U.S. Department of Justice

Antitrust Division

Liberty Place Building
325 Seventh Street NW
Washington, DC 20530

April 16, 1999

BY HAND DELIVERY

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

Dear Judge Farnan:

Pursuant to Your Honor's February 23, 1999 order, the United States respectfully submits this letter to outline the discovery issues to be resolved at the April 20th hearing and to reply to the letter brief, dated April 5, 1999, submitted by defendant, the Federation of Physicians and Dentists (the "Federation"), and certain of its member orthopedists.

As the Court may recall, the United States moved, by a letter brief dated February 24, 1999, to compel the defendant Federation and ten of its member orthopedic physician groups ("the practice groups"), all of which are represented by the same defense counsel, to respond to certain document requests. The issues to be resolved at the upcoming hearing are: 1) the four global objections and claim of undue burden raised by both the Federation and the practice groups; 2) the Federation's refusal to produce certain relevant information that would reflect on whether, when and what communications took place among some of the alleged conspirators; and 3) the practice groups' refusal to produce their (a) phone records concerning the Federation's activities, (b) revenue and expense statement and list of top-ten payers for 1997, and (c) communications concerning the Government's investigation of, or enforcement action against, the Federation and/or its members.

Rather than repeat the arguments that were laid out in detail in the February 24th letter brief, this letter will seek to focus only on areas that have been muddied by several inaccuracies in the Federation's April 5th letter. First, the Federation and the practice groups incorrectly claim that their negotiations with the United States have significantly narrowed the issues to be

resolved and that, as a result, they have produced "a significant number of documents" since the February 24th letter. The fact is that both the Federation and the practice groups have persisted in their objections, not once modifying them or even discussing them with plaintiff's counsel since February 24. The documents produced to date are merely the few documents that are responsive to requests to which the Federation and the practice groups had already agreed, with stated limitations, to respond. Indeed, despite the Federation's professed good-faith negotiations, it produced merely 114 pages of documents in December, 1998, and no more since then. Although the practice groups did make their long-overdue production within the last several weeks, their production was equally meager, totaling no more than 500 pages of documents for all ten practice groups combined.

In attempting to justify their withholding of relevant documents, the Federation and the practice groups also incorrectly claim that they already have borne a heavy burden in producing documents for the Government's pre-complaint investigation. But the fact is that they produced a total of only about 5,100 pages, or approximately two and one half boxes, of documents in the spring of 1998. Specifically, the Delaware practice groups produced a total of 2,729 pages of documents, and the Federation produced approximately 2,400 pages -- including documents relating to Delaware from its northeast coordinator, Dr. Michael Connair of Connecticut. These efforts cannot fairly be characterized as burdensome.

Moreover, the Federation and the practice groups' repeated references to the evidence already gathered by the United States during the investigative phase miss the point. The Federation's broad denials of the Complaint's allegations of concerted action alone warrant discovery of all of the documents sought by this motion. See SEC v. Saul, 133 F.R.D. 115, 119 (N.D. Ill. 1990 (citing Hannah v. Larche, 363 U.S. 420, 446 (1960)) (holding that once government agency "has completed its investigation and filed suit, it is entitled to . . . avail itself of its discovery rights in order to prepare its case for trial."). In addition, since the conclusion of the investigation and the filing of the Complaint, the Federation's Amended Answer (D.I. 11) has injected numerous new, purported defenses. The Federation's 13 "affirmative defenses" were not advanced during the Government's investigation and therefore were not the focus of that investigation. The United States has every right, therefore, to full discovery in this case of the information underlying those defenses in order to respond adequately to the Federation's defenses at trial.

The Federation and the practice groups are equally wrong when they claim that the Government's discovery requests "in many respects seem cumulative and duplicative" of the Civil Investigative Demands ("CID") served during the investigation. (4/5/99 Response Letter, Introduction) (emphasis added). First, as noted above, many of the discovery requests in fact seek to obtain information relevant to issues framed by the Federation for the first time in its Amended Answer. In addition, not only do the requests expressly exclude documents produced previously during the investigation, but, with the exception of categories of documents not produced during the investigation, the United States also has modified the time frame for production to a period clearly not covered by any previous CID production to eliminate any potential burden of determining whether a document was previously produced.

Similarly unpersuasive is defense counsel's repeated argument that the practice groups' non-party status lessens their duty to comply with the subpoenas. (See Response Letter at I.A. and III.B.). As the Complaint makes clear, the practice groups are not innocent bystanders, but, rather, conspirators without whom there could be no price-fixing conspiracy in this case. Their integral role as Federation members involved in the conspiracy fully warrants their production of documents relevant to issues raised in this case by their conspirator, the defendant Federation. Indeed, should the United States succeed in this enforcement action, the injunctive relief would, among other things, prevent the Federation from acting in concert with its member practice groups to achieve anticompetitive ends.

Finally, in supporting their claim that the United States does not need a list of each practice group's top-ten payers in 1997 or the total amount paid by each payer, the Federation and the practice groups make the sweeping statement that they "have already produced much information, including financial information." (4/5/99 Response Letter, at III.A.) Yet, no such financial information has been produced by these practice groups, much less any information that would allow the United States to accurately determine Blue Cross's relative financial importance to each group. Such information is undeniably relevant to resolution of the issue -- raised repeatedly by the Federation -- of whether each practice group would have independently terminated its Blue Cross contract in its own financial self-interest without the assurance that others would act in concert.

Instead of challenging this discovery request on relevancy grounds under Fed. R. Civ. P. 26 -- the appropriate standard for this discovery dispute -- the Federation and the practice groups attempt to argue the merits of the case. They wrongly claim that the United States' intended approach to establish concerted action is "based on an overly simplistic and false premise," while asserting (ironically) that Blue Cross "was only one of many insurers operating in a competitive market and vying for the services of Delaware's orthopedic surgeons." (Id.). It is precisely such Federation arguments that have forced the Government to move to compel production of the information establishing Blue Cross's relative financial importance. Absent this information, the Government cannot fully assess the validity of this repeated assertion or, indeed, the Federation's fundamentally inconsistent (but, nevertheless, oft-repeated) assertion that Blue Cross exercises monopsony power in the Delaware market, thereby leaving the physicians with no power to refuse any offer Blue Cross makes.

In sum, the withheld information sought by the United States directly concerns the very matters that the Federation has put at issue via its denial of concerted action and its long list of purported affirmative defenses, many of which focus on the relative economic power and financial wherewithal of Delaware insurers and Federation members. The Government's requests were narrowly drafted, and then further limited in negotiations, to eliminate any undue burden. The United States, therefore, respectfully requests that this Court order the Federation

and the practice groups to comply promptly with the discovery requests at issue, as modified by the United States.

Respectfully submitted,

_____/S/_____
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_____/S/_____
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