IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, Plaintiffs, v. BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant.	Civil Action No. 2:10-cv-14155-DPH-MKM Hon. Denise Page Hood Mag. Judge Mona K. Majzoub

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ENTRY OF THEIR PROPOSED CASE-MANAGEMENT ORDER

TABLE OF AUTHORITIES

Cases

Statutes and Rules

*Controlling or most appropriate authority

INTRODUCTION

The United States and the State of Michigan have moved for entry of a case-management order that would allow this government antitrust enforcement action to proceed – as Congress intended – "as soon as may be," 15 U.S.C. § 4, while coordinating with private plaintiffs in related actions in ways that do not delay or interfere with this case. Government plaintiffs therefore ask the Court to enter plaintiffs' proposed order incorporating the parties' deposition practice to date, which Blue Cross acknowledges it initially proposed (Doc. 148 at 9), and which has worked well. Plaintiffs also seek the Court's authorization of nationwide service of trial subpoenas.

Blue Cross's opposing brief makes clear that what Blue Cross really seeks is delay. Blue Cross seeks to slow down this government enforcement case – most obviously by seeking a stay of depositions for 90 days (Doc. 148 Ex. 1 ¶ 13), to resolve modest and speculative issues in the related private cases, and proposing byzantine and time-consuming solutions to those issues that would themselves cause further delay.

For more than a year, government plaintiffs attempted to reach agreement with Blue Cross regarding a case-management order in this action, agreeing to most of Blue Cross's requests – such as Blue Cross's demand for up to 170 depositions, far more than are likely to be needed (*see* Doc. 135 at 2 n3). After months of negotiations (*see id.* at 1-2), Blue Cross ultimately demanded a "comprehensive" order to govern all related cases (*id*. Ex. 2). Blue Cross did not provide any plaintiff with a proposed order until filing its opposition to this motion, when it attached it as an exhibit – without any prior disclosure to or discussion with any plaintiff in any pending case. Accordingly, Blue Cross's proposed order is not properly before the Court.

ARGUMENT

A. The Government's Proposed Order Sufficiently Addresses Coordination of Discovery, without Undue Delay to the Public's Interest in Prompt Antitrust Enforcement Against Ongoing Anticompetitive Conduct.

Contrary to Blue Cross's hyperbole that "key cross-case issues [are] presently plaguing the parties" with "real and festering discovery conflicts" (Doc. 148 at 3), plaintiffs have largely resolved these minor issues. In particular, government plaintiffs have acted in accord with their proposed order and have allowed private plaintiffs to participate in depositions, and private plaintiffs have in fact been attending depositions and asking questions out of the government's time. As Blue Cross notes (Doc. 148 at 8 n.4), in light of the Court's dismissal of the *Pontiac* case, informal cooperation among plaintiffs is likely to continue to be successful, especially in allowing all plaintiffs to ask deposition questions and thereby avoiding duplicative depositions.

Government and private plaintiffs have been cooperating to conduct discovery as efficiently as practical, without delaying or interfering with the prosecution of this government injunction action, so that it may proceed "as soon as may be," as the Sherman Act requires. 15 U.S.C. § 4. As the *Dentsply* court explained, "Congress has made the decision that inefficiencies and inconvenience to antitrust defendants are trumped by an unwillingness to countenance delay in the prosecution of Government antitrust litigation." *United States v. Dentsply Int'l, Inc.*, 190 F.R.D. 140, 146 (D. Del. 1999). Blue Cross incorrectly claims that *Dentsply* involved an inter-district transfer and is therefore distinguishable. (Doc. 148 at 6) To the contrary, the *Dentsply* court relied on the policy underlying 28 U.S.C. § 1407's antitrust enforcement exemption while refusing to consolidate – and thus delay – discovery in the United States' enforcement action with discovery in private damage actions, "all three of which were *already pending* before the same district court." *F.T.C. v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 33 n.7 (D.D.C. 2008)

(emphasis added). The court in *Cephalon* thus correctly distinguished the venue-transfer motion pending before it from the consolidation motion in *Dentsply*, and *Dentsply* remains directly applicable to this case.

Blue Cross claims that one "festering" problem with plaintiffs' ongoing informal coordination of discovery is the remote possibility that a plaintiff might seek a further deposition of a witness already deposed (Doc. 148 at 9-11). Additional depositions might be necessary if time was insufficient for all plaintiffs to question the witness (although to date this has not occurred), or because new information comes to light.[1] Blue Cross's proposed order would arbitrarily cut off the possibility of additional deposition time through a convoluted procedure, even where more time is appropriate (*see id.* Ex. 1 ¶¶ 1, 2). But no party should be ordered to forgo the opportunity to seek more deposition time where appropriate. Fed. R. Civ. P. 30(d)(1) contemplates that depositions can be extended beyond seven hours in appropriate circumstances. Indeed, "the Court has an obligation to permit additional time, if the circumstances require that a fair examination of the deponent run longer" – for example, to allow "each party . . . an opportunity to examine a deponent in a multi-party case . . . ." *Dow Chem. Co. v. Reinhard*, 2008 WL 1735295 at *3 (E.D. Mich. Apr. 14, 2008). The Court has ample power to protect

[1] In some non-party depositions, either the government or Blue Cross has sought to question the witness about a confidential document produced by another non-party (*e.g.*, a competitor to Blue Cross). If private plaintiffs have not, prior to the deposition, obtained that non-party's consent to view its confidential information produced in the government's case, private plaintiffs have been excluded from that brief portion of the deposition (Doc. 148 at 4), typically 5-10 minutes, under the protective order in this case (Doc. 36). Private plaintiffs have been seeking non-party consents to view confidential information, largely mooting this issue. In addition, some depositions occurred in the government case before Aetna and Blue Cross had a protective order in their case, and Blue Cross objected to Aetna's participation. (No. 11-cv-15346, Doc. 25 at 6) Although private plaintiffs have not waived any rights to take additional depositions of witnesses already deposed, no plaintiff has yet sought to do so (Doc. 148 at 10-11).

witnesses under Rules 26(b)(2)(C) and 45(c), should the need arise, and does not now need to address, in the abstract, speculative problems.

Blue Cross also proposes a 30-day procedure to force class plaintiffs to "propose to Blue Cross any additional search terms" for review of Blue Cross email in response to the government's *August 2, 2011* document request (Doc. 148 Ex. 1 ¶ 11), even though *Blue Cross* has not yet produced any email in response to government plaintiffs' document request, or said when it expects to begin or complete its production (*see* Motion to Compel, Doc. 112). Class plaintiffs have agreed to government plaintiffs' proposed search terms for the governments' request. When class plaintiffs serve their own document requests, Blue Cross can seek the Court's assistance at that time – on concrete facts rather than speculative concerns.[2] Blue Cross's desired "coordination" will further delay this case. It will expressly delay depositions and impose unnecessary procedures to "resolve" unripe and speculative concerns.

B. <u>The Court Should Authorize Nationwide Service of Trial Subpoenas.</u>

Both Blue Cross and *amici* hospitals oppose the Court's authorizing nationwide service of trial subpoenas. Neither brief cites any authority for denying the process authorized for antitrust enforcement actions by statute, and both admit that they are not aware of any case interpreting "cause" under the statute. (Doc. 148 at 12; Doc. 147-1 at 4) *Amici* invoke the "100 mile rule," Fed. R. Civ. P. 45(b)(2)(B), that applies in civil cases generally. (Doc. 147-1 at 2) Both ignore that 15 U.S.C. § 23's authorization is "an *exception* to [the 100-mile rule] due to the

[2] Blue Cross asks the Court to impose a "procedure for distributing previously-produced documents." (Doc. 148 Ex. 1 ¶ 7) This procedure – which Blue Cross would stretch out over 60 days – would presumably allow the private plaintiffs to obtain non-party consent to receive documents produced to Blue Cross, which private plaintiffs already have largely obtained. *See* 10-cv-14360, Doc. 56 at 5 ("document production issues have been worked out with over 30 third parties" and class plaintiffs).

scope of most antitrust cases." *United States v. Ciba Corp.*, 1973 WL 834 at *2 (D.N.J. June 21, 1973) (emphasis added).

Here, it is undisputed that many witnesses are more than 100 miles from the courthouse, including in the Western District.[3] Other witnesses are out of State. One *amicus*, Marquette General, and other hospitals have used out-of-state consultants to negotiate provider agreements and MFNs with Blue Cross at issue here. Blue Cross's argument boils down to claiming that relevance is not sufficient "cause" (Doc. 148 at 13), which ignores Congress's special authorization of nationwide trial subpoenas in antitrust enforcement actions.[4]

CONCLUSION

For the reasons set forth above and in plaintiffs' opening brief, plaintiffs the United States and the State of Michigan respectfully request that the Court enter, pursuant to Fed. R. Civ. P. 16(b), government plaintiffs' proposed Case-Management Order.

Respectfully submitted,

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[3] *Amici* hospitals may in any event be subject to subpoena under Fed. R. Civ. P. 45(b)(2)(C), which allows statewide service where allowed under state law – as Michigan law allows. M.C.L. Rule 2.506(G)(1).

[4] Both Blue Cross and *amici* acknowledge that the Court can consider a subpoenaed witness's burden on a motion to quash (Doc. 148 at 13; Doc. 147-1 at 5), refuting Blue Cross's assertion that the governments' proposed order would deny witnesses "notice and an opportunity to be heard." (Doc. 148 at 13)

CERTIFICATE OF SERVICE

I hereby certify that on the date listed above, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of the filing to the counsel of record for all parties for civil action 2:10-cv-14155-DPH-MKM, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants.

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Exhibit 1

Not Reported in F.Supp.2d, 2008 WL 1735295 (E.D.Mich.)
(Cite as: 2008 WL 1735295 (E.D.Mich.))

H

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Northern Division.
DOW CHEMICAL COMPANY, Plaintiff,
v.
J. Pedro REINHARD, Romeo Kreinberg, Defendants.
and
J. Pedro Reinhard, Romeo Kreinberg, Counterclaimants,
v.
Dow Chemical Company, Andrew N. Liveris, Counterdefendants.

No. 07-12012-BC.
April 14, 2008.

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ORDER DENYING DOW CHEMICAL AND LIVERIS' MOTION FOR A PROTECTIVE ORDER FOR HIS DEPOSITION

THOMAS L. LUDINGTON, District Judge.

***1** This case arises from the termination of the employment of J. Pedro Reinhard and Romeo Kreinberg from their respective positions as director and/or executive by Dow Chemical Company (Dow Chemical), allegedly at the initiation of Dow Chemical's chief executive officer, Andrew Liveris. On March 5, 2008, Dow Chemical and Liveris filed a motion requesting a protective order as to Liveris' deposition. On March 27, 2008, Reinhard untimely filed a response. On April 1, 2008, Kreinberg untimely filed a response. *See* E.D. Mich. LR 7.1(d)(2)(B) (requiring responses to be filed within 14 days after service of a motion). On April 10, 2008, Dow Chemical and Liveris filed a reply.

In its amended complaint, Dow Chemical recites that the chief executive officer of a major investment bank informed Liveris that Reinhard and Kreinberg were involved in discussions about a potential buyout of Dow Chemical. Dow Chemical states that, the following day, Liveris then communicated this information to its board of directors. The next day, according to Dow Chemical, Liveris met first with Reinhard and then with Kreinberg, both of whom purportedly denied the allegation. As asserted by Dow Chemical, Liveris then sought to confirm the information provided to him. At a meeting later that day and after earlier communications with the board to address the matter, Dow Chemical maintains that Liveris related to the board the fact of the termination of the employment of Reinhard and Kreinberg.

In their respective counterclaims, Reinhard and Kreinberg also allege that Liveris had significant involvement in the termination of their employment, which forms the basis of some of their claims. Reinhard and Kreinberg also assert that Liveris made defamatory statements about them.

The subject of motion practice and a previous order of the Court, Liveris' deposition eventually commenced on February 19, 2008. Dow Chemical

and Liveris now alert the Court to several concerns regarding the circumstances of his deposition. First, they note that opposing counsel refused to start the deposition at 8 a.m., rather than 9 a.m. as previously noticed. Second, they object that only Reinhard's counsel questioned Liveris, and they infer that Kreinberg's counsel had no intent to examine Liveris at that time. Third, Dow Chemical and Liveris assert that Reinhard's counsel spent time addressing purportedly irrelevant lines of inquiry, such as the bylaws governing the advancement of litigation expenses to directors and officers, a matter subject to litigation before another court, which is apparently proceeding in Delaware. Fourth, they claim that Reinhard and Kreinberg terminated the deposition early. FN1 Fifth, they assert that the questioning, in which counsel for Kreinberg did not participate, treated Liveris "unfairly." In their reply, they add that the same information can be or has been secured through other witnesses, thus implying that testimony from Dow Chemical's CEO would be redundant and an unnecessary use of his time. For these reasons, Dow Chemical and Liveris request that Reinhard and Kreinberg be afforded no further time to depose Liveris, beyond the seven hours already permitted under Federal Rule of Civil Procedure 30(d)(1). Alternatively, Dow Chemical and Liveris request that, if any additional time to depose Liveris is granted, that it be limited to an hour of questions specific to Kreinberg.

> FN1. In support of this assertion, Dow Chemical and Liveris refer to an exhibit identified as a "transcription of a tape recording," which is separate from the transcript of the deposition of Liveris and transcribed by a different person than the reporter at the deposition. In this transcription, Dow Chemical and Liveris' lead counsel disputes with junior counsel for Reinhard whether their discussion is on the record. *See* Dow Chemical and Liveris Mot., Ex. 15 [dkt # 157].

***2** Reinhard responds that he sought to accommodate the request to advance the time for starting the deposition but could not, given the limited time between the request and the scheduled deposition. He also claims that Liveris' counsel filled the deposition with repeated and lengthy speaking objections. According to Reinhard, the parties continued to discuss the continuation of Liveris' deposition, where Reinhard's counsel allegedly had not concluded his examination, both at the deposition and at subsequent times, such as during a hearing on a separate matter. Reinhard concludes that the centrality of Liveris to the claims at issue warrants extending his deposition beyond seven hours, as does the delay during the deposition, purportedly caused by Liveris' counsel.

Kreinberg responds that he advised Liveris' counsel, weeks ahead of the deposition date, of the need for an additional separate day to depose Liveris, given the expectation that Reinhard's counsel would require a day for his examination. According to Kreinberg, around the mid-point of the deposition, Liveris' counsel began asserting an intention to end the deposition at precisely seven hours. The deposition concluded at 5 p.m., after the court reporter departed. Kreinberg contends that Dow Chemical and Liveris have not shown good cause for entry of a protective order under Federal Rule of Civil Procedure 26(c) and that Federal Rule of Civil Procedure 30(d)(1) requires that additional time be permitted to depose Liveris further. Kreinberg requests that Liveris, whose conduct is at the center of the parties' claims, be compelled to be available for deposition for at least another full day. Additionally, Kreinberg seeks sanctions for the necessity of responding to a motion brought without factual basis and without meaningful effort at concurrence.

The Court has reviewed the parties' submissions and finds that the facts and the law have been sufficiently set forth in the motion papers. The Court concludes that oral argument will not aid in the disposition of the motion. Accordingly, it is **ORDERED** that the motion be decided on the pa-

pers submitted. *Compare* E.D. Mich. LR 7.1(e)(2).

Federal Rule of Civil Procedure 30(d), in relevant part, provides:

> (1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.
>
> (2) *Sanction.* The court may impose an appropriate sanction-including the reasonable expenses and attorney's fees incurred by any party-on a person who impedes, delays, or frustrates the fair examination of the deponent.

The Advisory Committee Note to the 2000 Amendments further develops the circumstances that inform on the application of the rule:

> [The above rule] imposes a presumptive durational limitation of one day of seven hours for any deposition.... This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition.... The presumptive duration may be extended, or otherwise altered, by agreement. Absent agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.
>
> ***3** ... [C]ourts asked to order an extension [of time for a deposition] might consider a variety of factors.... In multi-party cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest. Similarly, should the lawyer for the witness want to examine the witness, that may require additional time....
>
> It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need for resort to the court.... It is also assumed that there will be reasonable breaks during the day. Preoccupation with timing is to be avoided.
>
> The rule directs the court to allow additional time where consistent with Rule 26(b)(2) if needed for a fair examination of the deponent. In addition, if the deponent or another person impedes or delays the examination, the court must authorize extra time....

Federal Rule of Civil Procedure 26(c)(1), in relevant part, provides:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending.... The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense....

"The burden of establishing good cause for a protective order rests with the movant." *Nix v. Sword*, 11 Fed. Appx. 498, 500 (6th Cir.2001) (citation omitted); *see also* 6 Moore's Federal Practice 3d § 26.104[1] (2006). The movant must state specific facts and identify a clearly defined and serious injury that follows from the discovery sought, rather than relying on conclusory statements. *Nix*, 11 Fed. Appx. at 500 (citation omitted). District courts have "broad discretion" in determining whether to grant or deny motions for protective orders, albeit always limited by the dictates of the rule. *Lewis v. St. Luke's Hosp. Ass'n*, 1997 U.S.App. LEXIS 34854, *8 (6th Cir.1991) (citation omitted).

Notwithstanding the unusual procedural posture of a party seeking a protective order in anticip-

ation of a deposition running in excess of seven hours, rather than a party seeking a stipulation or a court order to extend a deposition beyond seven hours, the governing rule here is Federal Rule of Civil Procedure 30(d)(1). Although the rule generally limits a deposition to a single day of seven hours, on its face, the rule provides for extensions beyond that presumptive limitation. Indeed, "[t]he court *must allow additional time* ... if needed to fairly examine the deponent ...." Thus, the Court has an obligation to permit additional time, if the circumstances require that a fair examination of the deponent run longer. When making this assessment, the Advisory Committee to the 2000 Amendments noted that a court should consider such factors as whether each party has had an opportunity to examine a deponent in a multi-party case and whether the deponent's lawyer also wishes to examine the deponent.

***4** The Court will confine its analysis to the time needed to fairly examine Liveris. The Court will not, at this juncture, delve into the question of whether all counsel present, or even the deponent himself, impeded or delayed the examination in a manner that might warrant sanction under Federal Rule of Civil Procedure 30(d)(2). The parties' competing descriptions of Liveris' deposition and the events surrounding it make necessary this focus on the need for a fair examination of the deponent, rather than on delay to the examination, because the characterization and occurrence of relevant events seem to be disputed. Even the most mundane matters (such as the logistical viability of rescheduling a deposition from 9 a.m. to 8:30 a.m. or 8:00 a.m. or the proximity of the number 769 to the number 800) appear to generate competing accusations which the parties now address to the Court.

Based on Dow Chemical's own amended complaint, Liveris had a central role in the events giving rise to its claims. For instance, according to Dow Chemical's pleadings, he communicated with the investment bank's CEO about Reinhard's and Kreinberg's purported involvement in the potential sale of the company. Moreover, he allegedly communicated that information to his board of directors, and he purportedly addressed these concerns with Reinhard and Kreinberg at morning meetings, and he participated in the decision to end their employment. Additionally, Reinhard and Kreinberg each advance their own claims that Liveris made defamatory statements about them. Beyond the centrality of Liveris as a witness to the matters at issue, a review of his deposition on February 19, 2008 reveals that counsel for Reinhard had not completed his deposition, that counsel for Kreinberg had not examined Liveris, and that his own counsel (and counsel for Dow Chemical) had not had an opportunity to examine him. In light of the allegedly significant participation of Liveris in the events at issue, the Court concludes that a fair examination of him requires additional time. This case involves multiple parties, and Liveris' own counsel apparently would like to depose him as well, given his counsel's efforts to ensure that some portion of the seven hours available on February 19, 2008 would be available for that purpose.

In their motion, as well as through counsel during the deposition, Dow Chemical and Liveris suggest that any motion for an extension of time on a deposition must precede the commencement of the deposition. Dow Chemical and Liveris, however, offer no authority for the proposition that a party cannot, having failed to secure a stipulation from the opposing party to extend the time for deposition, seek a court order after a deposition commences. Indeed, Federal Rule of Civil Procedure 30(d)(3) contemplates a circumstance under which a party may seek relief through a court order based on conduct that occurs during a deposition. That is, the rule itself includes a provision that contradicts the presumption that a request for additional time for a deposition must necessarily precede the commencement of the deposition. *See also Malec v. Trustees of Boston College*, 208 F.R.D. 23 (D.Mass.2002) (describing as "the better practice" for a deposition to go forward and then determine through good faith effort to stipulate, if needed,

what additional time is required).

***5** Consequently, the Court is not persuaded that additional time to depose a central witness will result in "annoyance, embarrassment, oppression, or undue burden or expense," sufficient to establish good cause to issue a protective order as to Liveris' continued deposition. In light of the relief requested in Reinhard's and Kreinberg's responses, the Court will direct that Liveris' deposition may continue for an additional single day of seven hours.

Accordingly, it is **ORDERED** that Dow Chemical and Liveris' motion for a protective order as to Liveris' deposition [dkt # 157] is **DENIED.** Liveris' deposition may continue for an additional single day of seven hours.

E.D.Mich.,2008.
Dow Chemical Co. v. Reinhard
Not Reported in F.Supp.2d, 2008 WL 1735295 (E.D.Mich.)

END OF DOCUMENT

Not Reported in F.Supp., 1973 WL 834 (D.N.J.), 1973-2 Trade Cases P 74,603
(Cite as: 1973 WL 834 (D.N.J.))

C

United States District Court; D. New Jersey.
United States
v.
Ciba Corp.

Civil Action No. 791-69
791-69Civil Action No. 792-69
792-69Filed May 16, 1973
Amendments filed May 31, 1973
June 21, 1973

WHIPPLE, D. J.

Opinion

***1** This is an action by the United States against Ciba Corporation for alleged violations of Section I of the Sherman Act, 15 U. S. C. § 1. The Court has before it the motions of six non-party drug companies to quash or modify subpoenae directed to each of them requiring the production of a representative in Newark who would testify to, *inter alia*, certain cost-price information. The companies involved are Abbott Laboratories, Eli Lilly & Co., Johnson & Johnson, Merck & Co., Inc., Smith, Kline & French Laboratories and Warner-Lambert Co.

I. *Jurisdiction*

Before treating the contentions which are common to all of the movants, the Court will consider the argument of Abbott Laboratories that jurisdiction to issue the subpoenae to parties outside certain territorial limits was lacking. In its original application for the subpoenae, the government asserted that this Court possessed jurisdiction pursuant to Section 13 of the Clayton Act, 15 U. S. C. § 32, and/or Section 5 of the Sherman Act, 15 U. S. C. § 5. Section 13 of the Clayton Act provides as follows:

In any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: Provided, that in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

Section 5 of the Sherman Act provides:

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

It is the position of the government that either or both of these sections creates an exception to the territorial limits set forth in *Fed. R. Civ. P.* 45(a) which provides that subpoenae for depositions must issue out of the district court in which the deposition is to be taken. *Fed. R. Civ. P.* 45(d) (2) states:

A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

Abbott asserts that, since Rule 45(d)(2) mandates that it can only be deposed in Illinois, plaintiff should be required to go to the proper district in Illinois and seek issuance of the subpoena.

***2** With the issue thusly framed, this Court must decide whether the movant can be required to

travel to this jurisdiction and be deposed *before* it can decide whether it had jurisdiction to issue the subpoena in the first place. Stated differently, the issue presently before the Court is whether New Jersey is "the jurisdiction in which the deposition is to be taken" under *Fed. R. Civ. P.* 45(a). The sole rationale under which New Jersey could be considered the proper jurisdiction is that § 5 of the Sherman Act and/or § 13 of the Clayton Act create the previously mentioned exception to *Fed. R. Civ. P.* 45(d)(2).

The case of *United States v. General Motors Corp.* [1960 TRADE CASES P 69,66 5], 183 F. Supp. 858 (S. D. N. Y. 1960) has been cited by both sides as supportive of their respective positions. That case involved a motion by the defendant to transfer an action pursuant to 28 U. S. C. § 1404(a). In granting the motion for a change of venue the court examined several of the pertinent considerations and alluded to the fact that trial witnesses in an antitrust case are subject to subpoena under Section 13 of the Clayton Act wherever they reside and thus are not protected from subpoena by the territorial delimitations in *Fed. R. Civ. P.* 45(e). Counsel for Abbott correctly argues, however, that *General Motors* is inapplicable herein because the statement therein relates to subpoena for *trial* witnesses pursuant to Rule 45(e) rather than subpoenae for deponents under Rule 45(d).

It is clear that Section 13 of the Clayton Act was passed as an exception to Rule 45(e) due to the scope of most antitrust cases. If such a broad subpoena power did not exist there would often be no suitable venue for the trial of an antitrust case. This Court, however, sees no correlative need for engrafting a similar exception to Rule 45(d). That Rule possesses no infirmity peculiar to antitrust cases and therefore should be respected.

In view of the foregoing, then, this Court holds that the subpoena directed to the out-of-district drug companies are in contravention of the Federal Rules and void for lack of jurisdiction. This ruling applies to Abbott Laboratories; Smith, Kline & French Laboratories; and Eli Lilly & Co. For the record, the motions of these companies to quash are granted. Respective counsel for these companies shall prepare and submit appropriate Orders in conformity herewith.

Necessity of the Information

The government initially argues that the present movants lack standing to object to the present subpoenae on the grounds of relevancy and/or materiality. In support of this argument, the government cites *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E. D. Pa. 1968). Therein the court stated that non-parties had no standing to object on the aforementioned grounds because non-parties have no interest in the outcome of the suit.

The *Cooney* court, however, did recognize the principle that the party seeking the discovery must illustrate the need for it. *Hartley Pen Co. v. United States District Court*, 287 F. 2d 324, 331 (9th Cir. 1961); *Corbett v. Free Press Association, Inc.*, 50 F. R. D. 179, 181 (D. Vt. 1970). This principle renders any question as to the standing of the movants academic since the government could not possibly show a need for irrelevant information. This is not to say that the concept of relevancy is synonymous with need, but only that a showing of need necessarily includes an illustration of relevancy. Thus, the issues of relevancy and materiality are crucial to the determination of this motion, and whether this Court considers them as raised directly by the movants or only in opposition to the government's showing of need is of relatively little moment.

***3** As supportive of its need for the information, the government cites *Estate of Le Baron v. Rohm & Haas Company* [1971 TRADE CASES P 73,493], 441 F. 2d 575 (9th Cir. 1971). In that case it was held that, in a private treble damage action for price-fixing based on § 4 of the Clayton Act and § 1 of the Sherman Act, the profit margins of the defendant were discoverable by the plaintiff. The case is distinguishable from the present one,

however, in two important respects: (1) The instant action is not based on a price-fixing conspiracy and (2) The requested discovery is not from a party.

The complaint herein charges a violation of § 1 of the Sherman Act in that the defendant licensed certain other drug companies to deal in a particular product and through those licensing agreements restricted, inter alia, resale. It is true that § 1 of the Sherman Act forbids "contracts, combinations and conspiracies", but it is also clear that the present case is not a price-fixing conspiracy case as was *Le Baron.*

Furthermore, the discovery in *Le Baron* was sought of a party in the action and the case cannot, therefore, be viewed as countervailing authority to the admonitions contained in *Hartley* and *Corbett, supra,* against requiring information of a confidential nature from a non-party.

The plaintiff also asserts that three prior decisions (one of which was in the present case) of this Court, also support its argument that the cost and profit information requested of these parties is discoverable. The opinions involved were in this action (*United States v. Ciba* [1972 TRADE CASES P 74,026], Civil Action Nos. 791-69 and 792-69 (D. N. J. filed Sept. 24, 1971)), *Carter-Wallace v. Zenith Laboratories, Inc.,* Civil Action No. 728-68 (D. N. J. filed 1968) and *United States v. Sterling Drugs, Inc.,* Civil Action No. 175-69 (D. N. J. filed Oct. 31, 1969). This Court has reviewed its decisions in these cases and finds that, although they all held cost-profit information was in fact discoverable, none of them compelled said information from one not a party to the case. Thus viewed, these cases are no more supportive of the plaintive's position than *Le Baron.*

[*Protection of Non-parties*]

The general lesson taught by the cases is that non-parties are entitled to a greater degree of protection than are parties. The government, when seeking discovery from a non-party, must illustrate a relatively greater need. The argument of the government that the requested information is necessary to show the motivation and intent of these non-party companies is inconsistent with the gravamen of the complaint. The need which the government has illustrated at this juncture, then, is deemed insufficient to compel the requested information. Therefore, the subpoenas directed to Johnson & Johnson; Merck & Co., Inc., and Warner-Lambert Co. shall be modified to the extent that all requests therein relating to information concerning costs, manufacturing costs, prices or profit shall be stricken. Orders in conformity with this Opinion shall be prepared and submitted by respective counsel.

D.N.J. 1973.
U.S. v. Ciba Corp.
Not Reported in F.Supp., 1973 WL 834 (D.N.J.), 1973-2 Trade Cases P 74,603

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