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, a Michigan nonprofit healthcare corporation, Defendant.	Civil Action No.2:10-cv-1455-DPH-MKM Hon. Denise Page Hood Mag. Judge Mona K. Majzoub

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF DOCUMENTS

TABLE OF AUTHORITIES

Cases

American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 2217 n.10 (2010)….. 2

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After much ado about the roads to Rome, Defendant Blue Cross Blue Shield of Michigan ultimately acknowledges that "the only question for the Court is whether Blue Cross's objections [to Plaintiffs' document request] are meritorious." ("BC Resp.," Dkt. 43 at 4).[1] They are not.

First, Blue Cross concedes that Plaintiffs' pending request is not burdensome, because it seeks primarily the production of documents that Blue Cross has already gathered. (BC Resp. at 9). Thus, the principal justification Blue Cross advanced in support of its motion for a stay of discovery simply does not apply to the pending document request; the Government's interest in the prompt adjudication of antitrust enforcement actions clearly outweighs any *de minimis* burden arising from producing materials previously prepared for production.

Nor can the pendency of that stay motion suffice as a justification for refusing to comply with Plaintiffs' valid, non-burdensome discovery request. Blue Cross offers no authority to support its own position that filing a motion to stay allows it to avoid producing documents responsive to a valid discovery request. Instead it attempts to distinguish the case law Plaintiffs rely on in support of this motion to compel. Although two of the cases Plaintiffs cite -- *Omega Patents* and *Tinsley* -- are from districts that have local rules stating that motions to stay are not self-executing, the point stands equally in jurisdictions where there is no local rule, as those courts recognized. (Dkt. 38 at 5). Blue Cross asserts that the other cases cited by Plaintiffs contain "profound difference[s]" with the present facts (BC Resp. at 8), but never explains why those differences are of any significance.

[1] Blue Cross devotes most of the first four pages of its Response to contesting what it calls Plaintiffs' "implicit argument" that Blue Cross "ignored" Plaintiffs' discovery request. (BC Resp. at 3). In fact, Plaintiffs' *explicitly* argued that Blue Cross's complete refusal *to produce* any responsive documents, simply based on its objection that it had sought but not received a stay of discovery, was improper. (Dkt. 38 at 5 (contesting Blue Cross's "refusal to *comply*" with Plaintiffs' discovery request)).

Second, Plaintiffs' motion to compel the production of documents from 2004 and 2005 is properly before the Court. The parties met and conferred over a nine-day period. Plaintiffs offered a compromise, which Blue Cross rejected. (Dkt. 38 at 2-3). In its brief Blue Cross continues to oppose producing these documents. Apparently, Blue Cross believes that it is the *only* party entitled to declare an impasse, and that by declining to do so it can prevent a motion to compel from being filed. But one party's "position that it can indefinitely delay consideration of a motion to compel by insisting that no impasse has been reached is simply ridiculous." *Philadelphia Nat. Bank v. Dow Chem. Co.*, 106 F.R.D. 342, 344 (E.D. Pa. 1984). Moreover, Blue Cross has made no effort to contact Plaintiffs to seek the "clarification as to intent" it claims is required to resolve the current impasse.

In any event, the issue is crystal clear: Courts routinely grant discovery of materials generated outside the time period set forth in the Complaint.

Contrary to Blue Cross's assertion, its intent and purpose in adopting the challenged MFNs is a relevant subject for discovery. *See* Fed. R. Civ. P. 26(b)(1) (discovery need only be "reasonably calculated to lead to the discovery of admissible evidence). The Supreme Court recently reaffirmed the longstanding principle that a party's intent in adopting a restraint is relevant "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201, 2217 n.10 (2010); *see also Chiropractic Co-Ass'n of Michigan v. American Medical Ass'n*, 867 F.2d 270, 277 (6th Cir. 1989) ("intent" is a factor under the Rule of Reason "to be considered in determining the ultimate issue of whether the restraint imposed . . . may suppress or even destroy competition"). Moreover, Blue Cross has placed its own intent at issue by contending that it

sought MFNs in order to "ensure that it is obtaining the best possible prices from hospitals." (Dkt. 12 at 1). Blue Cross's refusal to produce documents from 2004 and 2005 would deny Plaintiffs the opportunity to test the validity of that assertion.

Further, as Plaintiffs' motion to compel discusses (Dkt. 38 at 6-9), because Blue Cross was seeking MFN-plus agreements as early as 2004, documents from that period are relevant to showing what Blue Cross believed to be the likely effect of such clauses. As Plaintiffs explained in their initial brief, documents from 2004 and 2005 are also relevant to show the bargaining history, design and planning of the MFN clauses. (Dkt. 38 at 8).

The Court should compel Blue Cross to produce documents responsive to Plaintiffs' First Request for Documents.

Respectfully Submitted,

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April 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2011, 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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