U.S. Department of Justice

Antitrust Division

Liberty Place Building
325 Seventh Street NW
Washington, DC 20530

September 15, 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 sets forth here the bases for its opposition to defendant Federation's motion, made by letter brief filed on September 8, 1999 (D.I. 145, 146), which seeks an unprecedented and unjustifiable protective order blocking plaintiff from deposing 23 persons, including 3 Federation representatives and 20 of the very member doctors (and their management) whose combination with the Federation to restrain trade is the essence of this litigation.[1] Despite defendant's familiar tactic of baselessly imputing venal motives to plaintiff's counsel, the fact remains that the noticed depositions of these hostile witnesses are essential to enable plaintiff to prove its case and refute defendant's numerous defenses at trial. In seeking to quash the depositions, defendant has ignored the importance of this discovery to the Government's trial preparation, misrepresented the extent of discovery taken to date, and greatly exaggerated the burden that the depositions would impose on these physicians -- whose actions are at issue because they now deny the violation alleged in the Government's complaint. Defendant's motion also threatens to disrupt the stipulated pretrial schedule that calls for completion of discovery by December 31, 1999. The United States, therefore, respectfully requests that the Court promptly

[1] Defense counsel actually represents 18 of the persons noticed to date in this action for depositions, rather than 17 as stated incorrectly in Defendant's letter brief. First State Orthopaedics has similarly moved to quash the depositions of 5 of its employees, relying expressly on defendant's motion and supporting papers. (D.I. 149). For simplicity's sake, therefore, First State's motion is also referred to herein as defendant's motion. (D.I. 149).

deny defendant's motion so that discovery may proceed beginning next month.

I. The Court Has Previously Rejected Defendant's Effort To Limit The Government's Deposition Discovery

This is an antitrust case in which the defendant, in coordination with its 44 Delaware orthopedic surgeon members, organized and became the hub of a conspiracy to oppose and prevent proposed reductions in payments for orthopedic services by Blue Cross and Blue Shield of Delaware ("Blue Cross"). The Federation flatly denies the United States' central allegation that, "The Federation and Federation members reached **a common understanding** that Federation members would deal and communicate with Blue Cross only through the Federation's officials, thereby facilitating a boycott to extract artificially high fees from Blue Cross and to prevent other health insurers in Delaware from reducing the fees they paid to these surgeons."[2] Indeed, defendant's Amended Answer denies almost all of the Complaint's underlying allegations relating to defendant's and its orthopedic surgeon members' alleged price fixing and boycott conspiracy, and then pleads thirteen so-called "defenses" in addition. The Federation's sweeping denials of the alleged conspiracy, combined with its affirmative allegations regarding its own and its member orthopedic surgeons' conduct, make clear that this case is typical of most antitrust conspiracy cases: the "proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Big Apple BMW, Inc. v. BMW of North America, 974 F.2d 1358, 1362 (3d Cir. 1992) (quoting Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962)), cert. denied, 507 U.S. 912 (1993).

Under these circumstances, on August 2, 1999, promptly following the Court's July 29 order on plaintiff's motions to compel production of withheld documents (D.I. 65),[3] plaintiff noticed depositions to be taken over the following four months of 24 persons, including 16 Delaware orthopedic surgeons, 5 orthopedic office managers, and 3 Federation representatives or employees, who appear to be the persons most knowledgeable about various facets of the alleged conspiracy, including the various meetings, telephonic communications and letters through which the defendant and its member physicians' common understanding was reached. This volume of deposition discovery is no surprise to defendant. Indeed, defendant has once before tried to limit deposition discovery. That effort was rebuffed by this Court. During the February 16, 1999 scheduling conference, this Court specifically rejected the Federation's attempt to limit the

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[2] Defendant's Amended Answer and Defenses, D.I. 11 at 1, ¶1 (emphasis added).

[3] Defendant claims that this Court's July 29 ruling on the irrelevancy of the practice groups' financial records conflicts with plaintiff's noticing of depositions. (Federation's 9/8/99 letter, D.I. 146 at 8). But that Order had nothing to do with the right of the Government to depose necessary witnesses under Fed. R. Civ. P. 30 and 45. As we explain later, the proposed depositions will cover numerous matters that are clearly relevant to this action. Contrary to defendant's baseless claim, the Government has no intention of skirting that Order by inquiring into the financial information that was the subject of the Court's ruling.

number of depositions to ten: "[M]y present sense of this case is that it's not a ten-deposition case, but it's not a hundred-deposition case. It's somewhere -- I don't want to say 50, but it's 40, 45, 50, 35." (Transcript, February 16, 1999, D.I. 64 at 28-29). In fact, the Court made these observations while cognizant of the extent of the Government's depositions taken pursuant to Civil Investigative Demands (CIDs); counsel for the Federation had argued that the Government should be precluded from further deposing Federation representatives or its members, (id. at 19-20), and the Court paid this argument no heed. In light of the Court's rejection of defense counsel's argument, which again underlies the present motion, defense counsel agreed to a limit of 30 depositions of non-expert witnesses for each side in the Stipulated Scheduling Order subsequently entered by the Court. (D.I. 71 at 3).

Defendant's motion now asks the Court to reverse its previous order allowing each side 30 depositions, and to ignore these witnesses' knowledge and role in the alleged conspiracy that forms the crux of the factual dispute in this case. Yet, defendant has plainly acknowledged the fact that these witnesses have important knowledge and that they may be witnesses at trial. In its Rule 26(a)(1) disclosure, the Federation stated that "**all Delaware members of FPD and their office managers**" are "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings."[4] The Federation previously also has represented to this Court that "although there are only two named parties in this action, as a practical matter, **there are a myriad of persons and entities whose conduct is at issue, including . . . FPD orthopedic surgeons**."[5] Similarly, the Federation has argued that information in the knowledge of such non-parties is crucial to the Court's resolution of this case: "The determination of the nature of the restraint at issue and the analysis thereof will be a very fact-intensive process. It is heavily dependent on information in the hands of numerous third parties."[6] Indeed, defendant sought and obtained plaintiff's agreement to present up to 20 witnesses at trial.[7] It would be grossly unfair and contrary to the essential premise of pretrial preparation under the Federal Rules for the Government to be denied the right to depose these admittedly critical witnesses before trial.

The reality is that there were 44 orthopedists who joined the Federation in Delaware and whose common understanding is at issue. Those physicians, at least in some cases, had office

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[4] Defendant Federation of Physicians and Dentists" Initial Rule 26(a)(1) Disclosures, D.I. 14 at 2 (emphasis added).

[5] Defendant Federation of Physicians and Dentists' Brief in Reply to Plaintiff's Opposition to Defendant's Motion for Entry of a Scheduling Order that Incorporates Its Proposed Discovery Plan and Schedule, D.I. 25 at 4-5 (emphasis added).

[6] Defendant Federation of Physicians and Dentists' Brief in Reply to Plaintiff's Opposition to Defendant's Motion for Entry of a Scheduling Order that Incorporates Its Proposed Discovery Plan and Schedule, D.I. 25 at 5.

[7] Proposed Discovery Plan, D.I. 13 at 4.

managers who were also deeply involved in these activities. Additionally, of course, Federation employees were at the center of the combination. Thus, there are about 60 individuals who clearly have important knowledge of the common understanding and concerted actions at issue. It is hardly an abuse for the Government to seek to depose less than half of that group.

This is particularly the case where it is the Federation who rejected the Government's good faith effort to reduce that number of depositions even further. The Government proposed to exchange preliminary and final witness lists during discovery so that the parties could focus on deposing those who would testify at trial. The Federation refused, thereby necessitating more depositions.[8] In short, whatever the burdens imposed by discovery here -- and we submit they are not even close to unusual -- they are largely of the Federation's own making.

II. The Federation Has Failed To Meet Its Heavy Burden Of Showing Extraordinary Circumstances Justifying Issuance Of A Protective Order Prohibiting Depositions

A. Quashing A Deposition Is An Extreme Measure

Defendant's motion wholly ignores well-established precedent that an order barring a litigant from taking a deposition is a most extraordinary measure. Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.")[9]; see also Jamison v. Miracle Mile Rambler, Inc., 536 F.2d 560, 565-66 (3d Cir. 1976) (questioning the scope of the district court's order barring the taking of a deposition; noting that "[t]here will be ample opportunity for legitimate objections to be raised during depositions if the plaintiff transgresses into forbidden areas. Those objections can be ruled on as they occur without the blanket prohibition imposed here."). The moving party bears a heavy burden of showing "extraordinary circumstances" that would justify such an order, and the showing must be sufficient to overcome plaintiff's "legitimate and important interests in trial preparation." Alexander v. FBI, 186 F.R.D. 71, 75 (D.D.C. 1998); see also Prozina Shipping Co., Ltd. v. Thirty-Four Automobiles, 179 F.R.D. 41, 48 (D. Mass. 1998); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986) (burden of persuasion is on the party seeking protective order; the harm alleged "must be significant, not a mere trifle"); Farnsworth v. Procter & Gamble

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[8] Defendant Federation of Physicians and Dentists' Brief in Support of Its Motion for Entry of a Scheduling Order That Incorporates Its Proposed Discovery Schedule, D.I. 19 at 2.

[9] Investment Properties Intl., Ltd. v. IOS, Ltd., 459 F.2d 705, 708 (2d Cir. 1972) (granting writ of mandamus to vacate district court order quashing notice of depositions in antitrust action); Alexander v. FBI, 186 F.R.D. 71, 75 (D.D.C. 1998); United States v. Mariani, 178 F.R.D. 447, 448 (M.D. Pa 1998); Prozina Shipping Co., Ltd. v. Thirty-Four Automobiles, 179 F.R.D. 41 (D. Mass. 1998); Naftchi v. New York Univ. Med. Ctr., 172 F.R.D. 130, 132 (S.D.N.Y. 1997); Motsinger v. Flynt, 119 F.R.D. 373, 378 (M.D.N.C. 1988); Wright, 8A Fed. Prac. & Proc. Civ. 2d § 2037 (1994).

Co., 758 F.2d 1545, 1547 (11th Cir. 1985) ("trial preparation and defense . . . are important interests, and great care must be taken to avoid their unnecessary infringement"). Examples of "extraordinary circumstances" are rare, such as if there is "compelling evidence that a deposition will constitute a substantial threat to a witness' life." United States v. Mariani, 178 F.R.D. 447, 448 (M.D. Pa. 1998) (protective order preventing the deposition of 83-year-old terminally ill witness warranted); see also Frideres v. Schlitz, 150 F.R.D. 153, 156 (S.D. Iowa 1993) (protective order issued where witness' physician opined that the stress from deposition could be "life threatening" to the witness); In re McCorhill Publishing, Inc., 91 B.R. 223, 225 (Bankr. S.D.N.Y. 1988).

The member physicians here base their claim for a protective order also on the notion that they are busy persons. Even if that is true,[10] it does not demonstrate extraordinary circumstances. Naftchi, 172 F.R.D. at 132. Even the busy schedule of a sitting President of the United States does not preclude his pretrial deposition in a private action against him. See Clinton v. Jones, 117 S. Ct. 1636, 1643 (1997). Nor can the witness' professed lack of knowledge or recollection of the matters at issue constitute a sufficient basis for a protective order because the party seeking the discovery is entitled to test that professed ignorance. Naftchi, 172 F.R.D. at 132; Rolscreen Co. v. Pella Products of St. Louis, Inc., 145 F.R.D. 92, 97 (S.D. Iowa 1992); Travelers Rental Co. v. Ford Motor Co., 116 F.R.D. 140, 143 (D. Mass. 1987); Wright § 2037 at 500.

B. Production Of Documents Is No Substitute For Oral Testimony

The Federation has utterly failed to meet its heavy burden of showing "extraordinary circumstances" justifying a protective order. Central to the Federation's claim for a protective order is the assertion that it and its member physicians have produced "voluminous" documents during the Government's investigation and discovery. Even assuming the truth of that assertion -- which this letter will later show to be untrue -- production of documents is no substitute for oral depositions. Indeed, the various discovery methods provided under the Federal Rules of Civil Procedure are intended to be complementary and not mutually exclusive. 7 James Wm. Moore et al., Moore's Federal Practice ¶ 33.04[1] (3rd ed. 1999). As distinct from a review of documents, "[t]he underlying purpose of a deposition is to find out what a witness saw, heard, or did -- what the witness thinks." Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993); see also Applied Telematics, Inc. v. Sprint Corp., 1995 WL 79237 at *1 (E.D. Pa. Feb. 22, 1995). In a case involving a common understanding and concerted action such as this one, the need to depose the alleged members of the conspiracy is even more obvious because the conspirators' actions and knowledge -- not merely what may be in documents -- are potentially important proof of the conspiracy. In addition, pretrial depositions are necessary to ascertain how and from whom evidence to be used at trial may be procured and admitted, and to commit adverse witnesses to their testimony. See Manual for Complex Litigation § 21.45 (3rd ed. 1995). Thus, the fact that

[10] As discussed below, the Government is willing to minimize any inconvenience to these witnesses in any event. We intend to avoid, to the extent reasonable, disruptions to their surgery schedules.

the Federation and some of its member physicians had previously responded to the Government's document requests does not render the taking of their pretrial depositions burdensome. See Prozina, 179 F.R.D. at 47-48 (denying request to limit discovery to documentary evidence and motion for a protective order to take deposition; noting that "[p]rohibiting the taking of depositions is an extraordinary measure."). Indeed, we are unaware of any cases in which a Court has ruled that persons who had produced relevant documents concerning events at issue thereby could avoid a deposition. Rather, simple logic dictates precisely the opposite result because possession of such documents supports the view that these persons participated in relevant events, and the scope of their knowledge and participation must be determined under oath.

C. Investigative Depositions Do Not Render Pretrial Depositions Of Some Of The Same Persons Or Their Business Associates Duplicative Or Unduly Burdensome

Similarly, the fact that some of the proposed deponents were deposed, pursuant to CIDs, during the investigation leading to the filing of this case does not render the pretrial depositions of those same witnesses or their business associates duplicative or unduly burdensome. The CID depositions were not taken to prove this case at trial, but rather to ascertain whether to press charges against the defendant. As such, federal courts have recognized that CID depositions do not supplant pretrial depositions of the same persons after the Government has determined to bring a case and understands the nature of the denials and alleged defenses that must be the subject of discovery. See United States v. GAF Corp., 596 F.2d 10, 14 (2d Cir. 1979) ("It is important to remember that the [Justice] Department's objective at the pre-complaint stage of the investigation is not to 'prove' its case but rather to make an informed decision on whether or not to file a complaint.") (quoting H. Rep. 94-1343 at 26, Hart-Scott-Rodino Antitrust Improvement Act of 1976). The Federation itself recognized as much in an earlier pleading, quoting Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 201 (1946): "[t]he purpose of CIDs is 'not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so.'"[11] That is precisely what the Government did in its investigation. As discussed below, the Government hurriedly took various CID depositions to gather information for the purpose of determining whether a violation had occurred. At this investigative stage, no systematic attempt was made to exhaust the CID deponents' knowledge, much less to commit the deponents to their testimony for potential direct or cross examination at trial.

[11] Defendant Federation of Physicians and Dentists' Answering Brief in Opposition to Plaintiff's Motion for Entry of Its Proposed Discovery Scheduling Order, D.I. 24 at 5.

1. The Investigation Preceding This Case Was Conducted With Great Speed With An Eye Toward The Possibility Of Seeking Preliminary Relief

The United States first became aware of the Federation's and its Delaware orthopedic surgeon members' price fixing and boycott activities upon receipt of a complaint letter from Blue Cross on February 18, 1998. By then, in response to Blue Cross's proposed fee reduction to be effective starting November 1, 1997, virtually all Delaware orthopedic doctors had sent contract termination notices to Blue Cross through the Federation, and none was willing to negotiate a contract with Blue Cross except through the Federation's Executive Director Jack Seddon. These actions imminently threatened Blue Cross patients' access to orthopedic services and exposed them to the burden and expense of being billed directly for high, non-contractual fees by the surgeons who were terminating their contracts.

With the likelihood of a need to seek emergency relief from this Court looming large at the time, the Antitrust Division moved very quickly to determine whether there was an antitrust violation and whether the evidence was sufficient to warrant filing a case. By mid-March, 1998, within a month of opening the investigation in late February, the Antitrust Division began taking CID depositions of Delaware orthopedic surgeons and office managers. Thirteen investigative depositions of Delaware orthopedic surgeons and office managers were taken within a one-month period running from March 19, 1998, to April 16, 1998.[12] Most of the depositions lasted a half-day, and, in some instances, CID documents were produced by the witnesses the day before the deposition was held. Many of the investigative depositions were taken without any systematic review of all potentially relevant documents of even the producing party, to say nothing of documents produced by other parties or those parties' deposition testimony that relate to activities or knowledge of those deposed.[13] By the same token, during March and April, the

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[12] At the insistence of counsel for the Federation to slow down the pace of the investigation, the CID depositions of three Federation representatives were delayed and completed by May 20, 1998. The CID deposition of one surgeon, who has not been noticed for a pretrial deposition, was taken on June 9, and the adjourned deposition of an office manager was completed on the same date. By June 1, 1998, the Division staff recommended that suit be filed, but without a request for preliminary relief because by then several Delaware orthopedic practices had reversed their insistence that they would negotiate with Blue Cross only through Mr. Seddon and had recontracted with Blue Cross or were in active negotiations to contract. Satisfied that sufficient evidence was gathered to determine a violation existed and that prospective injunctive relief was necessary, plaintiff filed its Complaint on August 12, 1998, naming only the Federation as a defendant.

[13] As defendant itself has recognized: "Antitrust cases typically are document-intensive and involve a host of complex factual and legal issues. This is especially true of the present litigation, where there are a large number of persons and business entities whose conduct will be at issue." Defendant Federation Physicians and Dentists' Brief in Support of Its Motion for Entry

Antitrust Division's incipient knowledge and understanding of the persons involved, the nature and scope of their activities, and their various channels of communication were continuously developing and expanding. Under these circumstances, it was simply impossible for the Antitrust Division to conduct the thorough depositions, with full knowledge of the relevant documents, denials and defenses, that now can be taken in preparation for a trial of this case.[14]

2. Pretrial Depositions Allowed Under the Federal Rules Serve Different Purposes That Cannot Be Attained In Investigative Depositions

Now that the Complaint has been filed and defendant has answered, plaintiff needs to use pretrial depositions -- including depositions of some persons who were deposed during the investigation and were central figures in the conspiracy -- to develop a complete and thorough understanding of all facts in preparation for trial. This necessarily includes: (1) gathering additional facts following a systematic analysis of all relevant documents, including additional documents produced **after** the pre-complaint depositions from defendant and other non-parties; (2) testing defendant's subsequently asserted denials of the Complaint's allegations and its 13 defenses that make claims concerning each member practice's activities and motives; (3) inquiring about events occurring since the pre-complaint depositions, such as practices negotiating and contracting with Blue Cross independently of Mr. Seddon; (4) narrowing and sharpening the issues for trial, particularly in light of defendant's claims; (5) ascertaining how and from whom evidence to be used at trial may be procured and admitted; (6) establishing evidentiary foundations for the admission of relevant documentary and other evidence; (7) testing the deponents' professed lack of knowledge about important events and communications; and (8) "locking in" the testimony of adverse witnesses in order to either refute their recollections or use such testimony for impeachment purposes at trial.

All of these purposes are clearly endorsed by the liberal deposition-discovery rules so that the trial would be "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States v. Procter & Gamble Co., 356 U.S. 677, 682-683 (1958); see also Wright, 8A Fed. Prac. & Proc. Civ. 2d §§ 2001, 2101 (1994);

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of a Scheduling Order that Incorporates Its Proposed Discovery Plan and Schedule, D.I. 19 at 9.

[14] Indeed, the Federation itself has recognized these difficulties, commenting on its own need for time to take staged deposition discovery in this case after receiving relevant documents:

> [I]t may take the [Federation] months of discovery before it is in a position to conduct its initial depositions in an efficient and effective manner. Then the [Federation] will need time to take follow-up discovery and to determine where to go and what information to elicit in its next round of depositions.

Defendant Federation of Physicians and Dentists' Answering Brief in Opposition to Plaintiff's Motion for Entry of Its Proposed Discovery Scheduling Order, D.I. 24 at 17.

Orion Ins. Co., Ltd. v. United Technologies Corp., 502 F. Supp. 173, 175 (D.C. Pa. 1980). Indeed, "a basic tenet of the current liberal discovery rules is that discovery may be had of issues that are already known to the party seeking discovery" because "the purpose of discovery is not only to uncover unknown facts but also to narrow and define the issues of the case." Hon Co. v. Travelers Indemnity Co., 1991 WL 229948 at * 3 (D.D.C. Oct. 25, 1991); Weiner v. Bache Halsey Stuart, Inc., 76 F.R.D. 624, 625 (S.D. Fla. 1977). Any of these eight purposes would justify the noticed depositions; together these motivations unquestionably justify the discovery the Government proposes. Denial of such discovery would dramatically affect the Government's right, given to every other party litigant, to prepare fully for trial by discovery of precisely what the relevant witnesses will say about both the plaintiff's allegations and the full range of affirmative defenses.

3. Courts Unanimously Agree That Investigative Depositions Do Not Supplant Pretrial Depositions Because Of Statutory Intent And The Significant Adverse Policy Implications Of A Contrary Ruling

Aside from a general reference to Rule 26(c), the Federation cites no authority to support its argument that the Government's right to take discovery under the Federal Rules of Civil Procedure is limited, based upon the extent of its previous investigation into the facts underlying its case. It also ignores the unanimous authority -- frequently cited by plaintiff to defense counsel -- from courts that have considered the issue, holding that investigative depositions do **not** render subsequent depositions of the same witnesses duplicative or burdensome under the Federal Rules of Civil Procedure. SEC v. Saul, 133 F.R.D. 115 (N.D. Ill. 1990); see also RTC v. Farmer, 1994 WL 317464 (E.D. Pa. June 24, 1994); SEC v Softpoint Inc., 958 F. Supp. 846 (S.D.N.Y. 1997).

Saul is directly on point. In Saul, the SEC sought to depose five persons, including three non-party witnesses, who were deposed during the investigation preceding the SEC's suit. The defendants moved to quash or limit the scope of the depositions, arguing that the SEC had already exhausted all discovery relevant to the case during the investigation, and that further depositions would be duplicative, imposing undue burden and expense on the witnesses. 113 F.R.D. at 117. Despite the parties' agreement that the witnesses had "already been examined thoroughly" during the investigation -- which is not the case here -- the Saul court denied the motion for a protective order, ruling that "once [the SEC] has completed its investigation and filed suit, it is entitled to review its investigation and avail itself of its discovery rights in order to prepare its case for trial." Id. at 117-18. The court reasoned:

> Whatever inquiries the agency posed in the course of its investigation were framed in the context of ascertaining whether or not to press charges against the defendants. The SEC's motives and concerns in that setting may not be dramatically different from those which currently underlie its preparation for trial; nonetheless, the contexts are sufficiently different to merit further discovery once the charges have been made and the parties are at issue.

Id. at 118. Indeed, in determining whether to bring suit, the Government agency typically must sift through information and take testimony that ultimately proves immaterial. Id. Thus, "[o]nce the complaint has been filed and the defendants have answered, and the issues requiring resolution have been clarified, and [sic] all parties must be afforded the opportunity to conduct discovery and prepare for trial with those issues in mind." Saul, 133 F.R.D. at 119. These observations apply even more forcefully to this case where the investigative depositions -- in contrast to the thorough investigative examinations in the Saul case -- were taken hurriedly in the interests of preparing for a likely motion for emergency injunctive relief. There may be some overlap between the pretrial depositions and the testimony of the persons whose CID depositions were previously taken. But "[w]hatever overlap there might be, however, is not sufficient to deprive the [government agency] of the discovery to which it is otherwise plainly entitled." Id. at 118. Were it not so, the investigative depositions would be accorded a preclusive effect that Congress did not intend. Indeed, a contrary ruling "would have the effect of imbuing the investigations of government agencies with the kind of formality and binding effect characteristic of full-blown litigation." Saul, 113 F.R.D. at 119; see also Softpoint, 958 F. Supp. at 857 ("Courts have avoided giving administrative inquiries preclusive effect because that would transform those inquiries into discovery or trials."); RTC v. Farmer, 1994 WL 317464 at *1 (E.D. Pa. June 24, 1994) (concluding that "there is no basis in law or equity to restrict the [pretrial depositions] sought by the [agency]," even though depositions of the proposed deponents were taken as part of a regulatory investigation by the agency before the commencement of the action; noting potential "prejudicial effect" on witnesses if the initial inquiry "would stand as the last and only word of deponents").

Similarly, granting the requested protective order here would threaten to cripple law enforcement efforts because "[t]he purpose of the CID procedure is to allow the Antitrust Division to investigate antitrust violations without prematurely becoming involved in a full-blown litigation," Associated Container Transportation (Australia) Ltd. v. United States, 502 F. Supp. 505, 510 (S.D.N.Y. 1980). If enforcement agencies have only one opportunity ever to depose a potential defendant or witness and if requesting documents from potential witnesses would also preclude the deposition of those same witnesses should the investigation lead to the filing of a case, the nature of the government's investigations would profoundly change. More potential witnesses would be deposed during the investigation, and CID deponents would be subject to more probing, cumbersome depositions because the government would have to determine **both** if sufficient evidence exists to file suit **and** to assemble any and all possible evidence in case of a trial, including anticipating any and all potential defenses that might be asserted by the potential defendant(s). Such a result would frustrate Congressional intent behind the Antitrust CID statutory scheme to ensure "effective and expeditious investigation into possible civil violations of the federal antitrust laws;"[15] it would lead to extremely costly, slow, and inquisitorial investigations, inuring to the detriment of both enforcement agencies, the targets of their investigations and ultimately the public interest.

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[15] H. R. REP. NO. 94-499, at 1 (1975) (Hart-Scott-Rodino Antitrust Improvements Act of 1976).

4. Twelve Of The Persons Whom Plaintiff Seeks To Depose Have Not Been Deposed During The Investigation

In emphasizing that some persons were deposed during the investigation, the Federation obscures the fact that 11 of the depositions it seeks to quash are of persons who have not been deposed previously, including all 9 deponents whose depositions were noticed for the month of September and will now have to be rescheduled. Yet, the Federation argues that these depositions are cumulative and unduly burdensome because others in their practice groups have provided depositions and all physician groups have produced documents.

The Federation's argument fails for several factual and legal reasons. First, lest there be any confusion, **no** post-complaint depositions have been taken to date. The same reasons that warrant taking pretrial depositions of several of those deposed during the investigation, even more strongly warrant a conclusion that those depositions do not supplant the need to take depositions of the 11 persons who were not deposed during the investigation.

Second, the Federation ignores that 5 of the 23 contested depositions --those of Drs. Crain, Easter, Spieker, and Sopa, and Ms. Mullaney--are of persons in practices from which **no one** was deposed during the investigation. It is absurd for the Federation to contend that these depositions are cumulative because defendant's main "defense" is that each practice acted independently in its dealings with Blue Cross--in other words, without knowledge of what other practices were doing. Surely, where defendant denies joint actions by any of its 44 members, plaintiff is entitled to inquire into the range of each practice's activities involving Blue Cross and the Federation to determine the veracity of such a defense. This is particularly the case where it is the Government that bears the burden of proof. It would be the height of irony for the Government to be denied any oral discovery from witnesses who deny they acted with the common understanding that the Government must prove.

Third, it is not the case that all persons from the various practices were all involved in all relevant activities. For example, not all physicians--perhaps not any--attended all five meetings convened over a period of fifteen months in Delaware to discuss the Federation and its activities. Few office managers attended any of the meetings. Similarly, not all physicians or office managers participated in all relevant written or telephonic communications--either among practices or within a practice. Rather, the instances and degree of each physician's and office manager's involvement in various meetings and communications are unique to each individual. For example, Lynda Odenkirk, the Federation's northeast coordinator based in Connecticut, engaged in many important telephone conversations with office managers to which the physicians in the same practice were not parties.[16]

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[16] Travelers Rental Co. v. Ford Motor Co., 116 F.R.D. 140 (D. Mass. 1987), is instructive. In that antitrust case, the defendant refused to produce several of its high-level executives for deposition on the grounds that plaintiff had already deposed lower level company officials, and that the proposed deponents' affidavits indicated that they lacked knowledge. The

Fourth, the recollections of most individuals deposed during the investigation regarding, for example, who attended meetings, the discussions at meetings, and the existence and subjects of telephone conversations, were vague or non-existent. Pretrial depositions of others involved in meetings and telephone conversations may turn up some individuals with better recollections. For example, Lynda Odenkirk, who was at the hub of the concerted activities as a Federation employee, seemed to have no independent recollection of most, if not all, of her many telephone conversations with numerous Delaware office managers. Perhaps, some of them will remember their conversations with her. Similarly, some physicians may have better recollections than others of statements attributed directly to them and the context in which they were made. For example, Dr. Hershey, who was not deposed during the investigation, should have a better recollection than others of his concerns about First State Orthopaedics' potential use of the Federation in negotiations with insurers as reflected in First State's own minutes: The Federation is "on the cutting edge. [First State] could be burned." Complaint (D.I. 1 at ¶21).

Finally, any Federation physician or office manager may show up as a witness hostile to the Government at trial. It should go without saying that, within the limits of the number of depositions allowed by the scheduling order, the Government should be allowed to depose those individuals whom it believes are most likely to appear at trial. Without the depositions, the likely effectiveness of plaintiff's direct or cross examination would be severely diminished.

III. The Federation's Claim of Harassment is Baseless.

A. There Is No Evidence Of Bad Faith

The circumstances leading to the noticing of the depositions demonstrate that plaintiff has noticed the depositions in a good-faith effort to prepare its case for trial. Plaintiff's stipulation to a maximum of 30 depositions in the face of defendant's acknowledgment that nearly 60 persons connected with the Federation are likely to have relevant information itself embodies plaintiff's commitment to depose only those who appear most knowledgeable. In fact, plaintiff has carefully selected the proposed deponents based on their roles in the alleged conspiracy and related

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defendant argued that the proposed depositions were thus solely for the purpose of harassment and oppression because "it is clear that the information which plaintiff wants is available through other employees." Id. at 142. The court disagreed, finding that plaintiff is entitled to explore the involvement of each of the high-level executives because when the motives behind corporate action are at issue, an opposing party usually has to depose those officers and employees who in fact approved and administered the particular action. Id. 143-44. Even the claimed lack of knowledge is insufficient to defeat plaintiff's right to depose those executives because the professed ignorance may, in and of itself, be relevant evidence respecting the company's motive in the alleged antitrust violation, and plaintiff is entitled to test the assertion. Id.

events.[17] Plaintiff also had structured the original deposition schedule potentially to render some later scheduled depositions unnecessary, depending on information learned from the earlier depositions.

In addition, as made clear to defense counsel, plaintiff intends to minimize the overlap between the CID depositions and pretrial depositions. Though it will be necessary at times to clarify or to follow up on topics covered in the initial CID depositions to prepare adequately for cross-examination, plaintiff has no intention of repeating lines of questioning already adequately answered during the CID depositions. Thus, defendant's apprehension of abuse is based on nothing more than its contrived conjecture. Moreover, the "mere possibility of repetition of testimony is not by itself sufficient to justify a protective order barring the taking of depositions," nor does a mere showing of some embarrassment, annoyance or expense require the issuance of a protective order. Blair v. H.K. Porter Co., Inc., 1986 WL 9593 at *2 (E.D. Pa. Aug. 29, 1986) (refusing to issue protective order even though "the same witness or witnesses had already testified at depositions in other asbestos cases on every aspect that has subject matter relevant to [the] action" at issue and "plaintiff had already conducted a complete and thorough examination of different representatives of defendant, one on two different occasions"); see also Cooper v. Welch Foods, Inc., 105 F.R.D. 4 (W.D.N.Y. 1984).

B. Plaintiff Is Willing To Accommodate the Deponents' Reasonable Requests To Alleviate Scheduling Conflicts

Plaintiff has always been willing to accommodate reasonable requests regarding the timing of particular depositions. When counsel for physicians from First State Orthopaedics sought to reschedule two of their depositions, plaintiff immediately accommodated them. For instance, Dr. Stephen Hershey's deposition was moved from Thursday, September 23, 1999 to October 4, 1999 because his daughter is being married the weekend following September 23. Plaintiff also agreed to start two depositions of First State's doctors at noontime to allow the deponents to complete surgery scheduled in the morning.

Defense counsel, on the other hand, while complaining to the Court about scheduling, have to date, made **no** effort to re-schedule any of the 18 depositions noticed of their clients for any day, or part of a day, over the next 3 ½ months. Rather, they frequently claim that at least some witnesses have no time at all during that whole period. For example, in a declaration submitted by defense counsel, Dr. Ali Kalamchi, echoing the 8 other physician declarations submitted, declares that "[Orthopaedic Specialists] and its physicians are booked very solidly at this time and through the end of the year. I am scheduled for appointments and/or surgery all day on October 18, 1999." This averment is entirely inconsistent with Dr. Kalamchi's actions before he recently came to be represented by defendant's counsel. When he was served with a subpoena

[17] See Appendix, attachment 1, for a brief explanation of why the United States seeks to take depositions of the five persons specifically disputed by defendant in its September 8, 1999 letter brief (D.I. 146).

in August, Dr. Kalamachi had his office notify Government counsel that he would be in Chicago for a conference on the originally scheduled deposition date, October 21, 1999. Plaintiff's counsel immediately offered to accommodate Dr. Kalamchi and suggested rescheduling the deposition two months in the future on October 18, 1999, **which his office accepted**. But now that Dr. Kalamchi is represented by defense counsel, he conveniently asserts the same non-specific conflicts as the other physicians.

C. The Federation Has Greatly Exaggerated The Burden And Scope Of The Investigation And Case Discovery To Date

Defendant's claim of harassment boils down to hyperbole about the burdens imposed on its members by the pre-complaint investigation, the extent of discovery taken in this case, and the anticipated burden that the noticed depositions will place on defendant, the deponents, and the deponents' patients. None of these claims is rooted in fact.

1. The Number of Documents Produced By The Federation And Delaware Physicians Can Scarcely Be Viewed as Burdensome

The brunt of defendant's argument of harassment and undue burden draws on its claims concerning the purported number of documents produced by the Federation and its Delaware physician members. The defendant claims that "close to 100,000 documents" were produced pursuant to CIDs during the investigation and an additional "[c]lose to 100,000 documents" have been produced in this action.[18] Thus, defendant suggests to the Court that the Government has obtained a total of about 200,000 documents, comprising untold hundreds of thousands or millions of pages.

These claims are grossly inaccurate and misleading.[19] In actuality, the total number of documents produced by Delaware physicians and the Federation combined during both the

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[18] Federation's 9/8/99 letter, D.I. 146 at 2 ("Through various **Civil Investigative Demands ("CIDs")**, the Government spent over eight months obtaining **close to 100,000 documents** from more than 30 FPD members in Delaware and elsewhere."); id at 10 ("**Close to 100,000 documents** have been produced **in this action**.").

Defendant may have attempted to inflate these numbers by including documents produced in separate investigations of the Federation in Tampa, Dayton, and New Haven. Of course, these productions by the Federation elsewhere should have no bearing on the claimed burden of discovery on Delaware physicians. Moreover, the total number of **pages** produced by the Federation and its Connecticut, Dayton, and Tampa members concerning activities under investigation in those areas is only about 15,600, which obviously constitute a much smaller number of documents.

[19] See Appendix, attachment 2, Declaration of Kathy Seldin.

investigation and in this case is a mere 2,852 documents, comprising a total of 10,101 pages.[20] The Federation has, thus, exaggerated the number of **documents** produced by a factor of about 70 times to support its complaint about overly burdensome document discovery. Once defendant's gross inaccuracy is exposed by actual figures, the Federation's complaints about unduly burdensome document productions (which, of course, should have no bearing on deposition discovery in any event) collapse.

For example, Dr. Victor Kalman's purportedly "substantial production of [CID] documents," as averred to in his "fill-in-the-blanks-style" declaration,[21] in actuality totals **8 documents** comprising just 20 pages. Dr. J. Hamilton Easter also avers to the "substantial production of [CID] documents" from his group of several physicians and to additional documents produced in this action pursuant to subpoena.[22] In fact, his practice produced **20 documents** during the investigation and **one document** in this action. Dr. Gelman of Orthopaedic Specialists makes the same claims in his identically worded declaration on this point,[23] but the fact is that his five-member group produced only **54 documents** pursuant to CIDs and only **10 documents** (about 10 per physician) pursuant to subpoena in this case. The identical claims of substantial document productions in Dr. Sopa's declaration[24] are belied by the actual number of documents that his group has produced: **12 documents** pursuant to CID and **16 documents** pursuant to subpoena. Without belaboring the actual numbers of documents produced by all of the other physicians, it suffices to say that there is no truth to defendant's claim to this Court that, "Each [FPD member physician] has also produced hundreds if not thousands of documents from their practice.")[25]

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[20] Specifically, during the investigation, the 46 Delaware physicians, to whom CIDs were issued, produced a combined total of 1,208 **documents** (averaging 26 per physician), comprising 3,950 pages, and the Federation (including Dr. Connair) produced 660 **documents**, comprising 2,455 pages, relating to its activities in Delaware. Since this action was filed, the 11 subpoenaed Delaware orthopedic groups produced 470 **documents** totaling 2,344 pages, of which 181 **documents** totaling 1,667 pages were produced by the 10-physician First State Orthopaedics group. In this action, the Federation has produced 514 **documents** comprising 1,352 pages, including multiple copies of a number of documents, and the Federation's vice president, Dr. Connair of Connecticut has produced 29 **documents** totaling 195 pages.

[21] D.I. 147, Kalman Declaration, Attachment 7, ¶ 3.

[22] D.I. 147, Easter Declaration, Attachment 4, ¶ 3.

[23] D.I. 147, Gelman Declaration, Attachment 5, ¶ 3.

[24] D.I. 147, Sopa Declaration, Attachment 10, ¶ 3.

[25] Defendant's 9/8/99 letter, D.I. 146 at 7.

2. The Federation Has Exaggerated The Extent Of The Investigation Leading To This Case

Not surprisingly, the Federation has also misrepresented the extent of the investigation leading to the filing of this case, claiming that Delaware orthopedic groups were responding to CID discovery over a period of eight months from November 1997 through July 1998.[26] The duration of the investigation in fact was much shorter.[27] As already explained, the Government was unaware of the Federation's and its members' problematic activities in Delaware until the latter part of February 1998. CIDs for documents were issued to 46 Delaware physicians and the Federation on February 25, 1998. Most documents were produced pursuant to the CIDs in mid-March or after. As soon as documents were available, nearly all of the investigative depositions of orthopedic surgeons and their practice managers were conducted within a one-month period from March 19, 1998 until April 16, 1998. Investigative depositions of three Federation agents were all delayed at the insistence of the Federation's counsel and completed by May 20. Thus, the investigation was concluded within four months, and, as concerned all but one physician, within two months. Since the Complaint was filed, the only discovery in this action to date involving any Federation physician member consists of the document subpoenas served on 11 Delaware orthopedic groups that, as detailed above, resulted in their **non-duplicative** production of a modest number of documents generated during a 5½-month period between the issuance of the CIDs in late February 1998, until the filing of the Complaint on August 12, 1998.

3. Defendant Has Also Exaggerated The Likely Burden The Noticed Depositions Would Impose

In complaining about the alleged burden the deponents would suffer in attending "day-long depositions," (D.I. 146 at 3), defendant conveniently ignores the parties' joint representation to the Court that, with very few exceptions, the parties will adhere to the Court's suggestion, at the scheduling conference, that depositions be limited to six hours.[28] The plaintiff has every intention, assuming cooperation by defense counsel, of concluding all but two of the depositions--those of Mr. Seddon and Dr. Newcomb, two of the ringleaders of the alleged conspiracy--within the six-hour limitation. Indeed, plaintiff is hopeful that a number of these depositions will take substantially less time. For that reason, plaintiff has noticed six of the contested depositions to be completed within a half day: one starting in the morning, another in the afternoon on the same day. In short, all but one depositions at issue will require no more than 6 hours of any physician's time, and many may require less.

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[26] Id. at 2 n.3

[27] See Appendix, attachment 2, Declaration of Kathy Seldin.

[28] See D.I. 70 at 2: "The parties agree [the six-hour limitation on depositions that the Court raised at the scheduling hearing] is generally workable, but each side foresees a small number of depositions that may take a longer time." Parties' Letter to the Court (Mar. 2, 1999).

Moreover, by serving the deposition notices on August 2, 1999, plaintiff allowed at least 5 weeks' notice to the five persons whose depositions were scheduled on September 8-10. With the exception of four physicians scheduled for September 21-24, who had seven weeks notice, all other physicians received two or three months notice of their depositions. Such advance notice allows plenty of time for a physician to reschedule any appointment that might have been booked by early August for the date of the deposition. Certainly any such appointments booked several weeks or months ahead are not emergencies. The depositions scheduled by the Government for six hours at maximum posed no threat to either the witnesses' financial well-being or their patients' health. Surely, with several months notice, these physicians can find a few hours to have a deposition taken and assure that their patients' schedules and health needs will not be affected. It simply cannot be the case that these physicians have no time off and that their every waking hour is already booked over the next several months in service of their patients. Indeed, we know that in previous years these witnesses had time to go to several meetings to form a group boycott when they saw their fee income threatened; and more recently they have themselves told us they have time to go to conferences out of town. Surely, they have a few hours to answer charges that they sought jointly to raise the prices for their medical services in this state.

IV. Conclusion

The Federation's present motion for protective orders has already delayed the taking of many depositions permitted by this Court's Scheduling Order in this case. For the reasons stated above, the United States respectfully seeks this Court's expedited denial of defendant's motion for a protective order so that depositions can proceed and this case can be readied on schedule for trial next spring.

Respectfully submitted,

_____/S/_____
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