

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

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UNITED STATES OF AMERICA and the )  
STATE OF MICHIGAN, )  
) )  
Plaintiffs, )  
v. )  
) )  
BLUE CROSS BLUE SHIELD OF )  
MICHIGAN, a Michigan nonprofit )  
healthcare corporation, )  
) )  
Defendant. )

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Civil Action No. 2:10-cv-1455-DPH-MKM  
Hon. Denise Page Hood  
Mag. Judge Mona K. Majzoub

**PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS  
RESPONSIVE TO PLAINTIFFS' FIRST REQUEST FOR DOCUMENTS**

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**PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS  
RESPONSIVE TO PLAINTIFFS' FIRST REQUEST FOR DOCUMENTS**

Plaintiffs United States and the State of Michigan respectfully, by their undersigned counsel of record, submit this motion, pursuant to Rule 37(a)(3)(B)(iv) of the Federal Rules of Civil Procedure, to compel Defendant Blue Cross Blue Shield of Michigan to produce documents responsive to Plaintiffs' First Request for the Production of Documents.

For the reasons set forth below, this Court should grant Plaintiffs' motion to compel and reject Blue Cross's contentions that (1) motions to stay discovery are self-executing; and (2) that it need not produce documents from 2004 and 2005, claiming irrelevance.

As required by Local Rule 7.1, attorneys for Plaintiffs have conferred in good faith with attorneys for the Defendant regarding the nature of this Motion and its legal basis and attempted to narrow the scope of the issues before this Court. After the meet and confer, counsel for the Defendant wrote that this motion "will never be considered." Defendant did not concur with the motion and Plaintiffs' attempt to narrow the relevant issues proved unavailing. Plaintiffs now seek the Court's consideration of this motion to help narrow the issues and expedite discovery in this case.

IN THE UNITED STATES DISTRICT COURT  
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BLUE CROSS BLUE SHIELD OF )	Mag. Judge Mona K. Majzoub
MICHIGAN, a Michigan nonprofit )	
healthcare corporation, )	
)	
) Defendant. )	
_____ )	

**BRIEF IN SUPPORT OF PLAINTIFFS’ MOTION TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO PLAINTIFFS’ FIRST REQUEST FOR DOCUMENTS**

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**STATEMENT OF ISSUES**

- 1) Whether a party may refuse to comply with a discovery request solely because it has a filed a motion to stay discovery, when the court has not granted the motion?
  
- 2) Whether in an antitrust suit alleging an illegal restraint of trade, a discovery request seeking documents relating to the development of the restraint of trade and that are potential evidence of anticompetitive intent, purpose, or market conditions then existing, are relevant or likely to lead to the discovery of relevant evidence?

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### **Introduction**

Pursuant to Rule 37(a)(3)(B)(iv) of the Federal Rules of Civil Procedure, Plaintiffs United States and the State of Michigan move to compel Defendant Blue Cross Blue Shield of Michigan to produce documents responsive to Plaintiffs' First Request for the Production of Documents served on February 4, 2011 under Rule 34.

Blue Cross has sought to stay discovery pending a resolution of its motion to dismiss primarily because it contended the burden of discovery in this case will be "enormous." Those concerns are not implicated by Plaintiffs' pending narrow document request, which seeks documents that Blue Cross represented that it had already gathered and sent for processing during Plaintiffs' investigation but did not produce, and a limited number of other easy-to-gather materials. Indeed, Blue Cross itself had endorsed such an approach, believing it would allow for later discovery to proceed "more efficiently."

Recognizing that it lacks a valid objection to Plaintiffs' pending narrow document request on burden grounds, Blue Cross has instead refused to fulfill its obligation under the Federal Rules to produce documents primarily on two insufficient grounds. First, it contends that it should not have to provide discovery while its motion to stay discovery is pending. This position is unjustified. Stays of discovery may not be self-imposed. The Federal Rules require parties to respond to proper discovery requests unless and until a court rules differently.

Second, Blue Cross also contends that Plaintiffs are not entitled to otherwise relevant documents from 2004 and 2005 relating to Blue Cross's development of its MFN provisions because those years antedate the allegations set forth in Plaintiffs' complaint. This argument is also unjustified. Courts have repeatedly recognized that in antitrust suits it is often necessary to look beyond the temporal scope of the complaint to develop evidence of the defendant's intent in

establishing the restraint in question. Moreover, Blue Cross has already produced selected highly probative documents from the time period in question that establish that Blue Cross was designing and negotiating anti-competitive MFN clauses beginning in at least 2004.

### **Background**

Plaintiffs sued Blue Cross on October 18, 2010, alleging that its most-favored nation provisions in contracts with Michigan hospitals have anticompetitive effects in health insurance markets throughout the State of Michigan. After receiving Plaintiffs' consent to a forty-day extension to respond to the Complaint, Blue Cross moved to dismiss the complaint on four grounds. [Dkt No.12]. More than a month later, Blue Cross filed a motion to stay discovery, pending a ruling on its motion to dismiss, even though it recognized that conducting limited discovery while its motion to dismiss was pending would enable additional discovery to proceed "more efficiently." [Dkt. No. 20 at 17]. Blue Cross's stay motion was filed prematurely before any discovery request was outstanding. Both motions have been fully briefed, and a hearing on both motions is scheduled for April 19, 2011. [Dkt No.29]. No stay of discovery has been granted.

On February 4, 2011, Plaintiffs served Blue Cross with a narrow document request (Ex. 1). The request was limited to documents that Blue Cross had already begun gathering and preparing for production pursuant to a Civil Investigative Demand issued on April 13, 2010, during Plaintiffs' pre-Complaint investigation, and other easy-to-gather documents. The parties have had multiple communications regarding Plaintiffs' initial discovery, and at no time, including in its motion to stay brief, which was filed before the discovery requests were served, has Blue Cross described any burden associated with producing the documents requested.



On February 25, 2011, after briefing on the stay motion had been completed, Blue Cross stated that it remained open to both parties conducting limited discovery before the motion to dismiss was decided. Letter from Todd Stenerson to Barry Joyce (2/25/11) (Ex. 2). Plaintiffs responded the next business day, stating the same willingness to continue with limited discovery and inviting Blue Cross to offer a specific proposal to advance discussions. Letter from Barry Joyce to Todd Stenerson (2/28/11) (Ex. 3).

Instead of making such a proposal, on Friday, March 4 (the business day before Blue Cross's document production was due), in response to Plaintiffs' pending document request, Blue Cross again reversed course and stated flatly that it "did not intend to produce the requested documents until Judge Hood has ruled on [its] pending [stay] motion." (Ex. 4).

Blue Cross formally raised as a general objection the same point in its March 7 formal objections to Plaintiffs' document request. In addition, it also objected and refused to produce documents from 2004 and 2005 claiming "that no allegation in the Complaint relates to any conduct prior to 2007." (Ex. 5 at 4). Blue Cross stated that, after its stay motion is resolved, it would produce documents dating back to 2006 for completeness, but would go no further. *Id.*

The next day, March 8, Plaintiffs initiated a meet and confer in hopes of avoiding the need to bring this issue before the Court. At the meet and confer's conclusion, counsel for Blue Cross asked Plaintiffs for legal authority that supported Plaintiffs' position in order to decide whether it intended to continue with its objections. Plaintiffs responded with appropriate authority in fifteen minutes. Blue Cross's counsel then did not offer any response, of any kind, for three days.

Finally, on March 11, counsel for Blue Cross responded by letter. (Ex. 6). Blue Cross's position was largely unchanged. Blue Cross remained unwilling to respond to any discovery

request until the court ruled on its motion to stay -- citing no authority that supported such a stance -- and stated that it would be willing to produce 2004 and 2005 documents responsive to only one of Plaintiffs' documentary requests, and then only upon Plaintiffs' agreement that they would not cite this production against Blue Cross should future discovery disputes arise. Once again, Plaintiffs promptly responded that same day, March 11, agreeing to not cite Blue Cross's withdrawal of its relevance objection against it in future disputes, provided that Plaintiffs be allowed to use information obtained from the request in support of any further discovery from 2004 and 2005. (Ex. 7). Blue Cross took three more business days to send its response, rejecting Plaintiffs' offer of compromise, holding firm in its positions, and still offering no authority to support those positions. (Ex. 8).

**I. Blue Cross lacks a legal basis for refusing to comply with Plaintiffs' Document Request**

Merely filing a motion to stay does not alter Blue Cross's responsibilities under the Federal Rules. "Until an order granting the motion is entered, discovery is not stayed, and a party cannot simply ignore valid discovery requests on the ground that [its] motion to stay [discovery] might be granted." *Polzin v. Unifund CCR Partners*, No. 08-CV-59, 2009 WL 2474668, at \*4 (E.D. Wis. Aug. 11, 2009).<sup>1</sup> Motions to stay discovery "are not self-executing."

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<sup>1</sup> See also *Willemijn Houdstermaatschaapij, B.V. v. Apollo Computer Inc.*, 707 F. Supp. 1429, 1441 (D. Del. 1989) ("unless and until [a party] is granted a stay, [that party] should be required to conduct discovery as if no motion had been filed at all"); *In re Toys R Us-Delaware, Inc. Fair and Accurate Credit Transactions Act*, 2010 WL 4942645 (C.D. Cal. July 29, 2010). The same rule applies to other types of discovery. See, e.g., *Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979) (filing motion for protective order does not relieve party's "duty to appear for [] deposition"); *Kelly v. Old Dominion Freight Line, Inc.*, 376 Fed. Appx. 909, 913 (11th Cir. 2010) (same).

*Omega Patents, LLC v. Fortin Auto Radio, Inc.*, 2006 WL 2038534, at \*3 (M.D. Fla. July 19, 2006).

Nonetheless, Blue Cross contends that it is free to ignore Plaintiffs' valid discovery requests until its stay motion is decided. In the interim, Blue Cross has effectively granted its own motion. But the Federal Rules make no such allowance. *Omega Patents*, 2006 WL 2038534, at \*3 ("nowhere in the rules" is there support for a party unilaterally refusing to comply with a discovery request merely because it has filed a motion to stay discovery); *Tinsley v. Kemp*, 750 F. Supp. 1001, 1013 (W.D. Mo. 1990) (party's refusal to comply with discovery merely because a stay motion was pending "would reduce a court's orders to useless and senseless formalities"). Indeed, the Rules mandate responses to proper discovery requests absent a court ordering otherwise. *See* Fed. R. Civ. P. 34(b)(2)(A); Fed. R. Civ. P. 37 Advisory Committee's Note (relief from discovery requests "depends on obtaining a court order to that effect").

Blue Cross's blanket refusal to comply with Plaintiffs' discovery request, (Ex. 4), cites no authority for its contrary position, nor did Blue Cross offer any in the meet-and-confer discussion or in follow-up communications. Indeed, following the meet-and-confer, counsel for Defendant wrote Plaintiffs that Plaintiffs should not file this motion simply because it will "never be considered." (Ex. 6 at 2). This statement suggests that Defendant knows its position lacks any legal basis and it is refusing to comply only in the hope that this Court will never reach the merits of this motion. Defendant's strategy should not be rewarded. This Court should grant Plaintiffs' motion to compel, and Blue Cross "must fully comply with the discovery request previously propounded by plaintiff[s]." *Polzin*, at \*4.

**II. Plaintiffs are Entitled to Blue Cross Documents from 2004 and 2005 because they are relevant and likely to lead to Admissible Evidence**

Blue Cross has objected to four of seven Plaintiffs' document requests and Instruction No. 1 in Plaintiffs' First Request for the Production of Documents to the extent that such documents seek information from 2004 and 2005, incorrectly contending that documents from those years are irrelevant and unlikely to lead to admissible information. (Ex. 5 at 3-5, 7, 8).<sup>2</sup> This objection is baseless. Courts have regularly held that the temporal scope of discovery in an antitrust suit is not so limited. Plaintiffs are entitled to responsive documents dating back to 2004 because such documents may be highly probative of Blue Cross's intent and strategy in entering into anti-competitive MFN clauses.

Plaintiffs have brought an antitrust claim under Section 1 of the Sherman Act that is evaluated under the Rule of Reason. *See United States v. Delta Dental of Rhode Island*, 943 F. Supp. 172, 174 (D. R.I. 1996). To apply the Rule to a challenged restraint, a court must consider factors including "the condition [of the relevant market] *before and after* the restraint is imposed . . . the history of the restraint . . . the reason for adopting [the restraint and] the purpose or end sought to be attained." *American Needle, Inc. v. National Football League*, --- U.S. ----, 130 S. Ct. 2201, 2217 n.10 (2010) (quoting *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918)) (emphasis added). In light of these factors, courts have recognized repeatedly that an antitrust "plaintiff is ordinarily permitted to discover defendant's activities for a reasonable

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<sup>2</sup> Defendant also objects to Document Requests 1 and 2 because "commencement of litigation renders the [pre-complaint Civil Investigative Demand ("CID") issued by Plaintiffs to Defendant] no longer valid." (Ex. 5 at 4-5). This statement is irrelevant. Plaintiffs are not seeking to enforce the CID. Instead, Plaintiffs have issued a valid document request pursuant to Rule 34 of the Federal Rules of Civil Procedure seeking documents that were requested and gathered pursuant to the CID, *but were not produced*. Here, the CID serves as a point of reference in describing specific documents requested, not as an independent legal obligation.

period of time antedating the earliest possible date of the actionable wrong.” *Arvco Container Corp. v. Weyerhaeuser Co.*, 2009 WL 311125, at \*4 (W.D. Mich. Feb. 9, 2009).<sup>3</sup>

Plaintiffs’ request, which seeks documents dating back to 2004, is a reasonable one and is aimed at discovering facts that are clearly relevant under the applicable legal standard.

Documents that shed light on the history of Blue Cross’s development and use of MFNs, its strategy in seeking them, and the competitive environment before they were entered into are all relevant under a Rule of Reason inquiry. Further, the time period in question is particularly reasonable in light of a limited number of documents from 2004 and 2005 already produced during the pre-complaint investigation by Blue Cross showing the development and discussion of its MFN clauses.

Blue Cross does not contend that any undue burden is associated with producing documents from 2004 and 2005.<sup>4</sup> Its objection is limited solely to the incorrect assertion that “no allegation in the Complaint relates to any conduct prior to 2007.” (Ex. 5 at 4) But not only is this assertion without legal import, it is also factually incorrect. Plaintiffs have attached two documentary examples that show Blue Cross was formulating and negotiating MFN clauses in 2004. [REDACTED]

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<sup>3</sup> See also, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 709-10 (1962) (history of development of conspiracy admissible at trial); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 75-76 (1910) (considering evidence dating back prior to passage of Sherman Act to determine whether there was anticompetitive intent); *Kellem Energy, Inc. v. Duncan*, 616 F. Supp. 215, 217-19 (D.Del.1985) (temporal scope of discovery “broad” where “needed to uncover evidence of invidious design, pattern or intent”).

<sup>4</sup> For the first time, in its March 11th letter, Blue Cross contends that “widespread” discovery from 2004 and 2005 would constitute an undue burden. Though “widespread” discovery for these years may be burdensome, there is no claim that the outstanding document request is burdensome. Blue Cross did object that a response to Specification #4 of Plaintiffs’ Request would constitute an undue burden. However, it did so in light of its assertion that the documents requested had already been produced. (Ex. 5 at 6). Thus, Plaintiffs are not seeking to compel a further response to that Specification.

[REDACTED]

From these two documents alone, it is clear that Blue Cross was both formulating and planning to negotiate MFN clauses at least as early as 2004. This bargaining history between Blue Cross and Michigan hospitals is clearly relevant to show how the MFN clauses Plaintiffs are challenging were developed. *Robertson v. National Basketball Ass’n*, 67 F.R.D. 691, 700 (S.D.N.Y. 1975) (“history of bargaining” before restraints in question were entered into relevant to question of how restraints “came into being”). Indeed, in light of case law establishing that the temporal scope of discovery can stretch backward far beyond the earliest possible date of alleged anti-competitive conduct, Plaintiffs would be justified in requesting documents going back well before 2004. *See, e.g., Quonset Real Estate Corp. v. Paramount Film Distr. Corp.*, 50

F.R.D. 240, 241-42 (S.D.N.Y. 1970) (allowing discovery for a period of ten years before commencement of illegal conduct). Judged against such far-ranging permitted discovery, the temporal scope of Plaintiffs' discovery here is demonstrably relevant and reasonable.

**Conclusion**

For the reasons stated above, Plaintiffs ask the Court to compel Blue Cross to produce documents responsive to Plaintiffs' First Request for Documents.

Respectfully Submitted,

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March 17, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on March 17, 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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healthcare corporation,	)	
	)	
Defendant.	)	
	)	

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COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO PLAINTIFFS’ FIRST  
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**EXHIBIT 1**

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

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UNITED STATES OF AMERICA and the	)	)	
STATE OF MICHIGAN,	)	)	
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OF MICHIGAN,	)	)	
	)	)	
Defendant.	)	)	
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**PLAINTIFFS' FIRST REQUEST FOR PRODUCTION  
OF DOCUMENTS FROM BLUE CROSS BLUE SHIELD OF MICHIGAN**

Pursuant to Fed. R. Civ. P. 34, the United States of America and State of Michigan ("Plaintiffs") serve this First Request for Production of Documents directed to Blue Cross Blue Shield of Michigan ("Blue Cross"). Plaintiffs request that Blue Cross produce the requested documents within 30 days for inspection and copying by counsel for Plaintiffs.

## I. DEFINITIONS

1. The terms "**you**," "**your**," or "**Blue Cross**" mean Blue Cross Blue Shield of Michigan, its divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, representatives, and any other person acting on its behalf. The terms "subsidiary," "affiliate," and "joint venture" refer to any person in which Blue Cross holds at least a 25 percent interest, regardless of how its interest is measured (*e.g.*, number of shares, degree of control, board seats, or votes).

2. The term "**CID**" means Civil Investigative Demand #25965 issued by the U.S. Department of Justice to Blue Cross Blue Shield of Michigan on April 13, 2010.

3. The term "**contract**" means any agreement or arrangement between Blue Cross and a hospital governing Blue Cross's reimbursement for health care services that the hospital provides to Blue Cross members. The term includes any amendments, letters of understanding, letters of agreement. The term also includes any attachments or exhibits.

4. The terms "**document**" and "**electronically stored information**" are synonymous in meaning and equal in scope to these terms as used in Fed. R. Civ. P. 34(a)(1)(A), and include emails and other electronic correspondence, spreadsheets, and other electronic documents stored in or accessible through computer or other information retrieval systems.

5. The terms "**including**" or "**include**" mean including, but not limited to.

## II. INSTRUCTIONS

1. Where a start or end date is specified in a document request, the information and documents requested include those in the possession, custody, or control of Blue Cross that were applicable, effective, prepared, written, sent, dated, or received as of the specified date. Where no start or end date is specified, the applicable period is January 1, 2004 to the present.

2. In responding to this document request, Blue Cross need not produce again a document that was previously produced by Blue Cross to Plaintiffs during their investigation(s) that preceded the filing of this action.

3. Blue Cross should produce documents as they are kept in the usual course of business. Documents found attached or joined to other documents by staple, clip, binder, binding, file folder, computer file, or directory should be produced to Plaintiffs in the manner in which they were originally found. Plaintiffs will accept electronic productions in Summation format, consistent with the format of prior Blue Cross productions. If Blue Cross seeks to produce documents in any other electronic format, Blue Cross must contact Plaintiffs in advance to determine whether the proposed data formats and choices of media will be compatible with Plaintiffs' equipment and resources.

4. If Blue Cross cannot respond fully, or objects in part, to any of the document requests, Blue Cross is nevertheless required to respond to the remaining portions.

5. Please mark each document page produced with corporate identification and consecutive document-control numbers. If paper documents are produced, the documents should be placed in boxes, and each box must be numbered and marked with corporate identification and the name(s) of the person(s) whose files are contained in that box.

6. If any documents are withheld from production or redacted based on a claim of privilege, Blue Cross must provide, for each withheld or redacted document, a statement of the claim of privilege(s), and all supporting facts relied upon, in the form of a privilege log that includes:

- a. the document control number(s);
- b. all author(s), addressee(s), and recipients of the original and any copies (with an indication as to which individuals are attorneys);
- c. the date;
- d. a description of the subject matter of the communication; and
- e. the steps taken to ensure the confidentiality of the privileged communication (including affirmation that no unauthorized persons have received the communication).

### III. DOCUMENT REQUESTS

1. Produce all documents and electronically stored information responsive to the CID, as modified, from 2004 and 2005, that Blue Cross represented on September 21, 2010 had already been gathered and sent for processing.
  
2. Produce all electronically stored information responsive to the CID from the files of Kevin Seitz (former Executive Vice President for Health Care Value).
  
3. Produce a current, complete Blue Cross organization chart, including the relevant pages for the department(s) responsible for pricing Blue Cross's commercial products.



4. Produce one copy of each "signature approval" or other similar document indicating final approval or denial and the underlying rationale of any request for any negotiated reimbursement arrangements or other modifications of the standard Participating Hospital Agreement since January 1, 2006.
  
5. Produce Blue Cross's final, signed current contract(s) with the following hospitals or hospital systems:
  - a. Carson City Hospital
  - b. Charlevoix Area Hospital
  - c. Garden City Hospital
  - d. Henry Ford Health System
  - e. McLaren Health System
  - f. Oakwood Healthcare
  - g. OSF St. Francis Hospital
  - h. Otsego Memorial Hospital
  - i. Pennock Hospital
  - j. Sturgis Hospital

6. Produce the minutes for the "PHA Advisory Committee" meetings on each of the following dates:
  - a. March 25, 2004
  - b. September 28, 2004
  - c. March 16, 2010
  
7. Produce the minutes for the "Blue Cross Contingent of the PHA Advisory Committee" meetings on each of the following dates:
  - a. September 14, 2004
  - b. March 15, 2007
  - c. May 24, 2010

Respectfully submitted,

s/ Barry Joyce

Barry Joyce  
Steven Kramer  
Ann Marie Blaylock  
Trial Attorneys

United States Department of Justice  
Antitrust Division  
450 Fifth Street N.W., Suite 4100  
Washington D.C. 20001  
Telephone: (202) 353-4209  
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*Attorneys for Plaintiff United States of America*

s/ M. Elizabeth Lippitt

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*Attorney for Plaintiff State of Michigan*

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the	)	
STATE OF MICHIGAN,	)	
	)	
Plaintiffs,	)	Civil Action No. 2:10cv14155-DPH-MKM
	)	Judge Denise Page Hood
v.	)	Magistrate Judge Mona K. Majzoub
	)	
BLUE CROSS BLUE SHIELD	)	
OF MICHIGAN,	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2011, I caused to be served the foregoing First Request for Production of Documents From Defendant Blue Cross, via personal service and electronic mail, on:

For Defendant Blue Cross Blue Shield of Michigan:  
D. Bruce Hoffman  
Todd M. Stenerson  
Hunton and Williams LLP  
1900 K Street, N.W.  
(202) 955-1500  
Email: tstenerson@hunton.com  
Email: bhoffman@hunton.com

I hereby certify that on February 4, 2011, I caused to be served the foregoing First Request for Production of Documents From Defendant Blue Cross, via electronic mail and U.S. Mail, on:

For Defendant Blue Cross Blue Shield of Michigan:  
Joseph A. Fink  
Dickinson Wright PLLC  
215 S. Washington Square Suite 200  
Lansing, MI 48933-1816  
(571) 371-1730  
Email: jfink@dickinsonwright.com

s/ Barry Joyce

Barry Joyce

United States Department of Justice

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*Attorney for Plaintiff United States of America*

**EXHIBIT 2**



HUNTON & WILLIAMS LLP  
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TEL 202 • 955 • 1500  
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TODD M. STENERSON  
DIRECT DIAL: 202-419-2184  
EMAIL: tstenerson@hunton.com

FILE NO: 77535.000002

February 25, 2011

**Via E-Mail**

Barry J. Joyce  
U.S. Department of Justice  
Antitrust Division  
450 Fifth Street, N.W., Suite 4100  
Washington, DC 20530

Re: *Phase One Discovery*

Dear Mr. Joyce:

We note that in response to our motion to stay discovery, the Government Plaintiffs appear to take the position that Blue Cross will not suffer significant burdens during the pendency of the motion to dismiss because the first request for production of documents itself seeks a limited set of materials, and, while this is not entirely clear, the Government Plaintiffs will not seek further discovery (or, if they do, it will be quite limited) during the pendency of the motion to dismiss. As long as the Government Plaintiffs remain committed to providing Blue Cross with the information learned during their investigation as a part of an exchange, we believe this to be a substantial return to the position discussed at the Rule 26(f) conference.

While, under the law and circumstances of this matter, Blue Cross is entitled to a full stay of discovery during the pendency of its motion to dismiss, it remains open to reaching a compromise. Please let us know whether the Government Plaintiffs are interested in discussing such a resolution further.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd M. Stenerson", written over a horizontal line.

Todd M. Stenerson

cc: Ann Marie Blalock  
Steve Kramer  
Elizabeth Lippitt  
Bruce Hoffman  
David Higbee

**EXHIBIT 3**





U.S. Department of Justice

Antitrust Division

---

Liberty Square Building  
450 5th Street, NW  
Washington, DC 20001  
(202) 353-4209  
barry.joyce@usdoj.gov

February 28, 2011

Via E-Mail

tstenson@hunton.com

Todd M. Stenson  
Hunton & Williams LLP  
1900 K Street, N.W.  
Washington, DC 20006

Re: *United States and State of Michigan v. Blue Cross Blue Shield of Michigan*  
Case No. 2:10-cv-14155-DPH-MKM

Dear Mr. Stenson:

This letter responds to your February 25, 2011 letter titled "Phase One Discovery" in which you suggested that Blue Cross remains open to both parties conducting limited discovery before the motion to dismiss is resolved. We are of course open to discussing discovery further with you, and if you believe these discussions may be advanced by sending us a specific proposal, we would be happy to give it due consideration.

Relatedly, we look forward to your response to our letter of February 18, 2011 that advanced our position on the protective order and case management order and our reasons behind those positions. The entry of a protective order is important to facilitating Plaintiffs' production of non-parties' information to Blue Cross, and we hope to be able to reach agreement (or alternatively to narrow the scope of disagreement, if any) well before the March 11, 2011 revised date for filing a protective order.

Sincerely yours,

/s/

Barry Joyce

cc: David Higbee  
Bruce Hoffman  
Jonathan Lasken  
Steven Kramer  
Ann Marie Blaylock  
Elizabeth Lippitt

**EXHIBIT 4**



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March 4, 2011

FILE NO: 77535.000002

**Via E-Mail**

Barry J. Joyce  
U.S. Department of Justice  
Antitrust Division  
450 Fifth Street, N.W., Suite 4100  
Washington, DC 20530

Re: *Plaintiffs' First Request for Production of Documents*

Dear Mr. Joyce:

We are in receipt of Plaintiffs' First Request for Production of Documents from Blue Cross Blue Shield of Michigan, dated February 4, 2011. As you know, on January 24, 2011 we filed a motion to stay discovery pending a ruling on Blue Cross's Motion to Dismiss. We therefore object to your request for production and do not intend to produce the requested documents until Judge Hood has ruled on our pending motion (and, of course, subject to the outcome of that motion).

Also, on a related note, we wanted to follow up on our letter dated February 25, 2011. We appreciate your February 28, 2011 response to that letter. However, we had asked whether Plaintiffs, in representing to the Court in response to the motion to stay, that the discovery being sought prior to the motion to dismiss was limited and non-burdensome, were resurrecting the phased discovery proposal we had previously discussed, and specifically whether Plaintiffs were now taking the position that the First Request for Production would be all or the majority of discovery Plaintiffs would anticipate pursuing until the resolution of the motion to dismiss. Your response did not address either point. Given that your response to the motion to stay raised this issue, we believe it is fair and reasonable for you to be clear with us on your position. We would appreciate a prompt response.

Sincerely,

Todd M. Stenerson

HUNTON &  
WILLIAMS

Barry J. Joyce  
March 4, 2011  
Page 2

cc: Ann Marie Blalock  
Steve Kramer  
Elizabeth Lippitt  
Bruce Hoffman  
David Higbee

**EXHIBIT 5**

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

UNITED STATES OF AMERICA  
and the STATE OF MICHIGAN,

Plaintiffs,

v.

Civil Action No. 10-cv-14155-DPH-MKM  
Hon. Denise Page Hood  
Hon. Mona K. Majzoub

BLUE CROSS BLUE SHIELD OF  
MICHIGAN, a Michigan nonprofit  
healthcare corporation,

Defendant.

---

**DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S OBJECTIONS TO  
PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

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Thomas G. McNeill (P36895)  
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D. Bruce Hoffman (Adm. E.D. MI, DC Bar 495385)  
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Bar 996403)  
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**BLUE CROSS'S OBJECTIONS TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to the Federal Rules of Civil Procedure ("Federal Rules") and the Local Rules of the United States District Court for the Eastern District of Michigan ("Local Rules"), Defendant Blue Cross Blue Shield of Michigan ("Blue Cross"), hereby objects to Plaintiffs' First Request for Production of Documents.

**1. GENERAL OBJECTIONS**

The following general objection applies to each of Plaintiffs' document requests and, unless otherwise stated, shall have the same force and effect as if set forth in full in response to each of the numbered document requests.

1. Blue Cross objects to Plaintiffs' discovery requests in their entirety because, for the reasons stated in Blue Cross's Motion to Stay Discovery (filed on January 24, 2011), discovery is not appropriate in this case while Blue Cross's Motion to Dismiss is pending. Blue Cross's Motion to Stay Discovery is scheduled to be heard by the Court on April 19, 2011.

**2. SPECIFIC OBJECTIONS**

**A. Definitions**

1. Blue Cross objects to DEFINITION NO. 1 on the grounds and to the extent that it seeks to impose requirements that are beyond the scope of the Federal Rules and Local Rules; Blue Cross will comply with all applicable rules. Blue Cross further objects to Plaintiffs' purported definition of the terms "you," "your," or "Blue Cross" as overbroad and unduly burdensome. In particular, the 25 percent interest threshold is too low and will lead to discovery of entities over which Blue Cross has no control.



3. Blue Cross objects to DEFINITION NO. 3 on the grounds and to the extent that it seeks to impose requirements that are beyond the scope of the Federal Rules and Local Rules; Blue Cross will comply with all applicable rules.

4. Blue Cross objects to DEFINITION NO. 4 on the grounds and to the extent that it seeks to impose requirements that are beyond the scope of the Federal Rules and Local Rules; Blue Cross will comply with all applicable rules.

5. Blue Cross objects to DEFINITION NO. 5 on the grounds and to the extent that it seeks to impose requirements that are beyond the scope of the Federal Rules and Local Rules; Blue Cross will comply with all applicable rules.

**B. Instructions**

1. Blue Cross objects to INSTRUCTION NO. 1 on the grounds and to the extent that it seeks to impose requirements that are beyond the scope of the Federal Rules and the Local Rules; Blue Cross will comply with all applicable rules. Blue Cross further objects to Plaintiffs' applicable time period set forth in Request No. 1 on the ground that no allegation in the Complaint relates to any conduct prior to 2007. Therefore, Blue Cross objects to Request No. 1 on the ground that it seeks information that is irrelevant and unlikely to lead to the discovery of admissible evidence. When discovery properly commences, Blue Cross will produce documents dated back to 2007 and one year earlier (2006) for completeness.

3. Blue Cross objects to INSTRUCTION NO. 3 on the grounds and to the extent that it seeks to impose requirements that are beyond the scope of the Federal Rules and the Local Rules; Blue Cross will comply with all applicable rules.

4. Blue Cross objects to INSTRUCTION NO. 4 on the grounds and to the extent that it seeks to impose requirements that are beyond the scope of the Federal Rules and the Local Rules; Blue Cross will comply with all applicable rules.

5. Blue Cross objects to INSTRUCTION NO. 5 on the grounds and to the extent that it seeks to impose requirements that are beyond the scope of the Federal Rules and the Local Rules; Blue Cross will comply with all applicable rules.

6. Blue Cross objects to INSTRUCTION NO. 6 on the grounds and to the extent that it seeks to impose requirements that are beyond the scope of the Federal Rules and the Local Rules; Blue Cross will comply with all applicable rules. Blue Cross further objects to Part (e) as overbroad and unduly burdensome. Blue Cross will provide at the time of completed production a privilege log that complies with all applicable rules.

**C. Document Requests**

**DOCUMENT REQUEST NO. 1:**

Produce all documents and electronically stored information responsive to the CID, as modified, from 2004 and 2005, that Blue Cross represented on September 21, 2010 had already been gathered and sent for processing.

**RESPONSE TO REQUEST NO. 1:**

Blue Cross incorporates its General Objection and objects on the grounds stated in Blue Cross's pending Motion to Stay Discovery filed January 24, 2011. Blue Cross further objects to this request because the commencement of litigation renders the CID no longer valid. Blue Cross further objects to Plaintiffs' request for documents from 2004 and 2005 on the ground that no allegation in the Complaint relates to any conduct prior to 2007. Therefore, Blue Cross objects to Request No. 1 on the ground that it seeks information that is irrelevant and unlikely to lead to the discovery of admissible evidence, and, when discovery commences, Blue Cross will only produce documents dated back to 2007 and one year earlier (2006) for completeness. *See* Objection to Instruction No. 1.

**DOCUMENT REQUEST NO. 2:**

Produce all electronically stored information responsive to the CID from the files of Kevin Seitz (former Executive Vice President for Health Care Value).

**RESPONSE TO REQUEST NO. 2:**

Blue Cross incorporates its General Objection and objects to this request on the grounds stated in Blue Cross's pending Motion to Stay Discovery filed January 24, 2011. Blue Cross further objects to this request because the commencement of litigation renders the CID no longer valid. Blue Cross further objects to Plaintiffs' request for documents from 2004 and 2005 on the ground that no allegation in the Complaint relates to any conduct prior to 2007. Therefore, Blue Cross objects to Request No. 1 on the ground that it seeks information that is irrelevant and unlikely to lead to the discovery of admissible evidence, and, when discovery commences, Blue Cross will only produce documents dated back to 2007 and one year earlier (2006) for completeness. *See* Objection to Instruction No. 1. Subject to and without waiving this or any other objections, to the best of Blue Cross's knowledge, all such documents have been produced in response to DOJ's investigation that preceded the filing of this action to the extent they exist.

**DOCUMENT REQUEST NO. 3:**

Produce a current, complete Blue Cross organization chart, including the relevant pages for the department(s) responsible for pricing Blue Cross's commercial products.

**RESPONSE TO REQUEST NO. 3:**

Blue Cross incorporates its General Objection and objects to this request on the grounds stated in Blue Cross's pending Motion to Stay Discovery filed January 24, 2011. Blue Cross also objects to Request No. 3 on the basis that the request is vague as to which department it refers. Subject to and without waiving this or any other objections, to the best of Blue Cross's knowledge, organization charts have been produced in response to DOJ's investigation that preceded the filing of this action.

**DOCUMENT REQUEST NO. 4:**

Produce one copy of each “signature approval” or other similar document indicating final approval or denial and the underlying rationale of any request for any negotiated reimbursement arrangements or other modifications of the standard Participating Hospital Agreement since January 1, 2007.

**RESPONSE TO REQUEST NO. 4:**

Blue Cross incorporates its General Objection and objects to this request on the grounds stated in Blue Cross’s pending Motion to Stay Discovery filed January 24, 2011. Blue Cross further states that in response to DOJ’s pre-filing investigation, Blue Cross undertook a reasonable search for contract files and related documents, and to the extent contract documents were located, they were produced. Therefore, Blue Cross has already complied with this request for documents, and to the extent Plaintiffs ask for further searches without any specific explanation as to why such a search is warranted, this request is overly broad and unduly burdensome.

**DOCUMENT REQUEST NO. 5:**

Produce Blue Cross’s final, signed current contract(s) with the following hospitals or hospital systems:

- a. Carson City Hospital
- b. Charlevoix Area Hospital
- c. Garden City Hospital
- d. Henry Ford Health System
- e. McLaren Health System
- f. Oakwood Healthcare
- g. OSF St. Francis Hospital
- h. Otsego Memorial Hospital
- i. Pennock Hospital
- j. Sturgis Hospital

**RESPONSE TO REQUEST NO. 5:**

Blue Cross incorporates its General Objection and objects to this request on the grounds stated in Blue Cross's pending Motion to Stay Discovery filed January 24, 2011. Subject to and without waiving this or any other objections, to the best of Blue Cross's knowledge, all such documents have been produced in response to DOJ's investigation that preceded the filing of this action to the extent they exist.

**DOCUMENT REQUEST NO. 6:**

Produce the minutes for the "PHA Advisory Committee" meetings on each of the following dates:

- a. March 25, 2004
- b. September 28, 2004
- c. March 16, 2010

**RESPONSE TO REQUEST NO. 6:**

Blue Cross incorporates its General Objection and objects to this request on the grounds stated in Blue Cross's pending Motion to Stay Discovery filed January 24, 2011. Blue Cross further objects to Plaintiffs' request for minutes from 2004 on the ground that no allegation in the Complaint relates to any conduct prior to 2007. Therefore, Blue Cross objects to Request No. 6 on the ground that it seeks information that is irrelevant and unlikely to lead to the discovery of admissible evidence, and, when discovery commences, Blue Cross will only produce documents dated back to 2007 and one year earlier (2006) for completeness. *See* Objection to Instruction No. 1.

**DOCUMENT REQUEST NO. 7:**

Produce the minutes for the "Blue Cross Contingent of the PHA Advisory Committee" meetings on each of the following dates:

- a. September 14, 2004

- b. March 15, 2007
- c. May 24, 2010

**RESPONSE TO REQUEST NO.7:**

Blue Cross incorporates its General Objection and objects to this request on the grounds stated in Blue Cross's pending Motion to Stay Discovery filed January 24, 2011. Blue Cross further objects to Plaintiffs' request for minutes from 2004 on the ground that no allegation in the Complaint relates to any conduct prior to 2007. Therefore, Blue Cross objects to Request No. 7 on the ground that it seeks information that is irrelevant and unlikely to lead to the discovery of admissible evidence, and, when discovery commences, Blue Cross will only produce documents dated back to 2007 and one year earlier (2006) for completeness. *See* Objection to Instruction No. 1.

/s/ Todd M. Stenerson  
Todd M. Stenerson (P51953)  
Hunton & Williams LLP  
1900 K Street, NW  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 7, 2011, I served the foregoing Objections via electronic mail and first class mail on:

Barry Joyce  
Steven Kramer  
Ann Marie Blaylock  
Trial Attorneys  
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/s/ Todd M. Stenerson  
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**EXHIBIT 6**





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TODD M. STENERSON  
DIRECT DIAL: 202-419-2184  
EMAIL: tstenerson@hunton.com

FILE NO: 77535.000002

March 11, 2011

**Via E-Mail**

Steven B. Kramer  
U.S. Department of Justice  
Antitrust Division  
450 Fifth Street, N.W., Suite 4100  
Washington, DC 20530

Re: *Blue Cross Blue Shield of Michigan's Objections to Plaintiffs' First Request for Production of Documents*

Dear Mr. Kramer:

The Department has requested that Blue Cross Blue Shield of Michigan ("Blue Cross") withdraw three of its objections to Plaintiffs' first request for production of documents. Blue Cross's response is set forth below.

First, Blue Cross's objection that discovery should be stayed while its motion to dismiss is pending is proper and will not be withdrawn. As discussed in Blue Cross's motion, there is significant authority for a stay in cases of this type, especially where, as here, discovery will impose a potentially unnecessary and significant burden on Blue Cross and the dozens of third-parties without any corresponding prejudice to DOJ.

Second, Blue Cross believes that wide-ranging discovery of documents from before 2006 constitutes an undue burden on Blue Cross. In an effort to compromise the current dispute, however, Blue Cross will agree to produce the documents requested in Request # 1 if and when the Court orders discovery to proceed. In withdrawing this time period objection, Blue Cross is not waiving this objection for future requests, and its agreement to do so is premised on your express agreement that neither DOJ nor the State of Michigan will cite to or rely on Blue Cross's withdrawal to argue that discovery of documents created before 2006 either is within the appropriate scope of discovery or does not constitute an undue burden on Blue Cross.

Third, in our call, DOJ agreed that the Blue Cross CIDs are now stale and unenforceable. Blue Cross requested that DOJ confirm this in writing, but it has not yet done so. Please let me know if I have misunderstood DOJ's position. We believe the most productive approach to discovery is for DOJ to make specific requests, without reference to the old, unenforceable CIDs.

HUNTON &  
WILLIAMS

Steven B. Kramer  
March 11, 2011  
Page 2

Fourth, the report of the joint 26(f) meeting with the private civil plaintiffs is due on April 11th. You have previously stated that DOJ will coordinate discovery with the private plaintiffs. To ensure that this coordination is meaningful, we believe it is important that DOJ attend this conference. Please let me know who should be contacted about the details of the conference and the crafting of a joint discovery plan.

Finally, we urge DOJ to reconsider its decision to file a motion to compel at this time. The motion to stay will be heard on April 19<sup>th</sup>, and Blue Cross will produce responsive, non-objectionable documents in a timely manner if that motion is denied. If it is granted, DOJ's motion to compel will be moot. Thus, any motion now will simply increase the parties' workload by requiring briefing on a motion that will never be considered and raises the same issue addressed in Blue Cross's motion to stay—the propriety of staying discovery while the motion to dismiss is pending.

Please do not hesitate to contact me if you have any further questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Todd M. Stenerson', written over a horizontal line.

Todd M. Stenerson

cc: Ann Marie Blalock  
Barry Joyce  
Elizabeth Lippitt  
David Gringer  
Bruce Hoffman  
David Higbee

**EXHIBIT 7**



U.S. Department of Justice

Antitrust Division

---

450 Fifth Street N.W.  
Suite 4100  
Washington, D.C. 20530

March 11, 2011

**VIA E-MAIL**

Todd M. Stenerson  
Hunton & Williams LLP  
1900 K Street N.W.  
Washington, D.C. 20006

Dear Mr. Stenerson:

Thank you for your letter sent this afternoon responding to our March 8, 2011 meet-and-confer regarding Blue Cross's unwillingness to produce any documents responsive to Plaintiffs' First Request for the Production of Documents. Our response to the four issues raised by your letter is set forth below.

*1) Blue Cross Must Respond to Proper Discovery Requests Unless Discovery is Stayed by the Court:*

Plaintiffs are mindful of Blue Cross's arguments why a stay of discovery is appropriate. Those arguments have no bearing on whether Blue Cross can refuse to comply with a discovery request, absent the court issuing a stay, because Plaintiffs have issued a narrow discovery request that Blue Cross's March 7th objections did not contend posed an undue burden. Unless or until the Court stays discovery, Blue Cross must comply with all proper discovery requests.

*2) Documents from 2004 and 2005 are Relevant to Show Blue Cross's Anti-Competitive Intent in Formulating MFN and MFN+ Clauses*

As Plaintiffs explained during the meet and confer, documents from 2004 and 2005 are relevant to Blue Cross's intent in negotiating the anti-competitive MFN clauses highlighted in Plaintiffs' complaint. Per your request, immediately following the conclusion of the meet-and-confer, Plaintiffs sent you highly relevant documents from the time period in question, showing that Blue Cross's MFN-related activity dates back to at least 2004, and legal authority establishing that courts regularly permit discovery in antitrust suits beyond the temporal scope of the complaint.

Thus, although Plaintiffs appreciate Blue Cross's willingness to withdraw its objection, in response to Plaintiffs' First Request for Documents, that such documents are irrelevant, we are

puzzled by your insistence that the withdrawal be predicated on “an express agreement” not to rely on the withdrawal should you object to producing additional documents from 2004 and 2005 in the future. In an attempt to compromise, Plaintiffs are willing to agree that we will not cite Blue Cross’s withdrawal of its objection to argue that discovery prior to 2006 is appropriate. Plaintiffs’ agreement is premised on retaining the right to use any information contained in documents produced by Blue Cross from 2004 and 2005 to demonstrate the relevance of such information sought in future discovery requests.

Further, your March 11 letter also raises -- for the first time -- the irrelevant argument that “wide-ranging discovery of documents” from 2004 and 2005 constitutes an undue burden. In response to Plaintiffs’ request for documents at issue presently, Blue Cross did not formally object to producing documents from this time period on burden grounds, nor does your letter set forth *how* producing such documents would be burdensome. Further, such an objection would be baseless. Plaintiffs’ narrow discovery request seeks documents that were already gathered but never produced in response to the pre-complaint Civil Investigative Demand issued to Blue Cross. To the extent Blue Cross intends to raise valid burden objections to future discovery requests seeking information from 2004 and 2005, Plaintiffs will agree not to rely on the withdrawal of Blue Cross’s objection in arguing that such discovery is not burdensome, subject once again to Plaintiffs’ retaining the right to cite the fact that Blue Cross has already produced such documents from 2004 and 2005 as evidence that production would, in fact, not impose an undue burden.

3) *Plaintiffs Do Not Seek To Enforce its Civil Investigative Demand Issued to Blue Cross*

As we have already stated, Plaintiffs are not seeking to enforce the Department of Justice’s Civil Investigative Demand (“CID”) through this document request. We believed the CID was a useful reference point since we were seeking documents that had already been requested in the CID and gathered by Blue Cross, but which it did not produce during the investigation. We make no representations regarding the enforceability of the CID generally.

4) *Joint 26(f) Meeting with Private Civil Plaintiffs*

We appreciate your informing us that there will be a joint 26(f) meeting with private civil plaintiffs and Blue Cross. As we have stated previously, Plaintiffs will attempt informal coordination with the private, tag-along plaintiffs, so long as such coordination does not interfere with Congress’s mandate that our enforcement action be resolved “as soon as may be.” Please contact me with the details of the conference when it is scheduled.

Substantial time has already elapsed while we have accommodated your consideration of our plan to file a motion to compel. Accordingly, your prompt response is appreciated.

Sincerely yours,

/s/  
Steven Kramer

**EXHIBIT 8**



HUNTON & WILLIAMS LLP  
1900 K STREET, N.W.  
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TODD M. STENERSON  
DIRECT DIAL. 202-419-2184  
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March 16, 2011

FILE NO: 77535.000002

**Via E-Mail**

Steven B. Kramer  
U.S. Department of Justice  
Antitrust Division  
450 Filth Street, N.W., Suite 4100  
Washington, DC 20530

*Re: Blue Cross's Objections to the First Request for Production of Documents*

Dear Mr. Kramer:

This letter is in response to your March 11, 2011 letter regarding Blue Cross's Objections to the First Request for Production of Documents and the related meet-and-confer issues. Blue Cross responds to each of DOJ's points in turn.

First, Blue Cross has asserted an objection to DOJ's pending document requests and having done so, is not required to file a motion for a protective order relating to that objection. We are unaware of any authority to the contrary and the DOJ cites none. Even so, the Court's resolution of Blue Cross's fully briefed motion to stay will effectively decide the issue.

Second, we understand that you have agreed not to cite Blue Cross's withdrawal of its objection to document request # 1 to argue that discovery from prior to 2006 is appropriate and not burdensome. We are confused, however, by your assertion that you may use our production in this instance to argue that the production of other documents would not be burdensome. This appears to render meaningless your agreement not to cite the withdrawal of our objection, as these are effectively the same thing.

Third, we do not understand your reference to "anticompetitive intent" in pre-2007 documents. Neither your letter nor, to use your words, the "highly relevant" documents you provided, shed any light on what anticompetitive intent those or any other pre-2007 letters might reveal. Blue Cross further rejects the other conditions the Department seeks to impose.

Fourth, DOJ's unwillingness to admit that its investigative CIDs are no longer enforceable is unproductive. At this juncture, Blue Cross can only note that the CIDs are

HUNTON  
WILLIAMS

Steven B. Kramer  
March 16, 2011  
Page 2

unenforceable and any litigation by DOJ to the contrary would be frivolous, resulting in wasted time and resources of the parties and the Court.

Fifth, we will provide the details of the joint 26(f) meeting with the civil plaintiffs when it is scheduled. We do not understand what "informal" coordination is. But, unless this means, for example, that each witness will be noticed for deposition only once for both the DOJ and private plaintiff cases, we find ourselves at impasse regarding the Plaintiffs' coordination obligations. Accordingly, Blue Cross will seek the Court's guidance on such coordination at the appropriate time.

Sincerely,



Todd M. Stenerson

cc: Ann Marie Blalock  
Barry Joyce  
David Gringer  
Elizabeth Lippitt  
Bruce Hoffman  
David Higbee



**EXHIBIT 11**

Slip Copy, 2009 WL 311125 (W.D.Mich.), 2009-1 Trade Cases P 76,543  
(Cite as: 2009 WL 311125 (W.D.Mich.))

**C**  
Only the Westlaw citation is currently available.

United States District Court,  
W.D. Michigan,  
Southern Division.  
ARVCO CONTAINER CORPORATION, Plaintiff,  
v.  
WEYERHAEUSER COMPANY, Defendant.

No. 1:08-cv-548.  
Feb. 9, 2009.

West KeySummary**Federal Civil Procedure 170A**  
**1625**

170A Federal Civil Procedure  
170AX Depositions and Discovery  
170AX(E) Discovery and Production of Documents and Other Tangible Things  
170AX(E)4 Proceedings  
170Ak1625 k. Protective Orders. Most Cited Cases

Alleged price discriminator was not entitled to a protective order limiting disclosure of sales and pricing documents to opposing attorneys and expert witnesses. The alleged discriminator failed to establish that its pricing history was a trade secret or confidential information. At best the alleged discriminator had demonstrated that it neither liked nor trusted the opposing party and would be uncomfortable if the opposing party's executives had access to discovery materials. Robinson-Patman Act, § 1, 15 U.S.C.A. § 13; Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

Craig H. Lubben, Miller Johnson PLC, James E. Vanderroest, Dietrich Vanderroest Attorneys, Kalamazoo, MI, for Plaintiff.

Atleen Kaur, Robert J. Wierenga, Miller Canfield Paddock & Stone PLC, Ann Arbor, MI, Carlos Enrique Provencio, International Paper Company, Memphis, TN, Jennifer M. Van Horn, Miller Canfield Paddock & Stone PLC, Grand Rapids, MI, for

Defendant.

**MEMORANDUM OPINION**

JOSEPH G. SCOVILLE, United States Magistrate Judge.

\*1 This is an antitrust case brought under the Robinson-Patman Act, 15 U.S.C. § 13, alleging secondary-line price discrimination. Plaintiff asserts that defendant, Weyerhaeuser Company, is selling pizza boxes to Star Pizza Box at a price significantly less than the price that Weyerhaeuser is willing to charge plaintiff. The matter is before the court on plaintiff's motion to compel production of sales and pricing documents by defendant regarding its transactions with Star Pizza Box from 2006 to the present and defendant's motion for a protective order seeking stringent limitations on the use and dissemination of those documents.

**Nature of Plaintiff's Claims**

Plaintiff alleges price discrimination by defendant, a manufacturer and seller of boxes. The history of federal prohibition against price discrimination begins with section 2 of the Clayton Act in 1914, passed by Congress to prevent financially powerful corporations from employing localized price-cutting tactics to the detriment of their competitors. *See FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543, 80 S.Ct. 1267, 4 L.Ed.2d 1385 (1960). Congress amended section 2 of the Clayton Act in 1936 by passage of the Robinson-Patman Act. This Act sought to target the "perceived harm to competition occasions by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand." *Volvo Trucks No. Am. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006). The Act provides, in relevant part:

It shall be unlawful for any person engaged in commerce ... to discriminate in price between dif-

ferent purchasers of commodities of like grade and quality, ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Clayton Act § 2(a); 15 U.S.C. § 13(a). In brief, section 2(a) prohibits a seller from discriminating in price between two or more competing buyers in the sale of commodities of like grade and quality, where the effect of the discrimination “may be substantially” to lessen competition in any line of commerce. Two types of possible injury to competition are commonly alleged in a Robinson-Patman case. The first is referred to as “primary-line injury,” because the actual or threatened injury is to competition between the seller granting the discriminatory price and the seller’s competitors. *See Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993). The second type of injury is referred to as “secondary-line injury,” because the actual or threatened injury is to competition between the favored customer of the seller who receives the discriminatory price and the seller’s disfavored customers. *See Volvo*, 546 U.S. at 176. In the present case, Arvco Container Corporation alleges a case of secondary-line injury.

\*2 To establish its claim under the Robinson-Patman Act of secondary-line injury, plaintiff in the present case must show that (1) Weyerhaeuser discriminated in price between plaintiff and Star Pizza Box; (2) the relevant sales were made in interstate commerce; (3) the pizza boxes were of “like grade and quality;” and (4) the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of the favored purchaser, *i.e.*, Star Pizza Box. *See Volvo*, 546 U.S. at 176-77. In a secondary-line section 2(a) case, the plaintiff must both show that it competes with the favored purchaser and that the plaintiff and the favored pur-

chaser operate in the same geographic market. *See Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 521 (6th Cir.2004).<sup>FN1</sup>

FN1. The Robinson-Patman Act recognizes certain affirmative defenses available to defendants, including cost justification and meeting competition.

Plaintiff’s complaint alleges that defendant Weyerhaeuser is in the business of processing trees into paper pulp, transforming the paper pulp into corrugated paper, and making the corrugated paper into corrugated boxes to be sold to customers. (Compl.¶ 6). Plaintiff Arvco is in the very same business of purchasing paper pulp, transforming it into corrugated paper, and making the corrugated paper into boxes, to be sold to customers. (Compl.¶ 8). Hence, plaintiff and defendant are direct competitors in the manufacture and sale of corrugated boxes. Plaintiff alleges that starting in the year 2006, it began losing sales to a competitor company, Star Pizza Box. (Joint Status Report (JSR), docket # 11, at 2). Plaintiff asserts that it was unable to manufacture the boxes at a cost that would allow it to compete with Star Pizza Box. Consequently, plaintiff sought to purchase boxes from its competitor, Weyerhaeuser, on the belief that Weyerhaeuser was selling pizza boxes to Star Pizza Box at a price of \$36 per thousand square feet, a price that plaintiff asserts was less than its own cost of manufacture. (JSR at 2; Compl. ¶ 13). Plaintiff alleges that Weyerhaeuser had been selling corrugated pizza boxes to Star Pizza Box at this price since about 2006. (Compl.¶ 10). Plaintiff alleges, however, that Weyerhaeuser refused to sell boxes to plaintiff at \$36 per thousand square feet, but instead sold corrugated boxes to plaintiff at about \$43 per thousand square feet. (Compl.¶ 11). Plaintiff alleges that it is in direct competition with Star Pizza Box as a seller of corrugated boxes. (Compl. ¶ 16). Consequently, even though plaintiff competes with Weyerhaeuser as a manufacturer, it brings this case for secondary-line discrimination in its role as a *customer* of Weyerhaeuser and competitor of Star

Pizza Box.

Weyerhaeuser denies that it sold boxes to Star Pizza Box at \$36 per thousand square feet. (Ans. ¶ 10, docket # 6). In its affirmative defenses, Weyerhaeuser asserts that if there were a price differential between the price charged to plaintiff and to Star Pizza Box, the price differential was justified by differences in grade and quality, differences in volume, or market differences. Defendant also asserts that it does not supply Star Pizza Box in any operation that competes with plaintiff.

#### *Discovery Requests*

\*3 The discovery requests at issue seek basic information regarding sales of corrugated boxes by Weyerhaeuser to Star Pizza Box from the year 2006 to the date of the request:

(a) Any and all documents, memoranda and e-mails between Defendant's representatives and representatives of Star Pizza Box regarding the price, quantity and specifications for pizza boxes sold by Defendant to Star Pizza Box from 2006 to the present; and

(b) All quotations, purchase orders, confirmations, invoices and other documents Defendant has in its possession showing prices Weyerhaeuser charges [sic] Star Pizza Box and Plaintiff from 2006 to the present.

Plaintiff made the request in the joint status report, filed in connection with the Rule 16 scheduling conference conducted in September 2008.<sup>FN2</sup> Defendant has objected to the production of these documents, raising a veritable barrage of reasons why it should not be required in the circumstances of this case to produce the requested information. Plaintiff moved on November 25, 2008, for an order compelling production of these documents. On December 12, 2008, defendant filed its brief in opposition to plaintiff's motion, along with its own motion for protective order. Plaintiff answered the motion for protective order, and defendant was granted leave to file a reply brief.

FN2. The parties stipulated (docket # 23) that the document requests contained in the Joint Status Report would be deemed discovery requests.

Defendant resists production of the requested documents on the ground that they are irrelevant. Alternatively, defendant seeks a protective order directing that the produced documents be disclosed only to plaintiff's counsel and expert witnesses. Defendant's reasons in support of these two requests range from the weak to the frivolous. For the reasons set forth below, the court finds that defendant must be compelled to produce the requested information, which is central to this Robinson-Patman case, and that defendant has not met its burden to show that the extremely restrictive protective order that it seeks is supported by good cause.

#### *Discussion*

##### **A. Relevance**

The Federal Rules of Civil Procedure allow a party to obtain discovery regarding any non-privileged matter "that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). In the present case, the sales and pricing information sought by plaintiff are directly relevant to plaintiff's claims. Plaintiff seeks documents disclosing the price, quantity and specifications for pizza boxes sold by defendant to Star Pizza Box. In a case for price discrimination under section 2(a) of the Clayton Act, plaintiff has the burden of establishing the fact of sales to a favored purchaser and the price at which the sales were made. *See Volvo*, 546 U.S. at 176. Plaintiff also seeks information concerning the specifications for the boxes sold to Star Pizza Box. This information is relevant to the statute's requirement that sales be of commodities of "like grade and quality." Defendant's answer denies that it sold corrugated boxes to Star Pizza Box for about \$36 per thousand square feet. (Ans.¶ 10). The issue is therefore one for discovery and proof at trial. It is difficult to imagine a more relevant line of inquiry in a Robinson-Patman case than the quantities, prices, and specifications of commodities sold by a

defendant to an allegedly favored purchaser.

\*4 Defendant nevertheless resists plaintiff's motion to compel on the ground that the requested documents are somehow "irrelevant." Defendant's relevance objections are set forth in a document served on November 3, 2008. (docket # 42-7). A principal ground for defendant's claim of irrelevance is the assertion that plaintiff's lawsuit is meritless. Defendant asserts in a single sentence that Weyerhaeuser never sold like grade and quantity of pizza boxes to Star Pizza at \$36 per thousand square feet. On the basis of this unadorned statement, defendant apparently expects the court to adopt its view of the case and reject all efforts by plaintiff to prove its claims by discovery. Defendant cites no authority that would support its obviously improper efforts to resist core discovery on the ground of its unilateral view of the merits of the opponent's case.

Defendant also objects to the scope of the requested document production, contending that all sales before the year 2008 are irrelevant. It is certainly true that allegedly discriminatory sales must occur reasonably contemporaneously in order to form the basis for a Robinson-Patman claim. *See, e.g., Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 693 (5th Cir.2003). At the discovery stage of the case, however, it is not possible to determine with precision the nature of competition in the market, such that a "reasonably contemporaneous" time period can be defined or the potential harm to competition assessed. Consequently, at the discovery stage, courts determining Robinson-Patman cases hold that the temporal scope of discovery "should not be confined to the limitations period of the anti-trust statutes or to the damage period, and plaintiff is ordinarily permitted to discover defendant's activities for 'a reasonable period' of time antedating the earliest possible date of the actionable wrong." *B-S Steel of Kansas, Inc. v. Texas Indus., Inc.*, No. 01-2410-JAR, 2003 WL 21939019, at \*3 (D.Kan. July 22, 2003) (footnotes and citations omitted) (quoting *Quonset Real Estate Corp. v.*

*Paramount Film Distrib. Corp.*, 50 F.R.D. 240, 241 (S.D.N.Y.1970)). In the *B-S Steel* case, the court allowed the Robinson-Patman plaintiff to discover information for sales that took place after the alleged price discrimination. The court found that the request was supportable because it provided important information for an analysis of the product market in question. *Id.* at \*3.<sup>FN3</sup> Defendant has provided no cogent analysis supporting its contention that discovery in this case should be limited to the year 2008, in contravention of the usual rule. The time period of 2006 through September 2008 (the month of the request) is reasonable for purposes of discovery.

FN3. Ultimately, the Tenth Circuit found that the Robinson-Patman claim faltered for failure of proof of reasonably contemporaneous sales, but did not express any disagreement with the scope of discovery allowed by the trial court. *B-S Steel of Kansas, Inc. v. Texas Indus., Inc.*, 439 F.3d 653, 665 (10th Cir.2006).

Defendant has resisted since September 2008 the production of core discovery information in a Robinson-Patman case on the ground that the discovery was "irrelevant." This is an abuse of the discovery process.

#### **B. Motion For Protective Order**

\*5 Although defendant knew that plaintiff was seeking information concerning sales to Star Pizza Box since early September 2008, defendant delayed in moving for a protective order until December 12, 2008. Defendant's motion for protective order seeks imposition of the most restrictive possible conditions on the dissemination of the price, quantity, and specification information sought by plaintiff. Defendant asks the court to limit this information to plaintiff's attorneys and expert witnesses, specifically excluding any employee of plaintiff. Defendant's ground for seeking this relief is the assertion that the information sought represents trade secret or other confidential information and would be subject to abuse by plaintiff, which competed with de-

defendant in the past and may compete in the future.

Federal Rule of Civil Procedure 26(c) authorizes a court, upon a showing of good cause, to issue a protective order protecting a party from "annoyance, embarrassment, oppression, or undue burden or expense," including an order forbidding the discovery or requiring that a trade secret or other confidential information not be revealed or be revealed only in a specified way. FED. R. CIV. P. 26(c)(1)(A), (G). A party seeking relief under Rule 26(c) must demonstrate the alleged harm "with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 550 (6th Cir.2004) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981)). Where a business is the party seeking protection, it is obliged to show that "disclosure would cause significant harm to its competitive and financial position. That showing requires specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of potential harm." *Deford v. Schmid Prod. Co.*, 120 F.R.D. 648, 653 (D.Md.1987); accord *Tinman v. Blue Cross & Blue Shield of Mich.*, 176 F.Supp.2d 743, 745-46 (E.D.Mich.2001); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D.Mich.1981) (movant must make a particularized showing that the information sought is confidential and come forth with specific examples of competitive harm). Moreover, because a protective order is already in place limiting the use and dissemination of discovery materials, defendant bears the burden of demonstrating why the current order is insufficient and a modification is necessary. *See Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 597 (7th Cir.1978); *Children's Legal Serv. P.L.L.C. v. Kresch*, No. 07-cv-10255, 2007 WL 4098203, at \* 2 (E.D.Mich. Nov.16, 2007).

Defendant seeks the most restrictive possible protective order, confining dissemination of discovery materials to plaintiff's attorneys and expert wit-

nesses only. To be sure, courts in many circumstances have found that a specific showing of competitive harm justifies a restriction of confidential or trade secret information to "attorney's eyes only." *See, e.g., Avocent Redmond Corp. v. Rose Elec., Inc.*, 242 F.R.D. 574, 576 (W.D.Wash.2007). Other courts, however, have recognized the harm that the indiscriminate use of "attorney's eyes only" protective orders can cause, especially in the absence of a strong showing of probable competitive harm. *See, e.g., Key Components, Inc. v. Edge Elec., Inc.*, No. 3:07-cv-224, 2008 WL 4937560, at \* 3-5 (E.D.Tenn. Nov.17, 2008). One court has warned against the overuse of "attorney's eyes only" protective orders:

\*6 On the other hand, this is not a case where the clients have no real, meaningful input to make into tactical decisions, or where their input would not be helpful in determining the bona fides of the information submitted by defendants. Moreover, the very real specter of over-designation of "attorneys' eyes only" information exists, and plaintiffs should not be put in a position where they are essentially kept in the dark about the important facts of the case.

*DeFazio v. Hollister, Inc.*, No. Civ-5-04-1358, 2007 WL 2580633, at \*2 (E.D.Cal. Sept.5, 2007). Determination of the good-cause issue, therefore, requires a balance of the difficulties imposed upon plaintiff against the need to protect information from abuse by competitors. *Id.* at \* 1. It is clear to this court that the indiscriminate use of "attorney's eyes only" protective orders does pose a significant handicap on the restricted litigant. Discovery, trial preparation, and trial are made more difficult and expensive if an attorney cannot make complete disclosure of the facts to the litigant. Further, courts cannot ignore the fact that ninety-eight percent of cases are not tried, but are resolved in mediation and other settlement methods. It is difficult, and perhaps impossible, for an attorney to counsel a client to compromise or even abandon a case on the basis of information kept secret from the client. A

litigant who is not in possession of all relevant facts, furthermore, is in a poor position to assess its obligation to evaluate its ongoing obligation to maintain only arguably meritorious actions at every stage of the case. Although the imposition of these and other handicaps upon a litigant is justifiable in some circumstances, such action by the court must be supported by a showing that disclosure will work a clearly defined and serious injury to the party seeking extraordinary confidential treatment.

Some of the arguments made by defendant in support of its motion for protective order are completely insubstantial. Defendant asserts that it is "curious" that plaintiff decided to purchase boxes from defendant when it could have made the boxes itself. (Brief, docket # 42, at 2). Plaintiff has explained, however, that it could not manufacture boxes as cheaply as defendant was selling them to Star Pizza Box. If this is true, plaintiff's desire to buy boxes from defendant is not a bit "curious." Defendant also discerns sinister motive from plaintiff's demand that defendant's national account representative for the Star Pizza Box account, John Segreti, be involved in the discussions regarding plaintiff's purchase request. (*Id.* at 2). Plaintiff is unsuccessful in explaining why this demonstrates a desire on plaintiff's part to abuse confidential information. Defendant also tries to emphasize the efforts by Robert Ford, plaintiff's representative, to record conversations with Mr. Segreti relating to pricing and product availability. (*Id.*). Defendant goes so far as to provide the court with a twenty-two minute audio recording of one of these conversations. The recording of telephone conversations, although impolite, is often legal under state law and is becoming a rather commonplace tool by which litigants attempt to prove their cases. Finally, in this vein, defendant is puzzled at the fact that plaintiff's president wished to participate in discussions involving a potential business arrangement. (*Id.* at 3-4). These arguments, considered singly or in combination, do little to persuade the court that plaintiff is a nefarious business attempting to gain a competitive advantage through this lawsuit. These

"atmospherics" do nothing to discharge defendant's burden under Rule 26(c).

\*7 At heart, defendant's request for a restrictive protective order is based upon two factual assertions: (a) plaintiff and defendant are direct competitors and (b) defendant's historical pricing information regarding sales to Star Pizza Box is a trade secret or confidential business information. With regard to the first contention, there can be little dispute. The allegations in plaintiff's complete make it clear that plaintiff is sometimes a direct competitor of defendant, although the present suit is brought in plaintiff's capacity as a customer.

Defendant's contention that its historical pricing information is a trade secret or confidential information, however, does not withstand scrutiny. A court cannot presume, in the absence of proof, that a particular company's prices are confidential. Although price information can be proprietary, it may not be confidential in the least, depending on the circumstances. In a highly competitive market, one which approaches the economists' concept of "perfect competition," the price level emerges from the interaction of demand with all firms' output decisions. Therefore, sellers are "price takers" with no power to set the price. *See generally AA Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir.1989). In such competitive markets, there are no secrets about price, as buyers and sellers are fully informed about the price and availability of products. WILLIAM A. MCEACHERN, MICROECONOMICS: A CONTEMPORARY INTRODUCTION 167 (5th ed.2000). Competition is not on the basis of price, and sellers prosper only by keeping their costs low and adopting efficiencies. Sellers in a competitive market make no effort to keep their prices secret, but publish price lists or even post their prices for the whole world to see on the Internet. By contrast, in less competitive markets, sellers have more power to influence price. Such sellers are deemed to have "market power," defined as the power to control prices or exclude competition. *See United States v.*

*E.I. DuPont Nemours & Co.*, 251 U.S. 377, 391 (1956); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 935 (6th Cir.2005). As a firm's market position approaches a pure monopoly (again, a theoretical construct), the firm has the power to engage in "perfect price discrimination," charging a different price for each unit of the commodity. MCEACHERN at 214. The firm's power over price requires secrecy, so that the monopolist can extract maximum monopoly rents from each transaction. In less competitive markets, where sellers exercise market power, price differentials may be significant, and sellers may treat their prices as proprietary. In the real world, markets fall somewhere on the continuum between the theoretical extremes of perfect competition and pure monopoly, and the firms in those markets exercise more or less control over price, depending on market conditions.

A corporation seeking to impose a restrictive protective order on price information has the obligation of establishing that its pricing structure is indeed proprietary. This is a matter of proof, to be established by affidavit or other factual material, not mere assertion. Defendant has submitted to the court only one affidavit in support of its motion for protective order. The affidavit of John Segreti (docket # 42-3) does not state or imply that defendant Weyerhaeuser considers its pricing structure to be confidential, that it takes reasonable steps to safeguard the proprietary nature of such information, or that the market in which it operates is relatively uncompetitive.<sup>FN4</sup> The sketchy information provided by the Segreti affidavit, to the extent that it addresses prices at all, would provide no information by which a court could assess the claim that Weyerhaeuser's prices for the commodity are proprietary or that the market is such that competitors would gain an advantage if they knew Weyerhaeuser's prices from 2006 through September 2008. The affidavit states only that market prices for pizza boxes are established based on volume, market and board combination and are controlled through efficiencies based on the remaining associ-

ated costs of production. (§ 7). Beyond this vague information, defendant has not provided the court with "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements," which would support a finding that prices are confidential (as opposed to reasonably available or ascertainable in the marketplace) or that production of historical pricing information would expose defendant to "a clearly defined and very serious injury," not already addressed by the existing protective order.

FN4. Another of defendant's exhibits would indicate that its pricing structure is not proprietary. In an e-mail dated January 27, 2007 (docket # 42-5), a Weyerhaeuser employee indicated that the company "announced to our customers" an increase in pricing for January. The e-mail makes it clear that the information was released on a prospective basis, months before the increase was to take effect. Obviously, defendant shared its pricing structure with customers and prospective customers. There is no indication that this announcement was accompanied by any pledge of confidentiality by the universe of customers and potential customers to which it was given.

\*8 At best, the present record shows that defendant neither likes nor trusts plaintiff and would be uncomfortable if plaintiff's business executives had access to discovery material, because they cannot be trusted to abide by the protective order. On the present record, the court could not possibly make a finding that defendant's price structures, especially with regard to historic prices, are trade secrets or should be given confidential treatment, nor could it identify a clearly defined and serious competitive injury to defendant. <sup>FN5</sup> A litigant's vague feeling of discomfort or its desire to hobble its opponent in litigation do not establish good cause. "[V]ague and conclusory allegations of confidentiality and competitive harm are insufficient.



The movant must make “a particularized showing that the information sought is confidential” and come forward with “specific examples” of competitive harm. *Waelde*, 94 F.R.D. at 28 (quoting *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D.Ga.1980)). As defendant has done neither, its motion will be denied.

FN5. Defendant attempts to assert the rights of Star Pizza Box, arguing that the cost incurred by Star Pizza Box for its purchase of products is entitled to protection. It is certainly true that cost information is more likely to be proprietary than price information, especially in a competitive market. Defendant, however, has not cited any authority that would grant it standing to assert the rights of Star Pizza Box in this litigation.

Finally, this court is distressed that defendant has been successful for months in blocking on a unilateral basis discovery of the most basic conceivable information in a RobinsonPatman case. Defendant is a sophisticated litigant and should understand its obligations under the Federal Rules of Civil Procedure. Further obstruction of the discovery process will not be tolerated. Defendant and its counsel are warned that any future failure to abide by discovery obligations will be met with the imposition of sanctions.

W.D.Mich.,2009.  
Arvco Container Corp. v. Weyerhaeuser Co.  
Slip Copy, 2009 WL 311125 (W.D.Mich.), 2009-1  
Trade Cases P 76,543

END OF DOCUMENT

Not Reported in F.Supp.2d, 2006 WL 2038534 (M.D.Fla.)  
(Cite as: 2006 WL 2038534 (M.D.Fla.))

**H**

Only the Westlaw citation is currently available.

United States District Court, M.D. Florida,  
Orlando Division.  
OMEGA PATENTS, LLC, Plaintiff/Counter Defendant,  
v.  
FORTIN AUTO RADIO, INC., and Directed Electronics, Inc., Defendants/Counter Claimants.

No. 6:05-cv-1113-Orl-22DAB.  
July 19, 2006.

Brian R. Gilchrist, Ryan Thomas Santurri, Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A., Orlando, FL, for Plaintiff/Counter Defendant.

J. Rodman Steele, Jr., Richard Leslie Horn, Vandana Koelsch, Akerman Senterfitt, West Palm Beach, FL, David S. Oliver, Greenberg Traurig, P.A., Orlando, FL, for Defendants/Counter Claimants.

**ORDER**

DAVID A. BAKER, Magistrate Judge.

\*1 This cause came on for consideration without oral argument on the following motion filed herein:

MOTION: PLAINTIFF'S MOTION FOR RULE 37 SANCTIONS AGAINST DIRECTED ELECTRONICS, INC. (Doc. No. 70)

FILED: June 14, 2006

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THEREON it is ORDERED that the motion is GRANTED.

Omega Patents, L.L.C., is a patent holding company that holds a number of patents in the consumer electronics field. Omega Patents previously filed suit against Defendant Fortin Auto Radio,


Inc., in March 2004 for patent infringement; that suit was resolved in September 2004 through a settlement agreement in which Fortin was granted a license to practice certain patents (the "Omega-Fortin Auto License"). Subsequently, Omega Patents filed this lawsuit on July 29, 2005 against Fortin to enforce the settlement agreement, believing that certain royalties from the patents were being under-reported. Doc. No. 1. One source of sales for the under-reported royalties was allegedly through Defendant Directed Electronics, Inc.'s ("Directed") sales of products allegedly containing Plaintiff's patents, although Fortin has denied licensing the technology to Directed. On November 18, 2005, Omega filed its First Amended Complaint naming Directed as an additional Defendant. Doc. No. 27.

On January 17, 2006, Directed filed a Motion to Transfer the case to California (Doc. No. 32) and a Motion to Stay Discovery (Doc. No. 39). Although Omega had served a number of discovery requests on Directed on February 3, 2006, Directed did not respond to the requests while its Motions to Transfer and Stay Discovery were pending. See Doc. No. 39. Omega filed motions to compel documents to be produced (Doc. No. 50) and the deposition of a Directed corporate representative (Doc. No. 51). On April 27, 2006, the Court denied Directed's Motion to Transfer (Doc. No. 57) and denied as moot Directed's Motion to Stay Discovery, and Omega's Motions to Compel in light of the other rulings. The Court ordered Directed to "produce responsive documents within 11 days of the date of this Order" and "produce its corporate representative for deposition" on May 18, 2006. Doc. Nos. 57, 61.

Omega now contends that Directed failed to comply with the Court's Order-producing only a small portion of its documents and a 30(b)(6) witness who was unprepared to respond to issues in the case-and seeks sanctions against Directed. Directed responds that Omega's contentions are "baseless

and contrived” because it produced responsive documents and its prepared corporate representative within the time required by the Court’s order.

### ***Production of Documents***

Omega’s document request to which the Court ordered Directed to provide a response, sought production of the following types of documents: referring to patents-in-suit; evidencing an attempt by Directed and Fortin to design around the patents-in-suit; identifying all employees, agents, or independent contractors responsible for new product development at Directed since 1999; evidencing development and gross sales of (a) the 417 GM OEM keyless entry upgrade to an alarm, (b) the 555G immobilizer; (c) 455J Jeep door lock interface (year 1999 ); (d) 455G Trailblazer interface; (e) 456A GM door lock interface; (f) 456B Buick and Cadillac door lock interface; (g) 456G GM full size truck and SUV door lock interface; (h) 457G GM bypass and door lock interface; (I) 457C Chrysler door lock interface. Doc. No. 50. The Court ordered that responsive documents be produced by May 8, 2006. Doc. No. 57. Omega contends that the documents produced by Directed were “sparse, at best.” For financial records, Directed produced tax returns and a single-page purportedly showing gross sales of the accused products. For development of the accused products, Directed produced only a few selected sections of Directed development notebooks and some circuit diagrams. According to Omega, Directed produced no e-mails.

\*2 Directed contends that, in addition to producing its annual tax returns and filings and an accounting of Directed’s gross sales of the accused products, Directed also produced annual audited financial statements going back to 1999. Doc. No. 77. Directed also contends that its production concerning “development of the accused products” included all schematics, PCB layouts records, design records and any other available materials regarding development of the accused products. Doc. No. 77. Directed contends that all of the accused products are “based on a basic platform that was developed

by Directed during the 1998-1999 period, when Directed was a much smaller company. For the most part, development of the accused products entailed typically minor changes to the basic platform or a product that came from the basic platform, neither of which are accused products. Accordingly, because development of the accused products typically entailed relatively minor changes to an existing product, little to no development documents were created during its development.” Doc. No. 77 at 4. Directed also contends that it produced all the requested development documents regarding the accused products by the court-ordered deadline and complied with the Court’s Order. Directed contends that it produced the notebook pages that were related to the accused products and responsive to Omega’s requests and that it is not obligated to produce documents that have no relevance to Omega’s requests and potentially contain Directed’s confidential or proprietary information. As to emails produced, Directed admits that it only produce a handful of emails (five Bates-numbered pages) in the initial disclosure, but has since supplemented its initial production with 2,000 additional pages of electronic documents within 30 days of the initial production. Directed argues that it could not have produced them sooner without incurring undue burden and expense; it was only able to produce the 2,000 <sup>FN1</sup> pages “after it performed a detailed and exhaustive key word search of all its electronic records to find documents that were responsive to Omega’s requests.” Directed searched “many tens of thousands of electronic documents in its active and archived databases and email systems, back-up devices and the personal hard drives and storage devices of Directed employees, [which] resulted in over seventeen thousand (17,000) potentially relevant documents which had to be organized, compiled, reviewed, Bates stamped and converted into the appropriate format.” Doc. No. 77 at 7.

FN1. Omega contends that 3,000 additional documents were produced, but the difference is of no moment. Doc. No. 70-1 at 3.

### ***Deposition of Corporate Representative***

The Court ordered Directed to produce a corporate representative in response to Omega's Rule 30(b)(6) Deposition Notice. Doc. No. 57. On May 18, 2006, Directed produced Mark Rutledge as its Rule 30(b)(6) corporate representative in response to Omega's Rule 30(b)(6) Deposition Notice. Omega contends that Mr. Rutledge was unprepared for Topic Nos. 1 through 4 of Omega's Deposition Notice: (1) The factual basis for Directed's defenses or denials of the allegations raised in Plaintiff's Complaint; (2) The factual basis for DEI's counterclaims; (3) DEI's claims of invalidity; and (4) DEI's claims of non-infringement. Omega also contends that during his deposition, Mr. Rutledge referenced numerous documents that were responsive to Omega's Request for Production, including some that he reviewed prior to his deposition, but Directed had not produced before May 8, 2006, or even by the date of the deposition. *See* Doc. No. 70-2 at 15, 24, 25. Omega contends that Directed's delay in its full email production until June 12, 2006—a month after Rutledge's deposition—reduced Omega's ability to obtain meaningful testimony during Directed's deposition.

\*3 Directed responds that its answer was not due until after Rutledge's deposition, thus it had no obligation to prepare him to answer questions regarding its defenses and counterclaims. Directed points to its self-described "generous" offer to provide another corporate representative at its corporate offices in California or via video conference, but not in Orlando. Directed also contends that Omega's Rule 30(b)(6) deposition notice did not specify a representative knowledgeable regarding Omega's specific document requests and Rutledge's responses were admittedly based on his personal knowledge of what documents *might* have existed.

### ***Ruling on Motion for Sanctions***

Pursuant to Federal Rule of Civil Procedure 37, the Court may impose discovery sanctions when the party "fails to obey an order to provide or permit discovery." Fed.R.Civ.P. 37(b)(2). Rule 37 sanc-

tions are intended to prevent unfair prejudice to the litigants and insure the integrity of the discovery process. *Gratton v. Great American Communications*, 178 F.3d 1373, 1374-1375 (11th Cir.1999) (affirming dismissal of suit for discovery abuse where trial court found that plaintiff bore "substantial responsibility" for the delays in discovery).

Rule 37(b)(2) provides a range of sanctions that a district court may impose upon parties and their attorneys for failure to comply with the court's discovery orders. It provides that the court, in its discretion, may impose, among others, the following sanctions: (1) the court may order that disputed facts related to the violated order be considered established in accordance with the claim of the party obtaining the sanctions order; (2) the court may refuse to permit the violating party to raise certain defenses, or it may prohibit that party from opposing certain claims or defenses of the party obtaining the sanctions order; (3) the court may strike any pleadings or any parts of the pleadings of the violating party, stay the proceedings, or even dismiss the action or enter a judgment of default against the violating party; and (4) the court may consider the violation a contempt of court." FED.R.CIV.P. 37. Rule 37(d), Federal Rules of Civil Procedure, provides that "[t]he Court shall require the party failing to act or the attorney advising that party or both to pay reasonable expenses, including attorneys' fees, caused by the failure unless the Court finds that the failure was substantially justified or that the circumstances make an award of expenses unjust."

Omega served its discovery on Directed on February 3, 2006. *See* Doc. No. 39 at 3. Directed unilaterally and erroneously decided that it was not required to produce responsive documents once it filed its Motion to Stay Discovery (Doc. No. 39). Pursuant to the Federal Rules of Civil Procedure and the Local Rules, and the Case Management and Scheduling Order <sup>FN2</sup>, discovery proceeds without regard to whether a motion to stay discovery is filed; nowhere in the rules is a motion to stay dis-

covery is self-executing. See *Handbook on Civil Discovery Practice in the United States District Court for the Middle District of Florida*, Middle District Discovery (2001) <sup>FN3</sup> (“Normally, the pendency of a motion to dismiss or a motion for summary judgment will not justify a unilateral motion to stay discovery pending resolution of the dispositive motion. Such motions for stay are rarely granted.... [U]nusual circumstances may justify a stay of discovery in a particular case upon a specific showing of prejudice or undue burden.”).

FN2. In support of its Motion to Stay, Directed cited only inapposite case law for the general principle that the court has inherent power to stay discovery. Doc. No. 39 at 1. Directed failed to cite any support for the proposition that discovery is stayed merely because a motion to dismiss is pending.

FN3. Directed cited the *Handbook* in its Response and is obviously familiar with its contents. Doc. No. 77 at 6.

\*4 Rather than prepare to produce the responsive documents in an expedited manner once the Court granted Directed an additional eleven days following the April 27, 2006 Order to produce them, Directed took its time conducting the search of its electronic databases and did not “supplement” its original production until more than one month later, on June 12, 2006, and well after the deposition of its designated corporate representative. Directed fails to adequately explain its delay in producing the 2,000 pages of emails, other than to vaguely claim (without supporting sworn affidavits) that it could not have produced them sooner without incurring “undue burden and expense.” Doc. No. 77 at 7.

Directed failed to timely respond to Omega's February 8, 2006 discovery with anything other than objections. Once the Court ordered Directed to respond by May 8, 2006 and to produce its properly-prepared representative by May 18, 2006, Dir-

ected had had an accumulated three months in which to prepare its response and its representative. It is no excuse, as Directed argues in its Motion to Stay, that preparing its discovery responses would “be needless” depending on the Court's rulings because the discovery “served is a nullity” if the motion to dismiss or transfer is granted. Doc. No. 39 at 4. Because the only viable option available to Directed was a transfer of the case to another federal forum (see Doc. No. 57 at 4), any discovery conducted would be equally valid and appropriate in the other federal forum. Directed's obligation under the practices of this Court, once it objected to Omega's production requests as overbroad, was to provide the documents responsive to a narrower version without waiting for a resolution of the dispute over the scope of the request. *A Handbook on Civil Discovery Practice in the United States District Court for the Middle District of Florida*, Middle District Discovery (2001).

Far more egregious than Directed's delay in discovery production, is its failure to prepare its corporate representative. At the beginning of the deposition, when asked whether he was prepared to testify as to four of the main issues in the case properly noticed in Omega's notice (see Doc. No. 51), Mr. Rutledge testified on May 18, 2006 that he was not prepared to testify as to the factual basis for (1) Directed's defenses or denial of allegations, (2) counterclaims, (3) invalidity claims, and (4) non-infringement claims. Doc. No. 70-2 at 5-6. Directed contends that its representative was not prepared on the four topics because it had not yet filed its Answer to the First Amended Complaint, which it did on May 25, 2006. Doc. No. 63. Despite the fact that Directed had been named as a Defendant on November 18, 2005 in the First Amended Complaint (Doc. No. 27) and served shortly thereafter, and had filed a Motion to Dismiss or Transfer filed on January 17, 2006, it claims that six months was not adequate time in which to prepare its response (filed exactly one week after Rutledge's deposition) and prepare its representative. This argument is without merit.

\*5 It is also clear from Mr. Rutledge's responses that the email searches pursuant to Omega's request for production had been conducted before his deposition (Doc. No. 70-2 at 7-8) yet the results of the search were not produced until June 12, 2006. From the content of Mr. Rutledge's answers (reproduced in Doc. No. 70-1 at 6), it appears that Directed did not produce all of the development documents it had until after Rutledge's deposition.

Directed does not deny that Mr. Rutledge was also inadequately prepared to answer questions regarding sales of or royalties paid for the allegedly infringing products. Directed also does not deny that, after questions from Omega's counsel pointing out obvious discrepancies in the financial statements, Mr. Rutledge admitted that he had doubts about whether the statements (with negative "gross sales") were accurate or contained information from years prior to 2002, which he believed to be difficult to obtain. *See* Doc. No. 70-1 at 8-9.

Directed admittedly failed to timely produce documents from its email system in accordance with the Court's April 27 Order. The Court finds Directed's failure to produce 2,000 documents from its email system until June 12, 2006 to be without substantial justification. The Court also finds that Directed's failure to present a corporate representative who was prepared to testify on Omega's properly noticed topics to be without substantial justification. Under Federal Rule of Civil Procedure 37(d), the Court "shall require the party failing to act or the attorney advising that party or both to pay reasonable expenses, including attorneys' fees, caused by the failure."

It is **ORDERED** as follows:

1. Directed shall pay sanctions for its failure to participate in discovery as set forth in the Federal Rules to Omega in the amount of \$1500.00. While this may not provide complete recompense for the difficulties entailed here, the Court considers that this sum is commensurate with the circumstances and should serve as an adequate reminder of the ob-

ligations of litigants and their counsel to conduct litigation in this Court in a spirit of cooperation and not obfuscation.

2. Directed will bear the cost of a second deposition of a properly prepared Rule 30(b)(6) corporate representative pursuant to the topics noticed in Omega's original notice of deposition dated April 3, 2006 (Doc. No. 52 at 5-8). The deposition will take place in Orlando, Florida at the offices of Plaintiff's counsel prior to August 4, 2006 on a date mutually agreeable to the parties.

DONE and ORDERED in Orlando, Florida on July 19, 2006.

M.D.Fla.,2006.

Omega Patents, LLC v. Fortin Auto Radio, Inc.  
Not Reported in F.Supp.2d, 2006 WL 2038534  
(M.D.Fla.)

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Slip Copy, 2009 WL 2474668 (E.D.Wis.)  
(Cite as: 2009 WL 2474668 (E.D.Wis.))

**H**  
Only the Westlaw citation is currently available.

United States District Court,  
E.D. Wisconsin.  
Gerald L. POLZIN, Plaintiff,  
v.  
UNIFUND CCR PARTNERS, John Does, Kohn  
Law Firm SC, Jack R. Chase, and David Ambrosch,  
Defendants.  
  
No. 08-C-59.  
Aug. 11, 2009.

Gerald L. Polzin, Green Bay, WI, pro se.

Amy Z. Knapp, Joseph P. Kincaid, Swanson Martin  
& Bell, Chicago, IL, for Defendants.

#### **DECISION AND ORDER**

LYNN ADELMAN, District Judge.

\*1 Plaintiff, who is currently incarcerated at the Green Bay Correctional Institution, filed a pro se complaint alleging that defendants violated his rights under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et seq.*, and Wisconsin state law in attempting to collect a credit card debt that he incurred prior to his incarceration. Defendants have filed a motion to dismiss for lack of subject matter jurisdiction and a motion to stay discovery pending resolution of that motion. Plaintiff opposes defendants' motion to dismiss and has filed numerous discovery-related motions. I address these motions below.

#### **I. MOTION TO DISMISS**

Because plaintiff alleges violations of the FD-CPA, a federal statute, I appear to have subject matter jurisdiction over this action pursuant to the general federal question statute, 28 U.S.C. § 1331, and supplemental jurisdiction over the state law claims, 28 U.S.C. § 1367. However, defendants argue that I lack subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine because plaintiff's

credit card debt was the subject of a state-court judgment rendered before plaintiff filed the present suit. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). Under *Rooker-Feldman*, district courts lack subject matter jurisdiction over "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Here, plaintiff is a "state-court loser" and the state-court judgment was rendered before plaintiff commenced the present proceedings. However, as explained below, plaintiff is not complaining about an injury caused by the state-court judgment or inviting district court review and rejection of that judgment, and therefore *Rooker-Feldman* does not apply.

On September 13, 2006, defendant Unifund filed an action in state court against plaintiff, seeking to collect an unpaid credit card debt. On August 13, 2007, the state trial court held a hearing on Unifund's motion for summary judgment.<sup>FN1</sup> At the hearing, the court found that plaintiff did not dispute that he owed the underlying principal balance of \$3,200.99. (Tr. at 9.) The court noted, however, that plaintiff disputed the amount of interest that Unifund had charged to the account. The disputed interest amount is what plaintiff in the present case refers to as "illegal interest." (*E.g.*, Compl. ¶ 12.) Instead of addressing the dispute over the alleged illegal interest, the trial court decided to award Unifund the undisputed principal balance plus statutory interest of five percent calculated from the date that the lawsuit was filed until the date of the hearing. (Tr. at 9-10.) Unifund was apparently satisfied with this result, even though the court awarded less interest than Unifund had requested. Over plaintiff's objection, the court entered judgment in favor of Unifund for the principal plus statutory interest. (Mot.

to Dismiss Ex B. at 72-73.)

FN1. The transcript of the hearing begins on page 89 of Exhibit B to Defendants' Motion to Dismiss. When citing to the transcript, I will use the page numbers in the transcript itself, rather than defendants' page numbers.

\*2 During the state trial court proceedings, plaintiff had requested leave to file a counterclaim against Unifund asserting violations of the Wisconsin Consumer Act based on the alleged illegal interest. Specifically, plaintiff asked to assert a claim under Wis. Stat. § 427.104(j), which prohibits a debt collector from making a claim or enforcing a right "with knowledge or reason to know that the right does not exist." The trial court never explicitly ruled on plaintiff's request, and no counterclaim was filed. The court simply entered judgment for Unifund and ignored plaintiff's request to file a counterclaim.

After the state trial court entered judgment for Unifund, plaintiff appealed, and the state court of appeals summarily affirmed the judgment. (Mot. to Dismiss Ex. D.) One of the issues plaintiff raised on appeal was that he should have been allowed to file a counterclaim under the Wisconsin Consumer Act. (Mot. to Dismiss Ex. C at 11.) In its opinion, however, the court did not address whether plaintiff should have been allowed to file a counterclaim. Instead, the court commented on the merits of plaintiff's Wisconsin Consumer Act counterclaim without acknowledging that plaintiff had never been granted permission to file any such claim in the first place. The court stated:

Polzin did not establish any violation of Wis. Stat. § 427.104(j) that would allow him any relief under the consumer act. That statute prohibits a debt collector under some circumstances from making a claim or threatening to enforce a right "with knowledge or reason to know the right does not exist." There is no evidence that Unifund knew or should have known that it lacked the

right to request the contractual interest rate on the loan it acquired from Citibank. The supporting papers submitted with the motion for summary judgment suggest an adequate basis for Unifund to have sought the amount requested in the complaint without violating Wis. Stat. § 427.104(j).

(*Id.* at 2.) The court of appeals's comments on this issue are perplexing. As noted, plaintiff had not been allowed to assert his counterclaim in the trial court, and thus the lack of evidence to support the claim was attributable to the fact that plaintiff had never been afforded the opportunity to present any such evidence. The court of appeals seemed to overlook this fact. Further, it is not clear what the court meant when it noted that Unifund's supporting papers "suggest[ed]" an adequate basis for the interest charges. Did the court mean that Unifund in fact had an adequate basis to collect the interest, or was the court merely remarking that Unifund seemed to have some evidence in its favor? Finally, whether plaintiff had established a violation of Wis. Stat. § 427.104(j) had nothing to do with the judgment that the court of appeals affirmed. That judgment did not in any way encompass plaintiff's claims under the Wisconsin Consumer Act because, as noted, plaintiff had not been allowed to assert any such claims in the first place.

\*3 In the present action, plaintiff essentially seeks to litigate the claims he was not permitted to litigate in the state trial court. Specifically, he alleges that the FDCPA prohibits the false representation of the "amount" of any debt, 15 U.S.C. § 1692e(2)(A), and that defendants' filings in the state-court action (including the complaint and an affidavit filed in support of Unifund's motion for summary judgment) falsely stated the amount of interest associated with his debt. Defendants argue that these claims seek to upset the state-court judgment and that therefore I lack jurisdiction pursuant to the *Rooker-Feldman* doctrine.

As noted, the *Rooker-Feldman* doctrine provides that district courts lack subject matter jurisdiction over "cases brought by state-court losers



complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). “The doctrine ... is inapplicable when the plaintiff is not attacking a state court judgment.” *Jones v. Brennan*, 465 F.3d 304, 305 (7th Cir.2006). Further, *Rooker-Feldman* does not “stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court.” *Exxon Mobil Corp.*, 544 U.S. at 284.

In the present case, *Rooker-Feldman* does not apply because plaintiff is not complaining of injuries caused by the state-court judgment. That judgment provides only that Unifund is entitled to recover the undisputed principal balance plus statutory interest, and plaintiff does not argue that he does not owe these amounts or that the judgment awarding these amounts injured him. Rather, plaintiff argues that defendants' actions in attempting to collect *more* than these amounts prior to the time the state court entered its judgment violated the FDCPA and Wisconsin Consumer Act. Plaintiff can prevail on these claims without upsetting or calling into question the state-court judgment.

Although for whatever reason the court of appeals discussed the merits of plaintiff's Wisconsin Consumer Act counterclaim in its decision, that discussion has no bearing on whether *Rooker-Feldman* applies. This is so for two reasons. First, the discussion was not incorporated into the state-court judgment. As noted, the court of appeals summarily affirmed the trial court's judgment, and the trial court's judgment did not address plaintiff's Wisconsin Consumer Act counterclaim—the trial court simply ignored plaintiff's request to file a counterclaim. Second, even if the discussion were somehow incorporated into the state-court judgment, plaintiff is not complaining about an injury caused by the discussion or asking me to review or reject that discussion. The court of appeals simply noted

that plaintiff had not produced any evidence of a Wisconsin Consumer Act violation and that one of Unifund's affidavits “suggest[ed]” an adequate basis for the interest it requested. (Mot. to Dismiss Ex. D at 3.) I do not know why the court of appeals decided to offer these remarks, but I do not need to review or reject them in order to find for plaintiff in this case. Any judgment in the present case will be based on the evidence developed here, and the state-court's observations about the state-court record are irrelevant.

\*4 Defendants argue that *Rooker-Feldman* applies based on the Seventh Circuit's recent opinion in *Kelley v. Med-1 Solutions, LLC*, 548 F.3d 600 (7th Cir.2008). In that case, the plaintiffs were state-court losers who came to federal court to assert FDCPA claims against the former state-court plaintiffs. The federal plaintiffs argued that *Rooker-Feldman* did not apply because they were not seeking redress for injuries that arose out of the state-court judgment but redress for injuries that arose out of defendants' conduct prior to entry of the state-court judgment. However, the Seventh Circuit held that the claims fell within *Rooker-Feldman* because a federal court could not find for the plaintiffs without upsetting the state-court judgment. *Id.* at 605. The court found that a federal court could not grant the plaintiffs the relief they sought without also determining that the state court had erred in granting the earlier judgment to the state-court plaintiffs. *Id.*

The present case is distinguishable from *Kelley* because, as explained, I need not upset the state-court judgment to award plaintiff the relief he seeks. Plaintiff does not dispute the state-court judgment, and that judgment does not address the claims that plaintiff asserts in the present case. Although the court of appeals commented on plaintiff's present claims, those comments were not incorporated into the state-court judgment, plaintiff does not argue that those comments injured him, and I need not review or reject those comments in order to find for plaintiff. Therefore, I have subject-

matter jurisdiction over plaintiff's claims.

## II. DISCOVERY MOTIONS

On the same day that defendants filed their motion to dismiss based on the *Rooker-Feldman* doctrine, defendants filed a motion to stay all discovery pending resolution of the motion to dismiss. That motion is still pending. Before defendants filed their motion to stay, plaintiff had served defendants with requests for admission, interrogatories, and requests for the production of documents. Although defendants responded to the requests for admission, they did not respond to the interrogatories or requests for the production of documents. Plaintiff subsequently filed motions to compel responses to the interrogatories and document requests and a motion to sanction defendants for their failure to respond.

Defendants argue that they were not required to respond to the interrogatories and document requests because their motion to stay discovery had not been ruled upon. However, the pendency of defendants' motion to stay discovery was not a valid reason for refusing to respond to plaintiff's discovery requests. A motion to stay is not self-executing. Until an order granting the motion is entered, discovery is not stayed, and a party cannot simply ignore valid discovery requests on the ground that the motion to stay might be granted. Therefore, defendants must fully comply with the discovery requests previously propounded by plaintiff.

\*5 Although it would be within my discretion to award sanctions or expenses to plaintiff based on defendants' refusal to respond to plaintiff's requests, I do not think that such an award is warranted here. Although the pendency of a motion to stay or a motion for protective order does not automatically excuse a party's failure to respond to discovery requests, the court can take into consideration whether the motion to stay was filed in good faith when deciding whether to award sanctions or expenses. See *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 78, 86-87 (D.D.C.1998). Here, defendants had filed a motion to dismiss for lack of subject

matter jurisdiction, and I find that such motion was filed in good faith. Further, because defendants had a good-faith basis for questioning the court's jurisdiction, defendants were justified in thinking that discovery would be stayed pending resolution of the jurisdictional issue. Thus, although defendants should have complied with plaintiff's discovery requests despite having filed a motion to stay discovery, I find that, under the circumstances, an award of expenses would be unjust. Fed.R.Civ.P. 37(a)(5)(iii) & (d)(3). However, plaintiff's motions to compel defendants' responses to interrogatories and requests for the production of documents are granted. Defendants must respond to these requests within thirty days of the date of this order.

Plaintiff has also moved to compel defendants to provide more complete responses to his requests for admission. Under Federal Rule of Civil Procedure 36(a)(6), a party may move to determine the sufficiency of an answer or objection to a request for admission. Plaintiff argues that defendant Unifund's responses to requests 14, 15, 21 and 27 are inadequate, that defendant Kohn Law Firm's responses to requests 14, 20 and 26 are inadequate, and that defendant Ambrosh's responses to requests 14, 20 and 26 are inadequate. Defendants' objections to request 14 are overruled and defendants are instructed to either admit or deny the request. Unifund has denied request 15 and therefore no further response is necessary. Defendants' objections to requests 20, 21, 26 and 27 are overruled and defendants are instructed to unequivocally either admit or deny the requests. Defendants shall amend their responses to plaintiff's requests for admission within thirty days of the date of this order. I find that defendants' objections were substantially justified and therefore will not award expenses pursuant to Federal Rule of Civil Procedure 37(a)(5).

Because the deadlines that I set in my previous scheduling order have lapsed, I will issue a new scheduling order providing the parties with additional time to conduct discovery and file dispositive motions. The parties are advised to abide by this

schedule unless a motion to modify the schedule is filed and granted prior to the applicable deadline.

### III. CONCLUSION

**IT IS THEREFORE ORDERED** that defendants' motion to dismiss is **DENIED**.

**\*6 IT IS FURTHER ORDERED** that plaintiff's motion to extend discovery is **GRANTED**. The court will issue an amended scheduling order contemporaneously with this order.

**IT IS FURTHER ORDERED** that defendants' motion to stay discovery is **DENIED** as **MOOT**.

**IT IS FURTHER ORDERED** that plaintiff's motion to impose sanctions is **DENIED**.

**IT IS FURTHER ORDERED** that plaintiff's motions to compel are **GRANTED IN PART**, as discussed above. Defendants shall fully respond to plaintiff's outstanding discovery requests within thirty days of the date of this order.

**FINALLY, IT IS ORDERED** that plaintiff's motion to strike defendants' reply brief is **DENIED**.

E.D.Wis.,2009.  
Polzin v. Unifund CCR Partners  
Slip Copy, 2009 WL 2474668 (E.D. Wis.)

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