U.S. Department of Justice

Antitrust Division

Liberty Place Building
325 Seventh Street NW
Washington, DC 20530

September 1, 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:

This letter is the response of plaintiff, the United States of America, to defendant Federation's August 25 letter brief (D.I. 124) to Your Honor seeking to compel the United States' production of certain documents. Without even attempting to discuss the issues with the Government before filing the pending motion with the Court, the Federation now demands production of those documents obtained by the Government via civil investigative demands (CIDs) issued during an entirely unrelated investigation of entirely unrelated non-parties in Tampa, Florida. That investigation led to the simultaneous filing of a complaint and consent decree in Tampa federal court against two entities that are not parties here. The Government opposes the production of such documents principally because they are entirely irrelevant as a matter of fact and law to any issue that is or may be in this case. Neither the activities of persons having nothing to do with the facts at issue here nor the terms of a settlement reached in that other action have anything whatever to do with this case, let alone the terms of a possible settlement of this case. Additionally, the Government opposes production of the requested CID documents because their disclosure to the Federation is prohibited by the Antitrust Civil Process Act ("ACPA"), 15 U.S.C. §§ 1313(c), unless the initially producing non-parties consent to the disclosure. Finally, this letter also addresses the most blatant of defendant's misrepresentations concerning the context and nature of the parties' settlement discussions, contained in defendant's latest--and by now familiar--campaign in this case to "attack the prosecutors" and mislead the Court.

I. Factual Background

On May 19, 1999, the Federation served a request for all documents and other materials obtained by the United States through CIDs or other compulsory process in connection with a case captioned United States v. Federation of Certified Surgeons & Specialists, Inc., No. 99-167-CIV-T-17F (M.D. Fla., consent decree entered June 1, 1999). That case involved the price-fixing and boycott activities of an accounting firm and the Federation of Certified Surgeons and Specialists, Inc. (FCSSI), an organization formed by 29 competing general and vascular surgeons in the Tampa area. Despite the coincidence that the defendant here and in the Tampa case share the word "Federation" in their names, the Tampa case and the actors there are entirely unrelated to the defendant in this case. As in this case, the defendants in the Tampa case had cloaked their price fixing and boycott activities under the pretense of employing the "third-party messenger" model. Soon after being served with CIDs for documents, both eventual defendants in the Tampa case approached the Antitrust Division to discuss a settlement. Following lengthy negotiations, in January, 1999, the United States concurrently filed a complaint and a consent decree resolving the Tampa case. The Florida court entered the consent decree on June 1, 1999, following the parties' compliance with applicable statutory requirements.

On June 15, 1999, well in advance of the deadline for a response to the Federation's document request, the United States served its objections to producing to the Federation the approximately 8,000 responsive pages of documents obtained via CIDs in the Tampa investigation. Some two months later, *without any effort to discuss the issue first*, the Federation filed its pending letter motion seeking to compel production of those documents.

II. The Defendant's Failure to Comply with Fed. R. Civ. P. 37(a)(2)(B) and D. Del. LR 7.1.1 Warrants the Court Striking Defendant's Motion to Compel

Consistent with Fed. R. Civ. P. 37(a)(2)(B), Local Rule 7.1.1 of this Court requires counsel for a party making a non-dispositive motion to file with the motion "a statement showing [s/he] has made a reasonable effort to reach agreement with the opposing attorneys on the matters set forth in the motion." Despite that explicit requirement, defendant's August 25, 1999, letter omits any reference to any such effort to discuss the matter with counsel for the Government. Indeed, no such statement could be made because no such discussion occurred or was attempted by the Federation's counsel.

Such a failure to abide by this Court's rules compels denial of the pending motion without consideration of its merits--or lack thereof. DeWitt v. Penn-Del Directory Corp., 912 F.Supp. 707, 713 (D. Del. 1996). Just as this Court held in DeWitt, such a "blatant disregard for Local Rule 7.1.1," id., warrants striking the motion here, regardless of whether a reasonable attempt to reach agreement would have in fact obviated the need to seek the Court's resolution of

the motion.[1] Id. The DeWitt decision put future litigants before this Court on notice that they must negotiate in good faith before they file non-dispositive motions. The Federation's failure to heed that warning fully justifies that its motion be summarily denied, with prejudice.

III. The Consent Decree Entered In The Tampa Case Is Irrelevant to the Appropriate Scope of Relief in this Case as a Matter of Fact and Law

The Federation's arguments in support of its motion are predicated on two essential, purported facts: (1) The violation alleged in the Tampa case is at least similar to the Federation's conduct challenged in this case; and (2) the consent decree entered in the Tampa case is allegedly less stringent than the relief sought by the complaint in this case. From these premises, the Federation contends that the Tampa documents will allow them to prove that the Tampa defendants' violation was more egregious than defendant's own violation in this case and is, therefore, relevant to the scope of relief this Court should grant after trial on the merits.

As is discussed in Section V below, the Federation's second premise is entirely false. But even if both were true, the Federation's argument would fail as a matter of law. The settlement terms that the Government may agree to in another case without adjudication, in its exercise of prosecutorial discretion, based on a number of circumstances unique to that matter, has no bearing whatever on the nature or scope of relief that may be appropriate after a liability finding against the Federation here. See United States v. Microsoft Corp., 56 F.3d 1448, 1459-61 (D.C. Cir. 1995). In overturning the trial court's failure to recognize the distinction between the permissible scope of relief in a settlement and the often broader scope of relief justified after trial on the merits, the Court of Appeals for the District of Columbia Circuit held in Microsoft that:

> when a consent decree [in an antitrust case] is brought to a district judge, because it is a settlement, there are no findings that the defendant has actually engaged in illegal practices. It is therefore *inappropriate* for the judge to measure the remedies in the decree as if they were fashioned after trial.

United States v. Microsoft Corp., 56 F.3d at 1460-61 (citation omitted) (emphasis added). That Court went on to note that the host of considerations affecting the compromise embodied by a consent decree dictate that remedies in a consent decree are an inappropriate measure of relief to be imposed by the Court after trial: "For instance, a settlement . . . will allow the Department of Justice to reallocate necessarily limited resources." Id. at 1459. Some other factors that may affect negotiations over the terms of an antitrust consent decree include "risk of an adverse decision, the need for a speedy resolution of the case, [and] the benefits obtained in the

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[1] Whether or not discussions between counsel would have entirely resolved this matter, they would surely have resulted in at least two benefits: (1) Federation counsel would have become aware of, and presumably considered, the case law, cited below, that expressly rejects the arguments they now present to this Court, and (2) their letter brief would presumably have dealt with the arguments now presented by the Government, rather than setting up "straw" arguments that are beside the point.

settlement." Maryland v. United States, 460 U.S. 1001, 1006 (1983) (Rehnquist, J., dissenting). In any particular case, "the considerations that led the Department of Justice to settle are *not* amenable to judicial review." Microsoft, 56 F.3rd at 1459. (emphasis added)

The inappropriateness of measuring a consent decree against a litigated judgment and the foreclosure of any judicial review of the circumstances or terms of the settlement in Tampa lead to the conclusion that the Tampa decree is irrelevant to this Court's entry of a judgment in this case as a matter of law. Since the Federation's argument predicates the relevance of the CID documents obtained in the unrelated Tampa investigation on the legally irrelevant Tampa decree, logic impels even more strongly that those investigative files are entirely irrelevant here and their discovery should be denied. Even if--contrary to law--there were any legal relevance to the scope of relief agreed upon in the Tampa case, discovery of the facts and circumstances at issue there would lead to a trial of the merits of that case, subsumed within the trial of this case. The parties would inevitably be drawn into a second trial in which they sought to prove the similarities or distinctions between the actions of physicians in Tampa--actors having *nothing whatever* to do with the physicians in Delaware--and the wholly distinct Federation and its members. The Government respectfully submits that this Court will have more than sufficient demands on its time to resolve the facts actually in dispute concerning the Federation and its misdeeds in Delaware; actions of other, unrelated persons in Florida having no relationship to Delaware should not become fodder for mini-trials in this litigation.

IV. The Antitrust Civil Process Act Prohibits the Disclosure of Information Obtained By the Government Pursuant to CIDs Issued In An Unrelated Case Without the Consent of the Producing Non-Parties

Section 1313(c)(3) of the ACPA, which generally governs disclosure of information produced in response to CIDs, expressly provides that no CID information shall be available for examination by anyone, other than duly authorized Department of Justice (DOJ) personnel (and under certain circumstances, members of the Congress and FTC attorneys), without the consent of the person who produced such information. The Federation does not dispute that the non-parties that produced the CID documents during the Tampa investigation *must consent* before the United States may produce them to the Federation in this case. Recognizing that the United States has not contacted the producing non-parties to obtain their consent to disclosure, the Federation claims this shows the United States is wrongly using Section 1313(c)(3) to frustrate its discovery.

Defendant's claim conveniently ignores the fact that the Government has objected that such information is irrelevant and should therefore not be produced, regardless of whether the affected non-parties consent. Thus, the Government maintains that these non-parties should not be bothered unless the Court finds that such materials are relevant and must be produced. If the Court does so rule, then the Government will act expeditiously to enable a determination of whether the producing non-parties in Tampa consent to production of their CID documents.

V. The Federation Has Misrepresented the Plain Terms of the Tampa Settlement and the Parties' Confidential Settlement Negotiations in this Case

The Federation's argument that the requested documents are relevant to the appropriate relief to be entered by this Court after a determination of liability ultimately lapses into a drawn-out attempt to depict the United States as acting unreasonably in what, until now, had been confidential settlement discussions in this case. The Federation apparently hopes to enmesh this Court--the sole finder of fact in this case--in the details of the parties' settlement negotiations.[2] Even if consideration of the terms of settlement negotiations here, as well as those in the Tampa case, were somehow relevant to the motion to compel at issue, it is entirely inappropriate for the Federation to present--inaccurately, no less--such irrelevant negotiations to the trier of fact in this case.

Faced with the Federation having wrongly done so, however, the Government is now forced to correct at least the most serious misstatements that the Federation makes. First, we note that the Federation, which bills itself as a "grass roots" physician organization, is comparable functionally to the defendant physician organization, FCSSI, in the Tampa case. Directly contrary to defendant's claim to this Court that FCSSI "was not required to disband or cease all [third party messenger] activities anywhere," D.I. 124 at 3, the Tampa decree *flatly prohibits FCSSI from acting as a third party messenger anywhere*. D.I. 124, Exhibit D at ¶ IV(A)(2). Defendant's further insinuation that the United States is seeking in this case to shut down the Federation is utterly false. In addition, the Federation's account ignores the Tampa decree's substantial limitation on the defendant accounting firm's ability to function *at all* as a third party messenger on behalf of members of the defendant physicians organization. The Federation also ignores the accounting firm's voluntary removal, during consent decree negotiations, of the individual whose role was central to its participation in the alleged conspiracy. A comparable action here would be the removal from office of Mr. Seddon, the Federation's executive director. Yet, the Government has *not* made such a demand in settlement negotiations in this case.

The Federation similarly insinuates that, in settlement negotiations, the United States has insisted that the Federation be precluded from acting as a third party messenger "at any place or at any time in the future." D.I. 124 at 3, 5. But the fact is that the Government offered a much narrower restriction on the Federation's ability to act as a third party messenger for competing physicians, prohibiting the Federation from acting as a messenger only for competing orthopedic surgeons in four areas: Delaware, Connecticut, Tampa, and Dayton, Ohio. In each of those areas there is substantial evidence that the Federation has led competing orthopedic surgeons to disrupt competitive market conditions. Such relief is particularly necessary in view of the Federation's insistence that its patently anticompetitive conduct in Delaware represents a lawful use of the third party messenger system. In contrast--and contrary to the Federation's insinuation--there is no evidence that the defendant accounting firm in the Tampa case had engaged in activities

[2] Oddly enough, rather than even respond to the United States' last settlement proposal, sent on June 14, 1999, the Federation has chosen months later to misrepresent the purported terms of negotiations to this Court.

beyond Tampa that appear to have disrupted competition. With the exception of the four specified areas where the Federation would be prohibited from acting as a third party messenger for orthopedic surgeons, the Government's proposed consent decree would allow the Federation to function as a third party messenger, with appropriate safeguards, across the country. Even within those four areas, the Federation would be allowed by the Government's proposal to act as a third party messenger, again with appropriate strictures, for all physicians other than orthopedic surgeons.

Far from making unreasonable demands on the Federation, the United States' litigation and settlement posture in this case is designed to "avoid a recurrence of the violation and to eliminate its consequences." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 697 (1978). The United States' attempt to obtain relief to assure against recurrence of similar antitrust violations outside Delaware is fully consistent with the Supreme Court's repeated admonition that, "'[R]elief, to be effective, must go beyond the limits of the proven violation.'" United States v. Ward Baking Co., 376 U.S. 327, 331 (1964) (quoting United States v. United States Gypsum Co., 340 U.S. 76, 88-89 (1950)).

VI. Conclusion

The Federation's inexcusable failure to negotiate concerning the matter at issue before seeking relief from this Court itself justifies striking of the motion. If the Court nonetheless decides to entertain defendant's motion, it should summarily reject defendant's arguments as frivolous in view of the utter irrelevance of the information sought, both as a matter of common sense and long-established case law.

Respectfully submitted,

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