally, Plaintiffs' economics expert, Dr. Tasneem Chipty, has significant constraints on when she is available to testify due to her work in other cases and long-standing travel plans. Dr. Chipty has expert reports due in two different matters on April 4 and April 13, is scheduled to be out of the country from April 15 through the 22, has a deposition that will be held before May 11, and has a report due on May 25. Moving these commitments is largely outside Dr. Chipty's control, and in some cases may require the consent of other federal judges. Therefore, Allegiance's request for a "brief delay" is infeasible for Dr. Chipty. And while Plaintiffs have not inquired into the availability of all of their intended witnesses should the trial be delayed, Plaintiffs have already issued trial subpoenas to the majority of the witnesses they intend to call at trial, and no witness has yet informed Plaintiffs that he or she is unavailable on March 6. Plaintiffs should not bear the risk of presenting a less effective case at trial due to Allegiance's unnecessary and unwarranted delay.

[1] *See* Def. Allegiance Health's Br. in Response to the Court's Request for Supp. Briefing (ECF No. 109), at 5, 8 n.4; *see also* Attachment A to Pl.'s Response to July 20, 2017 Order Requiring Parties to Submit Supp. Briefing (ECF No. 108-2).

3. If Allegiance had complied with Local Rule 7.1(a), which required Allegiance to consult with Plaintiffs before filing its motion, Allegiance would have learned that delay will prejudice Plaintiffs. But Allegiance did not inform Plaintiffs that it was intending to file a motion with the Court.[2]

4. Allegiance should not face prejudice from maintaining the March 6 trial date. Nothing prevents Plaintiffs and Allegiance from engaging in settlement negotiations while also preparing for trial. Nor is there any reason that settlement negotiations should be lengthy or time consuming.

5. Allegiance's purported basis for delaying trial is that "Plaintiffs recently expressed a desire to engage in serious settlement discussions" and invited Allegiance to attend a meeting in Washington, DC for that purpose.[3] This statement, however, is misleading and omits significant history. It was Allegiance that approached Plaintiffs to discuss settlement, both in September 2017 and in December 2017, and Plaintiffs accepted those meetings. Yet, other than

[2] Plaintiffs assume that Allegiance's certification is based upon a phone call that Mr. Burns had with Principal Deputy Assistant Attorney General Andrew Finch on Wednesday, January 17. During that call, Mr. Burns asked whether the United States would be amenable to moving the trial date to facilitate settlement discussions and whether the United States was interested in attempting a second round of mediation. Mr. Finch informed Mr. Burns that he believed that the United States was not interested in mediating the case and did not see any need to delay trial in order to pursue settlement discussions, but that he would discuss the issue with the counsel of record in this case. Mr. Burns never informed Mr. Finch or counsel of record that he intended to file a motion requesting an extension.

[3] Def. Allegiance Health's Mot. for Continuance (ECF No. 115), at 1-2.

Allegiance's request in September 2017 that Plaintiffs voluntarily drop the case without receiving any relief, Allegiance still has not presented a concrete settlement offer to Plaintiffs. Allegiance also claims, without any basis, that it "will likely take at least a few weeks to arrange" this settlement meeting.[4] But that is only because Allegiance has failed to treat these discussions as a priority. Allegiance's dilatory approach is not a legitimate reason to delay the trial in this case.

6. Allegiance points to the possibility that any trial preparation will be "unnecessary" if the parties ultimately settle this case. Plaintiffs, however, do not believe that the parties are on the verge of settlement, or that it would be fruitful to delay trial in order to facilitate further settlement discussions.

7. Maintaining the current trial date is particularly important given the length of time that this case has been pending before this Court. Fact discovery closed in September 2016. Expert discovery closed in December 2016. Trial was originally scheduled for April 2017. And Allegiance has had ample notice of the scheduled March 6, 2018 trial in this action. If its goal was to avoid conducting standard pre-trial work, Allegiance should have engaged with Plaintiffs before that pre-trial work was scheduled to begin. Instead, Allegiance's counsel filed this request for an extension on the Friday evening before the parties' first agreed-upon

[4] *Id.* at 3.

deadline for pre-trial exchanges on Monday, January 22. That Allegiance chose to delay its preparation with the hope of receiving a favorable ruling from the Court or negotiating a settlement is not a reasonable basis for extension. Where any "prejudice" is the result of a party's own decisions, it is properly disregarded.[5]

8. Further delay is also unwarranted because Allegiance has already requested and received two extensions of the trial date. When this Court proposed a trial date of July 18, 2017, Allegiance asserted that a scheduled transition of its computer system in early August required significant attention by Allegiance's executives and prevented them from preparing for trial. And when this Court scheduled trial for October 17, 2017, Allegiance requested an extension of the trial so that it did not have to expend resources preparing for trial while this Court considered the question of its ongoing jurisdiction.

9. Plaintiffs also oppose Allegiance's request that this case be referred to a Magistrate Judge for mediation. As Plaintiffs explained during the October 5, 2017 hearing before this Court, the parties have already attempted to mediate this case once with Magistrate Judge Grand, but that mediation was unsuccessful

[5] *Cf. Cincinnatus Partners I, LP v. Farm Bureau Prop. & Cas. Ins. Co.*, No. 11-427, 2014 WL 1884226, at *2 (S.D. Ohio May 12, 2014) (excluding evidence despite recognizing potential prejudice to party offering it because "the prejudice . . . is entirely of their own making"); *Milner v. Biggs*, No. 10-904, 2012 WL 44126, at *3 (S.D. Ohio Feb. 10, 2012) (denying motion for leave to amend because "any prejudice redounding to plaintiffs is of their own making").

because Allegiance made no serious settlement offer. Plaintiffs' multiple discussions with Allegiance since that mediation leave no reason to believe that a second attempt is likely to be more productive. Notably, Allegiance's brief identifies several "developments" in this case that have occurred since mediation,[6] but articulates no reason to believe that these developments are likely to lead to a more productive settlement discussion. The parties remain in largely the same position as they were prior to this Court's rulings.

10. Plaintiffs remain willing to discuss settlement options with Allegiance. But Plaintiffs also remain committed to enforcing the antitrust laws and ensuring that consumers receive the long-denied benefits of competition. Six weeks remain before the currently scheduled trial, which leaves ample time for Allegiance to prepare its defense while also engaging in meaningful settlement discussions.

11. Finally, the lapse of appropriations for the federal government does not currently provide a reason to delay trial. Plaintiffs continue to prepare their case against Allegiance, and only an extended lapse in funding would cause problems with maintaining the current March 6 trial date.

Plaintiffs therefore respectfully request that this Court deny Allegiance's motion and retain the March 6, 2018 trial date.

[6] Def. Allegiance Health's Mot. for Continuance (ECF No. 115), at 5.

Dated: January 21, 2018 Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

Peter Caplan (P-30643)
Assistant United States Attorney
U.S. Attorney's Office
Eastern District of Michigan
211 W. Fort Street
Suite 2001
Detroit, Michigan 48226
(313) 226-9784
peter.caplan@usdoj.gov

s/Andrew Robinson
Andrew Robinson (D.C. Bar No. 1008003)
Katrina Rouse (D.C. Bar No. 1013035)
Garrett Liskey
Jill Maguire
Antitrust Division, Litigation I Section
U.S. Department of Justice
450 Fifth St. NW
Washington, DC 20530
(202) 598-2494
andrew.robinson2@usdoj.gov

FOR PLAINTIFF STATE OF MICHIGAN:

s/with the consent of Mark Gabrielse
Mark Gabrielse (P75163)
Assistant Attorney General
Michigan Department of Attorney General
Corporate Oversight Division
G. Mennen Williams Building, 6th Floor
525 W. Ottawa Street
Lansing, Michigan 48933
(517) 373-1160
gabrielsem@michigan.gov

Certificate of Service

I hereby certify that on January 21, 2018, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 5:15-cv-12311-JEL-DRG, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants.

s/Andrew Robinson
Andrew Robinson (DC Bar No. 1008003)
Antitrust Division, Litigation I Section
U.S. Department of Justice
450 Fifth St. NW
Washington, DC 20530
(202) 598-2494
andrew.robinson2@usdoj.gov