



**U.S. Department of Justice**

Antitrust Division

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*Liberty Place Building  
325 Seventh Street NW  
Washington, DC 20530*

December 28, 1999

Honorable Joseph J. Farnan, Jr.  
United States District Court  
for the District of Delaware  
Federal Building, Room 6325  
844 King Street  
Wilmington, DE 19801

Re: United States v. Federation of Physicians and Dentists, 98-CV-475 JJF

Dear Judge Farnan:

Plaintiff United States of America hereby responds to defense counsel's letter motion (D.I. 172), filed on December 15, 1999, which seeks to quash the depositions of Carolyn Spiezio, a former practice manager with the Dover orthopedic group of Tooze & Easter, and Joseph R. Stokes, a practice manager with Delaware Bone & Joint Specialists. Specifically, defense counsel, who represents the defendant Federation as well as Mr. Stokes and Mrs. Spiezio, moves to join them in the Federation's pending September 8, 1999 motion to quash the depositions of 23 other persons whose participation in the alleged price-fixing and boycott conspiracy is the essence of this litigation. (D.I. 145). Defense counsel's current letter brief repeats many of the same baseless arguments already refuted by the plaintiff in its September 15, 1999 response to defendant's pending motion to quash. (D.I. 157). Defense counsel again also grossly exaggerates the burden imposed on the two proposed deponents, while ignoring Mr. Stokes' and Mrs. Spiezio's relevant knowledge about facets of the alleged conspiracy and plaintiff's resultant good-faith grounds to depose those two individuals in preparing for trial. For the reasons stated below as well as those in plaintiff's September 15, 1999 response letter brief, plaintiff respectfully requests that this Court deny Mr. Stokes' and Mrs. Spiezio's motion.

## I. Background

On August 2, 1999, plaintiff noticed the depositions of 24 individuals whom plaintiff believes to be persons knowledgeable about various facets of the conspiracy alleged in the Complaint, which focuses on the Federation's coordination of its Delaware member orthopedic surgeons' concerted refusal to negotiate their fee dispute with Blue Cross and Blue Shield of Delaware except through their common negotiating agent, Jack Seddon. Although this Court's Stipulated Scheduling Order (D.I. 71 at 3) allows each side to take up to 30 pretrial depositions, on September 8, 1999, defense counsel moved to quash the depositions of all those whom defense counsel represents and was joined in the motion by five employees of First State Orthopaedics, thus totaling all three Federation representatives noticed and 20 of 21 Delaware Federation member physicians and their practice managers. Besides claiming the deponents' lack of knowledge, undue burden, and bad faith, defense counsel made the blanket assertion that the proposed pretrial depositions were necessarily duplicative of the government's pre-Complaint investigation. As additionally explained in plaintiff's September 15, 1999, letter, defense counsel also grossly misrepresented the burden and scope of the pre-Complaint investigation and case discovery to date, including exaggerating the number of documents produced to the Government by a factor of about 70 times.

Defense counsel's September 8 letter brief built on the phantom "voluminous" document production, arguing--contrary to common sense--that by virtue of having produced documents concerning events at issue, the witnesses should not have to be deposed about their participation in, and knowledge of, the relevant events and those very documents. Indeed, defense counsel made no attempt to explain why depositions of the individual member physicians (and their practice managers) would be unreasonable under the liberal discovery rules, in view of defendant's principal defense that its member physicians acted independently, rather than concertedly, to oppose and prevent proposed fee reductions by Blue Cross Blue Shield of Delaware.

On September 15, 1999, plaintiff responded to defendant's September 8 motion to quash, setting forth the legal and factual inadequacy of the movants' claims, explaining its reasons for noticing the depositions, and fully demonstrating the movants' failure to meet their heavy burden of showing the "extraordinary circumstances" required for barring a party from taking a deposition. (See D.I. 157 at 4-5). On the latter point, plaintiff cited, among other numerous, basic legal principles, cases establishing that neither a simple claim of being too busy to be deposed nor the witness' professed lack of knowledge is sufficient to constitute "extraordinary circumstances." (D.I. 157 at 5).

Moreover, plaintiff's September 15 letter presents the statutory basis and unanimous case authority for the principle that investigative depositions neither (i) render pretrial depositions of the same persons or their business associates duplicative or unduly burdensome, nor (ii) bar the government from fully exercising its discovery rights under the Federal Rules once it decides to bring suit. (D.I. 157 at 6-10). Indeed, no true duplication would occur even as to those persons

who had been deposed during the investigation, because plaintiff detailed numerous purposes to be served by the proposed pretrial depositions that could not have been achieved in the investigative depositions, such as testing the factual basis of defendant's subsequently asserted denials of the Complaint's allegations and inquiring about events occurring since the investigative depositions. (D.I. 157 at 8-9). Defendant's motion to quash was fully briefed by September 21, 1999, and is currently pending before this Court.

As the scheduled cut-off date for fact discovery drew closer, on November 30, 1999, plaintiff noticed the depositions of Mr. Stokes and Mrs. Spiezio, who plaintiff believes have knowledge of events at issues. (D.I. 168, 170). Defense counsel filed the present motion to include these two individuals within the scope of its September 8 motion to quash, claiming, among other things, that Mrs. Spiezio lacks knowledge and that Mr. Stokes' investigative deposition and involvement in document production render his pretrial deposition unduly burdensome and duplicative. The plaintiff believes that the legal principles fully briefed in plaintiff's September 15, 1999 responsive brief letter (D.I. 157) are equally applicable to this Court's review of Mr. Stokes' and Mrs. Spiezio's present motion to quash and incorporates them here by reference. This letter, therefore, sets forth below only the factual explanations of why defense counsel's motion is woefully inadequate.

## **II. Mrs. Spiezio And Mr. Stokes Have Failed To Meet Their Heavy Burden Of Showing Extraordinary Circumstances Justifying The Issuance Of A Protective Order Prohibiting Their Depositions**

### **1. Mrs. Carolyn Spiezio**

The plaintiff seeks to depose Mrs. Spiezio, who was not deposed during the government's investigation, based on its good-faith belief that she possesses knowledge relevant to several factual issues in this case. For much of the period covering the events alleged in the Complaint, Mrs. Spiezio was the practice administrator for Tooze & Easter, one of the three orthopedic practice groups in Dover, and was, according to her own declaration filed by defense counsel with its motion, responsible for "overseeing the entire practice's operation." (Spiezio Decl. D.I. 173 at ¶ 3). Such responsibilities would likely include the negotiation of contracts with insurers such as Blue Cross Blue Shield of Delaware as well as the practice's evaluation of Blue Cross' contractual offers rejected by the practice group.

Moreover, despite Mrs. Spiezio's assertions in her declaration that she "hardly know[s] anything" concerning the Federation (D. I. 173 at ¶ 3), she was the sole addressee of several written communications relating to the Federation as well as to the concerted action among the orthopedic groups that was led by the Federation. For example, she was the addressee of a letter from Mr. Stokes that lays out the physicians' coordinated refusal to negotiate individually with Blue Cross. Specifically, Mr. Stokes advised Mrs. Spiezio that

Jack [Seddon] has asked that if Paul King [of Blue Cross], or anyone else from BCBSD, contact us to negotiate, we are to refer them to Jack Seddon. . . . It is Jack's belief that this is the only effective way to get BCBSD to negotiate. (Exhibit 1).

This document is obviously important evidence of concerted action, especially given Mr. Stokes' position as the practice administrator of a competing orthopedic practice group in Milford. In yet another written communication from Mr. Stokes dated November 3, 1997, Mrs. Spiezio apparently received copies of a "messenger letter" as well as a "union [letter] to [Blue Cross]" of the same date. (Exhibit 2). Attached to the fax cover sheet was a document labeled "SAMPLE LETTER," quoted extensively in ¶ 30 of the Complaint (and flatly denied by defendant), which was authored by Dr. Newcomb of First State Orthopaedics--yet another practice--and addressed to Paul King of Blue Cross. The sample letter designated Mr. Seddon as the third-party messenger through whom Blue Cross was directed to communicate concerning all contractual matters. Significantly, the day after Mrs. Spiezio's receipt of this correspondence from Mr. Stokes, her practice group sent an identical letter, save for the names of the author and practice group, to Mr. King of Blue Cross. Finally, on at least two occasions, Mrs. Spiezio was the recipient of Mr. Seddon's markups of proposed insurer contracts with her orthopedic group.

Surely, plaintiff is entitled to depose Mrs. Spiezio concerning all relevant documents that were addressed to her, as well as those documents and events of which she is likely to have knowledge as the practice manager of Tooze & Easter. It would defeat the purpose of discovery and run contrary to case law if a witness with apparent involvement in relevant activities could avoid the taking of her deposition through self-serving assertions of lack of knowledge. As already set forth in plaintiff's September 15, 1999, response letter, the law is clear that a witness' professed lack of knowledge or recollection of the matters at issue is an insufficient basis to quash her deposition because the party seeking the discovery is entitled to test that professed ignorance. (D.I. 157 at 4-5).

Equally important, the documents may refresh Mrs. Spiezio's memory of relevant events, the significance of which may not be fully appreciated by Mrs. Spiezio given her own statement that she has little knowledge about the overall nature of plaintiff's case. Indeed, during plaintiff counsel's two brief, substantive telephone conversations with Mrs. Spiezio in an attempt to schedule an informal interview, Mrs. Spiezio's memory was refreshed by plaintiff counsel's limited questions. (Declaration of Heather Howard, Exhibit 3 at ¶ 5). For example, Mrs. Spiezio was able to recall the circumstances surrounding Drs. Tooze and Easter's joining the Federation. (*Id.* at ¶ 5). She also recalled being a party to at least one communication between competing practices regarding the Federation. (*Id.* at ¶ 5). Additionally, she remembered receiving a telephone call from Mr. Stokes informing her that he was sending a confidential fax to Dr. Easter concerning the Federation, though she said that she did not examine the fax. (*Id.* at ¶ 5). The plaintiff thus needs to be able to question Mrs. Spiezio to examine the circumstances surrounding this confidential fax concerning the Federation. Furthermore, Mrs. Spiezio recalled, during her brief conversations with plaintiff's counsel, the

circumstances regarding Tooze & Easter's decision to "no longer [] adjust off the Blue Cross Blue Shield write off" in November, 1997, a fact relevant to showing the negative impact on patients from the orthopedic surgeons' price-fixing activities. (Howard Decl. at ¶ 5; Spiezio Decl. D.I. 173 at ¶ 6). Ironically, Mrs. Spiezio's declaration, offered ostensibly to establish Mrs. Spiezio's lack of knowledge, actually confirms her knowledge of several of these relevant events, about which plaintiff should be entitled to inquire further.

Mrs. Spiezio's claim of burden is also specious. As the attached declaration by plaintiff's counsel demonstrates, plaintiff's dealings with Mrs. Spiezio can hardly be considered burdensome or improper. Indeed, plaintiff's counsel has made every attempt to minimize the burden on

Mrs. Spiezio. Although plaintiff's counsel has had six conversations with Mrs. Spiezio, four of them were very brief, and all combined amounted to less than fifty minutes.<sup>1</sup> As the declaration details, the telephone calls were necessary to first locate Mrs. Spiezio and then to inquire about her willingness to meet for an informal interview. Plaintiff's counsel sought to accommodate Mrs. Spiezio by proposing to meet with her at a time and place convenient for her, for no more than an hour. Such a meeting would have allowed plaintiff to discover and place in context what she knew, and to prepare a declaration setting forth the relevant facts as Mrs. Spiezio related them. Had this occurred, Mrs. Spiezio's deposition would have not been noticed. To the extent that Mrs. Spiezio now feels burdened about being subpoenaed for the deposition, that burden is largely the result of her decision to rely on the advice of Jack Seddon concerning whether to be interviewed by the plaintiff. (Howard Decl. at ¶ 8).

## **2. Mr. Joseph Stokes**

Similarly, Mr. Stokes' motion to quash his deposition clearly fails to establish the legally requisite extraordinary circumstance necessary to warrant issuance of a protective order. In opposing Mr. Stokes' deposition, defense counsel claims that Mr. Stokes' prior investigative deposition, the contested depositions noticed of his business associates, as well as his involvement in responding to document or other discovery requests should excuse him from being deposed during pretrial discovery. But defense counsel's otherwise lengthy and inaccurate arguments fail to address two key points: (1) Mr. Stokes was heavily involved in Federation activities, both as they pertained to his own group and as a downstate coordinator for the Federation in its dealings with other downstate practices; and (2) a number of relevant issues within Mr. Stokes' personal knowledge have arisen subsequent to Mr. Stokes' investigative deposition in the spring of 1998.

These points converge in the following example demonstrating why plaintiff needs Mr.

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<sup>1</sup> Indeed, two telephone calls were made to Mrs. Spiezio after the date she had set for calling back plaintiff's counsel had passed, to determine whether she had decided to meet with plaintiff. A third call was placed as a courtesy to inform Mrs. Spiezio of the time and date scheduled for her deposition.

Stokes' pretrial testimony to prepare its case adequately for trial. The Federation's Amended Answer and Defenses (D.I. 11), filed several months after Mr. Stokes' deposition, flatly denies ¶ 41 of the Complaint (D.I. 1), which alleges:

[L]etters sent on October 31, 1997, at Mrs. Odenkirk's request, *by one orthopedic group's office manger* to several other orthopedic groups stated:

Word has been received that Paul King is reluctant to speak to Jack Seddon regarding negotiating fees. Jack [Seddon] has asked that if Paul King, or anyone else for [Blue Cross], contact us to negotiate, we are to refer them to Jack Seddon at 1-800-373-5777. It is Jack's belief that this is the only effective way to get [Blue Cross] to negotiate. (emphasis added).<sup>2</sup>

The facts alleged, if proven, are obviously important evidence supporting the Government's claim that competing orthopedic groups were acting concertedly in refusing to negotiate with Blue Cross except through Mr. Seddon. Such facts, on their face, also refute the Federation's central claim that each of its member groups acted independently in contract negotiations with Blue Cross. As the letters attached hereto as Exhibits 1, 4, and 5 show, and as Mr. Stokes confirmed in his investigative deposition, the office manager referred to in the above-quoted allegations is Mr. Stokes. Indeed, Mr. Stokes, in his investigative deposition, appeared to confirm all of the allegations in ¶ 41 of the Complaint--the same allegations that the Federation subsequently, unequivocally denied in its Amended Answer. In view of the Federation's flat denial of ¶ 41, which Fed. R. Civ. P. 11(b)(4) requires to be "warranted on the evidence," Mr. Stokes' pretrial deposition is necessary for plaintiff to determine, among other things, whether he has any knowledge of the implied evidentiary basis warranting the Federation's blanket denial, including whether his personal knowledge supporting these subsequently denied allegations has changed. In a similar vein, Mr. Stokes' pretrial deposition will allow plaintiff to determine what information, if any, that Mr. Stokes, as the downstate coordinator for the Federation, may be aware of in support of the Federation's numerous affirmative "defenses" filed several months after his investigative deposition.

Another relevant event that occurred after Mr. Stokes' investigative deposition was Mr. Stokes' principal involvement on behalf of Delaware Bone & Joint Specialists ("DB&JS") in re-contracting with Blue Cross in the summer of 1998--without Mr. Seddon's involvement. The plaintiff is surely entitled to discover Mr. Stokes' knowledge of what caused his group to negotiate without insistence on Mr. Seddon being involved--as it had previously insisted, and as Mr. Stokes had urged others to insist in his October 31, 1997 letters--and how his group determined that the fees it ultimately contracted for were acceptable. In addition, plaintiff did not attempt in its investigative deposition to cover or pin down Mr. Stokes on all points that may arise in a trial examination of him.

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<sup>2</sup> As already discussed, Mrs. Spiezio was a recipient of one of these letters.

In light of these important reasons to depose Mr. Stokes, defense counsel's attempt to impute bad faith to plaintiff is groundless. Defense counsel argues that the pretrial depositions noticed for Dr. Quinn and Mrs. Dora Cummings, both currently employees of DB&JS, demonstrate the lack of need for Mr. Stokes' deposition. However, both of these persons were involved in discrete, relevant activities that did not involve Mr. Stokes, and, conversely, Mr. Stokes was involved in relevant activities, such as those that are the subject of ¶ 41 of the Complaint, in which they were not fully involved.<sup>3</sup> Indeed, after reading defense counsel's argument, one would be surprised to learn that, during the key events underlying the conspiracy in the fall of 1997 and into 1998, Mrs. Cummings worked for the Nanticoke Orthopaedics group, a group then wholly independent from Mr. Stokes' and Mr. Quinn's practice group. Thus, Ms. Cummings' pretrial deposition will cover her relevant knowledge while employed at Nanticoke Orthopaedics, including her dealings at that practice with Federation officials and with persons in other practices such as Mr. Stokes, who also sent Ms. Cummings one of the October 31, 1997 letters. (Exhibit 4).

Finally, in claiming undue burden, defense counsel relies heavily on Mr. Stokes' involvement in coordinating Dickinson Medical Group's production during the investigation of, what in reality are, 282 documents and the successor Delaware Bone & Joint Specialists' additional production of 120 documents subpoenaed in this case. Defense counsel also argues that Mr. Stokes has been burdened in coordinating his group's response to a Rule 30(b)(6) deposition notice in this case. (D.I. 164). None of these arguments has any legal or factual basis. The small number of documents produced can hardly support a claim of burden in an antitrust conspiracy case. Also, as already briefed in plaintiff's September 15, 1999 response letter, the production of documents is no substitute for oral testimony, especially in view of Mr. Stokes' significant involvement in the Federation's price-fixing and boycott activities.

Mr. Stokes' involvement in responding to plaintiff's Rule 30(b)(6) deposition notice similarly provides no basis for quashing his deposition. Plaintiff's Rule 30(b)(6) deposition notice served on Mr. Stokes' group sought testimony concerning two similar, anonymous letters (attached as Exhibits 6 and 7), that are the subject of allegations almost entirely denied by the Federation in ¶ 34 of the Complaint. These letters, inviting Delaware orthopedic surgeons to attend a Federation meeting in Dover on September 18, 1997, during the time when Blue Cross' proposed fee reduction was pending, discuss the need for Delaware orthopedic surgeons to "stand united" in their dealings with insurers and how the union will provide them with a "collective voice." The letters strongly support the plaintiff's claim that the Federation coordinated a concerted response among Delaware orthopedic surgeons to Blue Cross' proposed fee reduction.

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<sup>3</sup> For example, Dr. Quinn, who showed a poor memory of events in which he was involved, testified in his investigative deposition that he delegated the primary responsibility for contracting with Blue Cross to Mr. Stokes, subject only to his approval. While Mr. Stokes was most prominently involved in contracting with insurers, it was Dr. Quinn who attended at least two meetings at which Federation activities were discussed--meetings that Mr. Stokes testified he did not attend.

Even defense counsel did not object to responding to this Rule 30(b)(6) deposition notice, evidently recognizing that it sought to discover facts pertaining to important documents. Aside

from the addressees and handwriting on them, the letters differ in that Exhibit 7 contains an R.S.V.P. line with the telephone number of Dr. Quinn's and Mr. Stokes' group. The other letter is addressed to a physician in Dr. Quinn's and Mr. Stokes' group.

In view of the evidentiary importance of these anonymous letters, and given both Dr. Quinn's and Mr. Stokes' claims of unfamiliarity with either of these documents during their investigative depositions--despite the letters' obvious connections to their group--plaintiff issued the Rule 30(b)(6) deposition notice requesting that Mr. Stokes' group designate a person or persons to testify about, among other things, the authorship, drafting, typing, and sending of the documents. The group's own election to have Mr. Stokes show the two letters to members of his practice group can hardly constitute undue burden. Moreover, Mr. Stokes' inquiry of members of his practice group was fruitful--revealing that the two anonymous letters were indeed typed by a secretary in his practice group, further evidencing Mr. Stokes' practice group's involvement in the alleged conspiracy. Defense counsel's attempt to excuse Mr. Stokes now from his pretrial deposition based in part on his coordination of his group's response to the Rule 30(b)(6) request is simply preposterous.

#### **IV. Conclusion**

For the reasons stated above, the United States respectfully requests that this Court deny Mrs. Spiezio's and Mr. Stokes' present motion to quash, along with the September 8, 1999 motion to quash and/or for a protective order filed by defense counsel on behalf of 23 other individuals connected with this case.

Respectfully submitted,

\_\_\_\_\_/S/\_\_\_\_\_  
Virginia Gibson-Mason  
Assistant U.S. Attorney  
Chief, Civil Division

cc: Hal K. Litchford, Esq. (via U.S. Mail and e-mail)  
Litchford & Christopher  
Perry F. Goldlust, Esq. (via hand delivery)  
Heiman, Aber, Goldlust & Baker  
P. Clarkson Collins, Jr., Esq. (via U.S. Mail)  
Morris, James, Hitchens & Williams





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## **I. Background**

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Moreover, plaintiff's September 15 letter presents the statutory basis and unanimous case authority for the principle that investigative depositions neither (i) render pretrial depositions of the same persons or their business associates duplicative or unduly burdensome, nor (ii) bar the government from fully exercising its discovery rights under the Federal Rules once it decides to bring suit. (D.I. 157 at 6-10). Indeed, no true duplication would occur even as to those persons

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## **II. Mrs. Spiezio And Mr. Stokes Have Failed To Meet Their Heavy Burden Of Showing Extraordinary Circumstances Justifying The Issuance Of A Protective Order Prohibiting Their Depositions**

### **1. Mrs. Carolyn Spiezio**

The plaintiff seeks to depose Mrs. Spiezio, who was not deposed during the government's investigation, based on its good-faith belief that she possesses knowledge relevant to several factual issues in this case. For much of the period covering the events alleged in the Complaint, Mrs. Spiezio was the practice administrator for Tooze & Easter, one of the three orthopedic practice groups in Dover, and was, according to her own declaration filed by defense counsel with its motion, responsible for "overseeing the entire practice's operation." (Spiezio Decl. D.I. 173 at ¶ 3). Such responsibilities would likely include the negotiation of contracts with insurers such as Blue Cross Blue Shield of Delaware as well as the practice's evaluation of Blue Cross' contractual offers rejected by the practice group.

Moreover, despite Mrs. Spiezio's assertions in her declaration that she "hardly know[s] anything" concerning the Federation (D. I. 173 at ¶ 3), she was the sole addressee of several written communications relating to the Federation as well as to the concerted action among the orthopedic groups that was led by the Federation. For example, she was the addressee of a letter from Mr. Stokes that lays out the physicians' coordinated refusal to negotiate individually with Blue Cross. Specifically, Mr. Stokes advised Mrs. Spiezio that

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Mrs. Spiezio. Although plaintiff's counsel has had six conversations with Mrs. Spiezio, four of them were very brief, and all combined amounted to less than fifty minutes.<sup>1</sup> As the declaration details, the telephone calls were necessary to first locate Mrs. Spiezio and then to inquire about her willingness to meet for an informal interview. Plaintiff's counsel sought to accommodate Mrs. Spiezio by proposing to meet with her at a time and place convenient for her, for no more than an hour. Such a meeting would have allowed plaintiff to discover and place in context what she knew, and to prepare a declaration setting forth the relevant facts as Mrs. Spiezio related them. Had this occurred, Mrs. Spiezio's deposition would have not been noticed. To the extent that Mrs. Spiezio now feels burdened about being subpoenaed for the deposition, that burden is largely the result of her decision to rely on the advice of Jack Seddon concerning whether to be interviewed by the plaintiff. (Howard Decl. at ¶ 8).

## **2. Mr. Joseph Stokes**

Similarly, Mr. Stokes' motion to quash his deposition clearly fails to establish the legally requisite extraordinary circumstance necessary to warrant issuance of a protective order. In opposing Mr. Stokes' deposition, defense counsel claims that Mr. Stokes' prior investigative deposition, the contested depositions noticed of his business associates, as well as his involvement in responding to document or other discovery requests should excuse him from being deposed during pretrial discovery. But defense counsel's otherwise lengthy and inaccurate arguments fail to address two key points: (1) Mr. Stokes was heavily involved in Federation activities, both as they pertained to his own group and as a downstate coordinator for the Federation in its dealings with other downstate practices; and (2) a number of relevant issues within Mr. Stokes' personal knowledge have arisen subsequent to Mr. Stokes' investigative deposition in the spring of 1998.

These points converge in the following example demonstrating why plaintiff needs Mr.

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<sup>1</sup> Indeed, two telephone calls were made to Mrs. Spiezio after the date she had set for calling back plaintiff's counsel had passed, to determine whether she had decided to meet with plaintiff. A third call was placed as a courtesy to inform Mrs. Spiezio of the time and date scheduled for her deposition.

Stokes' pretrial testimony to prepare its case adequately for trial. The Federation's Amended Answer and Defenses (D.I. 11), filed several months after Mr. Stokes' deposition, flatly denies ¶ 41 of the Complaint (D.I. 1), which alleges:

[L]etters sent on October 31, 1997, at Mrs. Odenkirk's request, *by one orthopedic group's office manger* to several other orthopedic groups stated:

Word has been received that Paul King is reluctant to speak to Jack Seddon regarding negotiating fees. Jack [Seddon] has asked that if Paul King, or anyone else for [Blue Cross], contact us to negotiate, we are to refer them to Jack Seddon at 1-800-373-5777. It is Jack's belief that this is the only effective way to get [Blue Cross] to negotiate. (emphasis added).<sup>2</sup>

The facts alleged, if proven, are obviously important evidence supporting the Government's claim that competing orthopedic groups were acting concertedly in refusing to negotiate with Blue Cross except through Mr. Seddon. Such facts, on their face, also refute the Federation's central claim that each of its member groups acted independently in contract negotiations with Blue Cross. As the letters attached hereto as Exhibits 1, 4, and 5 show, and as Mr. Stokes confirmed in his investigative deposition, the office manager referred to in the above-quoted allegations is Mr. Stokes. Indeed, Mr. Stokes, in his investigative deposition, appeared to confirm all of the allegations in ¶ 41 of the Complaint--the same allegations that the Federation subsequently, unequivocally denied in its Amended Answer. In view of the Federation's flat denial of ¶ 41, which Fed. R. Civ. P. 11(b)(4) requires to be "warranted on the evidence," Mr. Stokes' pretrial deposition is necessary for plaintiff to determine, among other things, whether he has any knowledge of the implied evidentiary basis warranting the Federation's blanket denial, including whether his personal knowledge supporting these subsequently denied allegations has changed. In a similar vein, Mr. Stokes' pretrial deposition will allow plaintiff to determine what information, if any, that Mr. Stokes, as the downstate coordinator for the Federation, may be aware of in support of the Federation's numerous affirmative "defenses" filed several months after his investigative deposition.

Another relevant event that occurred after Mr. Stokes' investigative deposition was Mr. Stokes' principal involvement on behalf of Delaware Bone & Joint Specialists ("DB&JS") in re-contracting with Blue Cross in the summer of 1998--without Mr. Seddon's involvement. The plaintiff is surely entitled to discover Mr. Stokes' knowledge of what caused his group to negotiate without insistence on Mr. Seddon being involved--as it had previously insisted, and as Mr. Stokes had urged others to insist in his October 31, 1997 letters--and how his group determined that the fees it ultimately contracted for were acceptable. In addition, plaintiff did not attempt in its investigative deposition to cover or pin down Mr. Stokes on all points that may arise in a trial examination of him.

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<sup>2</sup> As already discussed, Mrs. Spiezio was a recipient of one of these letters.

In light of these important reasons to depose Mr. Stokes, defense counsel's attempt to impute bad faith to plaintiff is groundless. Defense counsel argues that the pretrial depositions noticed for Dr. Quinn and Mrs. Dora Cummings, both currently employees of DB&JS, demonstrate the lack of need for Mr. Stokes' deposition. However, both of these persons were involved in discrete, relevant activities that did not involve Mr. Stokes, and, conversely, Mr. Stokes was involved in relevant activities, such as those that are the subject of ¶ 41 of the Complaint, in which they were not fully involved.<sup>3</sup> Indeed, after reading defense counsel's argument, one would be surprised to learn that, during the key events underlying the conspiracy in the fall of 1997 and into 1998, Mrs. Cummings worked for the Nanticoke Orthopaedics group, a group then wholly independent from Mr. Stokes' and Mr. Quinn's practice group. Thus, Ms. Cummings' pretrial deposition will cover her relevant knowledge while employed at Nanticoke Orthopaedics, including her dealings at that practice with Federation officials and with persons in other practices such as Mr. Stokes, who also sent Ms. Cummings one of the October 31, 1997 letters. (Exhibit 4).

Finally, in claiming undue burden, defense counsel relies heavily on Mr. Stokes' involvement in coordinating Dickinson Medical Group's production during the investigation of, what in reality are, 282 documents and the successor Delaware Bone & Joint Specialists' additional production of 120 documents subpoenaed in this case. Defense counsel also argues that Mr. Stokes has been burdened in coordinating his group's response to a Rule 30(b)(6) deposition notice in this case. (D.I. 164). None of these arguments has any legal or factual basis. The small number of documents produced can hardly support a claim of burden in an antitrust conspiracy case. Also, as already briefed in plaintiff's September 15, 1999 response letter, the production of documents is no substitute for oral testimony, especially in view of Mr. Stokes' significant involvement in the Federation's price-fixing and boycott activities.

Mr. Stokes' involvement in responding to plaintiff's Rule 30(b)(6) deposition notice similarly provides no basis for quashing his deposition. Plaintiff's Rule 30(b)(6) deposition notice served on Mr. Stokes' group sought testimony concerning two similar, anonymous letters (attached as Exhibits 6 and 7), that are the subject of allegations almost entirely denied by the Federation in ¶ 34 of the Complaint. These letters, inviting Delaware orthopedic surgeons to attend a Federation meeting in Dover on September 18, 1997, during the time when Blue Cross' proposed fee reduction was pending, discuss the need for Delaware orthopedic surgeons to "stand united" in their dealings with insurers and how the union will provide them with a "collective voice." The letters strongly support the plaintiff's claim that the Federation coordinated a concerted response among Delaware orthopedic surgeons to Blue Cross' proposed fee reduction.

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<sup>3</sup> For example, Dr. Quinn, who showed a poor memory of events in which he was involved, testified in his investigative deposition that he delegated the primary responsibility for contracting with Blue Cross to Mr. Stokes, subject only to his approval. While Mr. Stokes was most prominently involved in contracting with insurers, it was Dr. Quinn who attended at least two meetings at which Federation activities were discussed--meetings that Mr. Stokes testified he did not attend.

Even defense counsel did not object to responding to this Rule 30(b)(6) deposition notice, evidently recognizing that it sought to discover facts pertaining to important documents. Aside

from the addressees and handwriting on them, the letters differ in that Exhibit 7 contains an R.S.V.P. line with the telephone number of Dr. Quinn's and Mr. Stokes' group. The other letter is addressed to a physician in Dr. Quinn's and Mr. Stokes' group.

In view of the evidentiary importance of these anonymous letters, and given both Dr. Quinn's and Mr. Stokes' claims of unfamiliarity with either of these documents during their investigative depositions--despite the letters' obvious connections to their group--plaintiff issued the Rule 30(b)(6) deposition notice requesting that Mr. Stokes' group designate a person or persons to testify about, among other things, the authorship, drafting, typing, and sending of the documents. The group's own election to have Mr. Stokes show the two letters to members of his practice group can hardly constitute undue burden. Moreover, Mr. Stokes' inquiry of members of his practice group was fruitful--revealing that the two anonymous letters were indeed typed by a secretary in his practice group, further evidencing Mr. Stokes' practice group's involvement in the alleged conspiracy. Defense counsel's attempt to excuse Mr. Stokes now from his pretrial deposition based in part on his coordination of his group's response to the Rule 30(b)(6) request is simply preposterous.

#### **IV. Conclusion**

For the reasons stated above, the United States respectfully requests that this Court deny Mrs. Spiezio's and Mr. Stokes' present motion to quash, along with the September 8, 1999 motion to quash and/or for a protective order filed by defense counsel on behalf of 23 other individuals connected with this case.

Respectfully submitted,

\_\_\_\_\_/S/\_\_\_\_\_  
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