UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>FEDERATION OF PHYSICIANS AND DENTISTS, INC.,<br><br>Defendant. | ) | CA 98-475 JJF |

**UNITED STATES' ANSWER TO MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY PRINCIPAL HEALTH CARE OF DELAWARE, INC.'S MOTION FOR A PROTECTIVE ORDER**

Dated: May 24, 1999

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## . STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

On March 3, 1999, the Court entered a Protective Order (D.I. 68) in this action. The Protective Order contains a provision allowing disclosure of confidential information to Defendant's Executive Director, Jack Seddon, "where deemed necessary to assist outside counsel acting for defendant in defense of this action or in preparation for hearings or depositions in this action, unless otherwise ordered by the Court." Protective Order at ¶ 7(g). Seeking protection of a limited portion of its confidential information from such disclosure to Mr. Seddon, Principal Health Care of Delaware ("Principal") filed a Motion for a Protective Order and accompanying memorandum of law on May 10, 1999. The United States now submits this Answering Brief responding to several issues raised by Principal's submission.

## II. SUMMARY OF THE ARGUMENT

1. The orthopedic fee information sought from Principal by the United States is directly relevant to assessing Defendant's central denial that it concertedly organized and became the hub of a price-fixing conspiracy among Delaware orthopedic surgeons to oppose and prevent proposed reductions in payments for their services by Blue Cross and Blue Shield of Delaware ("Blue Cross") and other health care insurers. In denying concerted action, Defendant argues that its members independently rejected Blue Cross's fee proposal because the fees proposed were too low. Principal's and other insurers' orthopedic fee schedules are directly relevant to assessing Defendant's claim and are, therefore, discoverable under Fed. R. Civ. P. 26(b). Consequently, the Court should reject Principal's motion to bar use of its fee schedules and, instead, protect the confidentiality of Principal's information through an appropriate protective order.

2. The United States agrees with Principal's argument that the Court should restrict the disclosure of its "highly confidential, supersensitive and proprietary fee schedule information" to "(outside) attorney's-eyes only review" for the reasons already set forth in the United States' protective order briefs (D.I. 36 and 55) and in its argument at the February 16, 1999 scheduling conference.

## III. STATEMENT OF FACTS

The United States first became aware of Defendant's anticompetitive activities in Delaware in late February, 1998. Shortly thereafter, the United States commenced an investigation and served Delaware health care insurers, including Principal, with Civil Investigative Demands ("CIDs") issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14. Principal was represented by antitrust counsel in connection with its compliance with the CID.[1] On March 13, 1998, Principal produced 174 pages of documents to the United

[1] During the United States' investigation and during the initial stages of this litigation, Principal was represented by counsel other than Mr. Folt, counsel for Principal in the present proceedings.

States in response to the CID.[2]

After the United States filed its complaint in August, 1998, it promptly began negotiations with Defendant on the terms of an appropriate umbrella protective order that would afford parties and non-parties appropriate protection of their confidential information over the course of pretrial litigation. After agreeing in principle to terms of a stipulated protective order, Defendant demanded that a provision be inserted in the protective order that, in the words of defense counsel, allowed Jack Seddon "full access" to nonparties' confidential information. The United States rejected such a provision on the grounds that it would unnecessarily risk great harm to non-parties, and the parties determined that they would not be able to reach a joint stipulated protective order.

The United States' position on the disputed provision was buttressed by the input of non-parties, including Principal. Former counsel for Principal expressed concern about the provision, and contemplated preparation of a declaration from a Principal representative, setting forth Principal's concerns about allowing Mr. Seddon full access to its confidential information. Principal ultimately did not furnish such a declaration. At all times, however, former counsel for Principal was aware of the United States' opposition to the Defendant's full access provision.

In January, 1999, seven non-party health care insurance companies, including Principal, accepted service of the United States' Rule 45 subpoenas. The subpoenas sought a number of categories of documents relevant to the subject matter of the litigation. Contrary to Principal's assertion, the instructions accompanying the subpoena specifically excluded from production any documents that had been produced previously in response to the United States' Civil Investigative Demands. On February 10, 1999, Principal sent to the United States its Rule 45(b) objections to the categories of documents requested by the United States' subpoena.

On March 3, 1999, the Court entered a protective order containing a provision that allowed Mr. Seddon access to confidential information. Soon thereafter, the United States notified non-parties, including Principal, that had produced information to it during the investigation, that it would, pursuant to its discovery obligations, be turning over non-parties' documents once Defendant requested the documents. The United States also sent to these non-parties a copy of the protective order entered by the Court.[3]

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[2] The documents were produced pursuant to a statutory framework that specifically authorizes the Antitrust Division to use CID material in connection with any judicial, grand jury, or Federal administrative or regulatory proceeding in which the Antitrust Division is involved. 15 U.S.C. § 1313(d)(1).

[3] After the Court's entry of the Protective Order, upon inquiry from Defendant, the United States informed Defendant that it would not be producing the non-parties' documents until it received document requests for the documents from Defendant. About four weeks later, on April 16, 1999, counsel for Defendant sent a letter to counsel for the United States demanding that the

On April 20, 1999, the United States advised counsel for Principal that it intended to produce to Defendant the documents Principal had produced during the United States' investigation. The United States also advised counsel for Principal that, in the interest of preserving the rights of non-parties to have their views known by the Court before Mr. Seddon had the opportunity to see their confidential information, the United States had secured a commitment from Defendant not to show Mr. Seddon any non-parties' confidential information until after May 4, 1999. As the Court is aware, counsel for Principal then made an appearance later in the day on April 20, asking that the Court bar the United States' production of any documents to Defendant (including counsel for Defendant). The Court stayed the United States' production of Principal's documents to Defendant pending a negotiated resolution with the parties or Principal's filing of a motion for a protective order.

Thereafter, counsel for Principal, Defendant, and the United States held a teleconference to attempt to resolve issues related to Principal's concerns about disclosure of its confidential information. It was agreed that the United States would turn over to Defendant all of Principal's CID documents, except for its general orthopedic fee schedules. The United States sent these documents to Defendant on April 27, 1999. Pursuant to Principal's directive and this Court's April 20th instructions, the United States has not sent to Defendant copies of Principal's general fee schedules. Principal now seeks to have its orthopedic fee schedules, produced in compliance with the CID, declared irrelevant for purposes of discovery in this case and, consequently, barred from disclosure to Defendant and possible use in this case, or, short of that, subject to an "attorneys'-eyes only" provision limiting disclosure.

## IV. ARGUMENT

### . Principal's Fee Schedules Are Relevant to the Subject Matter of this Action and Accordingly Are Discoverable and Properly Subject to Disclosure Under an Appropriate Protective Order

Relevance in discovery under Fed. R. Civ. P. 26(b)(1) is broadly construed to "encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). Accordingly, this Court has recognized that " 'discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action.' " In re ML-LEE Acquisition Fund II, 151 F.R.D.

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United States produce the non-parties' documents, and, in a subsequent telephone conversation, stated that the United States had obligated itself to do so, after entry of a protective order, in a statement made in its Rule 26(a) disclosures submitted in October, 1998. Upon reviewing the situation, the United States promptly produced the documents on the condition that defense counsel would not show non-parties' confidential information to Mr. Seddon until after May 4, 1999, to enable non-parties, such as Principal, to seek greater protection of their confidential information before it would be shown to Mr. Seddon.

37, 39 (D. Del. 1993) (quoting La Chemise Lacoste v. Alligator Co., Inc., 60 F.R.D. 164, 171 (D. Del. 1973)).

Contrary to Principal's claim that its orthopedic fee schedules are irrelevant, such fee schedules of Principal and other health care insurers operating in Delaware, and in areas contiguous to Delaware, are directly relevant to a central issue in this action. The United States alleges that Defendant and its members conspired to facilitate a boycott to extract artificially high fees from Blue Cross and other health care insurers in Delaware. United States' Complaint at ¶ 1 (D.I. 1). Ignoring the substantial evidence supporting the allegations, Defendant claims that its orthopedic surgeon members independently rejected Blue Cross's proposed fees because they were too low and unprofitable. Defendant's Amended Answer (D.I. 11) at ¶ 71. Defendant's claims cannot -- as Principal suggests -- be examined in a vacuum. Rather, Defendant's claim that Blue Cross's proposed fees were too low begs for a comparison of Blue Cross's proposed fees with the fees of other Delaware health care insurers to provide at least one meaningful basis to evaluate the Federation's claim. Far from demonstrating Principal's claim that this is a "novel" theory of relevance, such analysis represents a straightforward, common sense basis for evaluating Defendant's claim.[4]

The clear relevance of Principal's orthopedic fee schedules to a central issue in this case warrants their use with appropriate safeguards of confidentiality. As this Court has found, "[a] survey of the relevant case law reveals that discovery is virtually always ordered once the movant has established that the secret information is relevant and necessary." Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 107 F.R.D. 288, 293 (D. Del. 1985). Indeed, the Supreme Court has observed that:

> [O]rders forbidding any disclosure of trade secrets or confidential commercial information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel.

Federal Open Market Committee of the Federal Reserve System v. Merrill, 443 U.S. 340, 363 n.24 (1979).

Accordingly, the United States respectfully requests that the Court reject Principal's requests for an order barring disclosure of its fee information even pursuant to an appropriate

[4] Principal's surmise that "[t]he four insurance groups in Delaware that provide health care plans all value and price services differently," Principal Mem. at 11, does not support its claim that its fee schedules are irrelevant. Indeed, even if Delaware health care insurers do "value and price services differently," a comparison of Blue Cross's and other insurers' fee levels remains important to assess Defendant's claim.

protective order and its premature request to bar the use of such information at trial.[5]

. **The United States Does Not Object to Principal's Request to Limit Access to its Fee Schedules to Counsel and Experts**

This Court has stated that, in examining the potential injury arising out of disclosure of trade secrets in litigation, "[b]ecause protective orders are available to limit the extent to which disclosure is made, the relevant injury to be weighed in the balance is not the injury that would be caused by public disclosure, but the injury that would result from disclosure under an appropriate protective order." Coca-Cola Bottling Co., 107 F.R.D. at 293; see also Tristrata Tech., Inc. v. Neoteric Cosmetics, Inc., 35 F. Supp.2d 370, 372 (D. Del. 1998) (directing production of "highly confidential trade secret information" under a "particularized protective order" that would maintain the secrecy of the information). The United States, for reasons set forth in its protective order briefs and at the February 16, 1999, scheduling hearing, believes that Principal's request to prevent Federation representatives from having access to its "superconfidential information"[6] is reasonably sought to protect Principal's interests as well as the public interest in preserving competition for physician services.[7] As such, the United States does not object to Principal's

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[5] Principal also asks that the parties be prohibited from propounding further paper discovery against it. The United States does not object, provided that Principal's request does not restrict the United States' ability to obtain the information that it seeks in its outstanding subpoena, as modified by subsequent agreement.

[6] The basis for Principal's contention that all of the fee schedules that Principal produced to the United States are "superconfidential" is somewhat unclear. In its Memorandum of Law, Principal claims that all of its fee schedules are "superconfidential," including a fee schedule that has not been in effect since March 1, 1997, and what is referred to as a "Current Fee Schedule," that has, according to Principal, been in effect since March 1, 1997. Though not disputing that a fee schedule that has not been in effect for over two years is properly designated as "confidential," Plaintiff fails to understand how such an outdated fee schedule rises to the level of "superconfidential." It is beyond doubt, however, that a health care insurer's current fee schedule may be among the most sensitive confidential business information of that insurer and would cause the most harm if disclosed to Mr. Seddon.

[7] As with AmeriHealth, Defendant, in the context of its confidentiality dispute with Principal, has declared that Principal's documents are "highly relevant" to the case. Letter from Mary Beth Fitzgibbons (counsel for Defendant) to Daniel V. Folt (counsel for Principal) (April 29, 1999) (D.I. 85; Tab A). It bears repeating that, in opposing the United States' pending motion to compel, defense counsel argued that the United States is "misus[ing] . . . the discovery process to inquire into the Federation's [and its members'] dealings with other insurers," such as AmeriHealth and Principal, because such dealings are, purportedly, irrelevant to the claims at issue. (D.I. 73, at p. 5). As the United States pointed out in its May 13, 1999, letter (D.I. 90) response to AmeriHealth/IBC's letter motion seeking modifications to the protective order (D.I.

request that disclosure of its fee schedules be limited to "attorneys'-eyes only" and experts.

Dated: May 24, 1999

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85), if Principal's documents are "highly relevant" to the case, then the Federation's and its members' documents relating to insurers, such as Principal, are *a fortiori* relevant to this case and should be produced by the Federation and its member physicians. Moreover, Defendant's May 19, 1999, letter to the Court (D.I. 93), responding to AmeriHealth's motion, simply ignores, rather than attempts to reconcile, this glaring contradiction.