



U.S. Department of Justice

Antitrust Division

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February 24, 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 instruction at the February 16, 1999 scheduling conference, the United States respectfully submits this letter, in lieu of motions seeking to compel defendant, the Federation of Physicians and Dentists (the "Federation"), and certain of its member orthopedic physician groups to comply respectively with the United States' First Request for Documents and subpoenas duces tecum.

As the Court is aware, the United States sued the Federation in August, 1998, to enjoin the Federation from conspiring with its Delaware member orthopedic surgeons to negotiate prices and other contract terms with health care insurers that purchase orthopedic services. The suit challenges the Federation's leadership of its members' alleged concerted refusal to negotiate with Blue Cross and Blue Shield of Delaware ("Blue Cross") about proposed fee reductions except through the Federation's executive director, Mr. Jack Seddon, and ultimately its members' termination of their Blue Cross contracts through Mr. Seddon. In its Answer filed on October 13, 1998, the Federation denies the alleged conspiracy, claiming that each of its members independently rejected Blue Cross's proposed fees because the fees were too low and would have jeopardized the standard of care provided by the members.

In October, 1998, the United States served a First Request for Documents (the "Document Request") on the Federation and subpoenas duces tecum on most of the

Federation's Delaware orthopedic members and Dr. Michael Connair, a Connecticut Federation member, who was also involved in the Federation's activities in Delaware. These discovery requests seek information, not previously produced in the investigative phase, that may provide direct or circumstantial evidence of the alleged conspiracy and refute the Federation's claim of independent action and its other defenses. The Federation and certain of its member physicians or practice groups represented by the same counsel as the Federation (hereinafter the "practice groups"), however, have made numerous sweeping objections to the Document Request and subpoenas.* The objecting practice groups are: Delaware Orthopaedic Center, Orthopaedic Associates of Southern Delaware, Morgan Kalman Arthroscopic Specialists, Orthopaedic Specialists, Tooze & Easter, Lewes Orthopaedic Center, Nanticoke Orthopaedics, Dickinson Medical Group, Richard DuShuttle, M.D., and Michael Connair, M.D. These practice groups, as well as the Federation, are the subject of this letter.

Despite the United States' good-faith efforts to resolve its differences with defendant and the practice groups, including significant modifications to the Federation's document requests and the practice groups' subpoenas, the Federation and the practice groups have remained firm on virtually all objections. To date (and now long after the production deadlines have passed) the United States has received scant production -- a mere 114 pages of documents -- from the Federation and no production at all from any of the 10 practice groups. The United States believes that it is entitled to the information sought because it bears on or could lead to evidence that bears on the issues in this case -- especially those issues injected into this litigation by the Federation's defenses. The Federation's and the practice groups' withholding of the information sought contravenes the liberal discovery policy particularly applicable in antitrust conspiracy cases. The following sections summarize the invalidity of those objections raised I) in common by both the Federation and the practice groups; II) by the Federation alone; and III) solely by the practice groups.

I. Objections Raised by Both the Federation and the Practice Groups

The Federation raised four global objections to the Document Request, limiting its production to only: (1) pre-complaint information, (2) related to the Federation's activities on behalf of orthopedic surgeons in Delaware, (3) concerning Blue Cross, or (4) "third party messenger" activities in Delaware with respect to Blue Cross. The practice groups also seek to impose the same limitations on their subpoenaed document productions. In addition, all

* For the Court's convenience, we have attached: (1) the United States' First Request for Documents; (2) Defendant's Objections and Response to the First Request for Documents; (3) Objection of Dr. Michael Connair, and (4) Objection of Delaware Orthopaedic Center. The Objection of Delaware Orthopaedic Center is in all respects substantively identical to those of the other practice groups with the exception of Dr. Connair, and therefore is attached as an example of all practice groups' objections. As explained elsewhere in the letter, Dr. Connair is not a Federation member in Delaware.

objected to the discovery requests on the grounds that they are cumulative, duplicative, unduly burdensome, harassing and vexatious. None of these objections is warranted.

• Pre-Complaint Information Limitation

The United States seeks information up to November 1, 1998, a period of less than three months after the complaint was filed. The objectors, however, imposed, or propose to impose, a temporal limitation on production as of the date the Complaint was filed, August 12, 1998. The limitation is unjustified. Courts have repeatedly held in antitrust cases that “[d]iscovery as to materials produced after the filing of the complaint is proper where the materials are relevant to plaintiff’s claim.” Dart Drug Corp. v. Corning Glass Works, 480 F. Supp. 1091, 1107 (D. Md. 1979). This is especially true where the complaint “allege[s] continuing violations.” Carlson Companies, Inc. v. Sperry and Hutchinson Co., 374 F. Supp. 1080, 1102 (D. Minn. 1974). Information about the Federation’s post-complaint dealings with its physician members and Delaware insurers should illuminate how long the alleged conspiracy may have continued post-filing. Post-complaint information would also allow an assessment of the Federation’s claim--advanced after its Amended Answer was filed--that it no longer functions as a “third party messenger” for its Delaware orthopedic members. In addition, because some Delaware orthopedic surgeons have contracted with Blue Cross after the Complaint was filed, the terms and circumstances surrounding those contracts, including the degree of the Federation’s involvement in advising the groups, would be relevant to analyzing whether, as the Federation contends, each practice group previously rejected Blue Cross’s fee proposal independently.

• Geographic Limitation to Delaware

Equally unreasonable is the Federation’s and its member practice groups’ geographic limitation to Delaware for their production. Consistently with this Court’s admonition that discovery in antitrust actions may be geographically broad when the inquiries are relevant to the action (Kellam Energy, 616 F. Supp. at 219; see also Natcontainer Corp. v. Continental Can Co., 362 F. Supp. 1094, 1102 (S.D.N.Y. 1973)), the United States’ discovery requests focus narrowly on seeking information of communications and activities -- wherever they might have taken place -- that reflect on the conspiracy at issue in Delaware. The Complaint makes clear that the conspiracy involved actors and activities outside Delaware. It alleges, for instance, that a Connecticut orthopedic surgeon, Dr. Michael Connair, played a key role in the Federation’s Delaware recruiting efforts by publicizing to the Delaware physicians the Federation’s success story of negotiating favorable contracts with insurance carriers in Connecticut. The Federation’s executive director, Mr. Seddon, is also known to be a frequent speaker to audiences across the nation on topics relating to physician unions and the use of a “third party messenger” arrangement in contract negotiations with health care insurers. In some of those presentations, he has talked at some length about the impasse that developed with Blue Cross in Delaware. Those presentations often occurred outside Delaware and yet shed considerable light on the nature of the Federation’s role as a contract negotiator for its orthopedic members with Delaware insurers, including Blue Cross.

Moreover, the Federation itself has placed at issue information relating to events outside Delaware. For example, the Federation boasts that it was only after the successes of its “third party messenger” activities elsewhere that it began offering its “contracting assistance program” to Delaware members. The United States is entitled to discover facts relating to this and other issues raised by the Federation.

3. Blue Cross Limitation

Similarly, the Federation and the practice groups’ attempt to limit production to information relating only to Blue Cross must be rejected because the Federation’s and its members’ relationship with Blue Cross occurred within the context of their dealings with other Delaware health care insurers. Indeed, as alleged in the Complaint, a member group expressed the concern to Mr. Seddon that “Blue Cross represents the linch pin for New Castle County. If they can impose these fees on providers, the entire managed care market in New Castle County will collapse.” Moreover, the Federation’s activities have affected more than just Blue Cross. At least one other Delaware insurer, AmeriHealth, has stated that its effort to negotiate separately with each Delaware practice group has been frustrated in the past by the Federation. Information relating to this issue is relevant to the appropriate scope of relief. At the February 16, 1999 scheduling hearing before the Court, counsel for the Federation ironically highlighted the inappropriateness of this limitation on plaintiff’s discovery when, as the Court may recall, she argued that defendant itself purportedly needs extensive discovery from insurers in addition to Blue Cross.

4. “Third Party Messenger” Limitation

Finally, the Federation’s and the practice groups’ subject-matter limitation to “third party messenger” activities is unworkable because it gives them unbridled discretion to interpret the term “third party messenger,” allowing them to exclude from production the information most relevant to establishing the alleged conspiracy. If the Federation and its members use the United States’ concept of “third party messenger” in determining the scope of their production, they could conveniently exclude documents relating to the price-fixing and boycott activities at issue, since such activities obviously fall outside the legitimate functions of a “third party messenger.” The United States’ discovery requests, however, avoid this substantial risk by using a functional approach -- they request documents relating to specific activities, such as the Federation’s negotiations with Delaware insurers on behalf of its members, regardless of how such activities may be characterized.

. Objections that the Discovery Requests are Cumulative, Duplicative, Unduly Burdensome, or Harassing

In addition to the above four global objections, the Federation and the practice groups further state that the United States should now be “estopped” from seeking discovery because it had already obtained information pursuant to civil investigative demands (“CIDs”) during the pre-litigation phase. According to the Federation and the practice groups, any request for

information by the United States now is necessarily cumulative, duplicative, unduly burdensome, harassing and vexatious. Their argument fails for several reasons. First, the United States has expressly requested only additional information that was not previously produced pursuant to a CID. In fact, to address defense counsel's claim that the involved parties should not even be put through the burden of determining whether a document was previously produced, the United States generally modified the onset of the time frame for production to March 7, 1998 for the practice groups and March 15, 1998 for the Federation -- the approximate dates of their prior CID productions, thus reducing the time frame to a seven and one-half month period clearly not covered by any previous CID production. For a few requests seeking documents of a type not produced previously by the Federation and the practice groups, the United States moved up the opening discovery date from November 1, 1996, to August 1, 1997, covering the period from when Blue Cross proposed its fee reduction. Second, as discussed before, the United States must conduct post-complaint discovery to address the issues injected into this enforcement action by the Federation's numerous defenses, such as the claim that each Federation member acted independently out of quality of care concerns and not because of a conspiracy. Finally, but equally important, attaching to the United States' pre-filing investigation a preclusive effect on discovery in this action, as proposed by the Federation and the practice groups, "would raise the stakes of administrative inquiries toward an end which courts have expressly sought to avoid -- transforming regulatory investigations into trials." 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").

The Federation and the practice groups have also objected specifically to numerous document requests on the ground that the information sought is duplicative of certain previous document demands, often citing a litany of wholly unrelated prior demand numbers pursuant to which, the United States in fact had obtained no information similar to that currently being requested. To give but one example, subpoena Request No. 9 seeks a list of each practice group's top 10 payers in 1997, including the corresponding amounts of payment. The practice groups claimed, among numerous other objections, that the request is cumulative and duplicative of several previous demand numbers. Yet, the cited, supposedly duplicative demand numbers actually concern documents reflecting certain communications between the physicians and the Federation, between competing physicians, and between the Federation and any payer -- obviously not the information called for by Request No. 9. The Federation and the practice groups involved should therefore be ordered to produce all documents responsive to the Document Request and the subpoenas, as modified by plaintiff.

II. Objections Raised Only By the Federation

The Federation has improperly refused to produce any documents responsive to Request Nos. 3, 12 and 26. Request No. 3 calls for e-mails and recorded voice communications relating to such matters as (1) negotiations or contracting with Blue Cross or other Delaware insurers, (2) physician fees, and (3) the government's investigation or enforcement action. Request No. 12 calls for excerpts from diaries, appointment books, telephone logs, telephone bills, and notes or outlines of the Federation's officers who had

responsibility for the Federation's activities in Delaware. And, as modified, Request No. 26 calls for communications between or among the Federation's members or employees concerning events in Delaware that relate to the Federation's and its member physicians' dealings with insurers and to the government's investigation or enforcement action.

The purpose of these requests is to determine whether, when, and what communications took place by and among the Federation, its representatives, or members during the relevant time period. They bear upon the issue of conspiracy because the timing, opportunity for, and substance of, communications among alleged conspirators are obviously relevant to assessing whether a conspiracy has occurred and may reveal the anticompetitive purpose underlying the conspirators' actions.

Indeed, in an attempt to obtain production, the United States has offered significant concessions to ease any alleged burden of production, such as by modifying significantly the subject matter of Request No. 26 to the above-noted topics. For Request No. 12, the United States volunteered to specify by name the individuals' records to be searched. Upon the Federation's protestation that it would be unduly burdensome go through its telephone bills and records to cull out responsive information, the United States also offered to assume the burden of the search. The Federation, nonetheless, has persisted in its refusal to produce.

III. Objections Raised Only By the Practice Groups

To date, despite repeated promises, none of the ten practice groups represented by counsel for the Federation has produced any documents responsive to subpoenas served in October, 1998. In addition, as the enclosed example of objections filed by Delaware Orthopaedic Center shows, the practice groups, served with virtually identical subpoenas, have stated their intent not to produce documents relating to: communications concerning the government's investigation of or enforcement action against the Federation or its members (subparts (d) and (e) of Request Nos. 1, 2 and 5); each practice group's 1997 revenues and expenses (Request No. 7); each group's top ten payers in 1997 (Request No. 9); and each group's phone records concerning the Federation's activities (Request No. 11). In addition, Dr. Michael Connair, the only non-Delaware physician, to whom the United States issued a different subpoena because of his status as a Federation representative in Delaware, has objected to the relevance, among numerous other grounds, of virtually all requests that call for information concerning the Federation's Delaware activities. A copy of Dr. Connair's objections is also attached.

The relevance of the information sought is discussed below except with respect to Request No. 7, which involves the identical issue already briefed in connection with the United States' motion to compel First State Orthopaedic's production of 1997 revenue and expense information. It is worth noting that First State and the only other subpoenaed practice group that is represented by counsel, other than defense counsel, worked out all other production issues with the United States.

. **Sections (d) & (e) of Subpoena Request Nos. 1, 2 & 5**

In sections (d) and (e) of Request Nos. 1, 2 and 5, as modified, the United States seeks to discover communications by and among the Federation, its members, and Blue Cross concerning the Department of Justice’s investigation of or enforcement action against the Federation or its members. The information is relevant because it may reflect the involved parties’ own assessment of the anticompetitive nature of their conduct. Indeed, the government’s investigation or enforcement action may have precipitated a change in the Federation’s or its members’ behavior -- a topic the United States is certainly entitled to explore because it bears upon the nature and duration of the conspiracy and the appropriate scope of injunctive relief.

2. Subpoena Request No. 9

Request No. 9 seeks a list of each practice group’s top 10 payers in 1997 and the total amount paid by each payer. Viewed in combination with each practice’s total revenue--an element sought by Request No. 7--this information sought should reveal the relative importance of Blue Cross’ business to the practice group. Such information may shed light on whether each group would have independently terminated its Blue Cross business in the absence of knowing that other competing practice groups would also terminate their Blue Cross contracts.

. **Subpoena Request No. 11**

As modified, Request No. 11 calls for the practice groups’ phone bills or other records of telephone calls concerning the Federation’s activities. The practice groups objected to the request on grounds of relevancy and burdensomeness. In addition, they argued that the request is overbroad because it seeks documents concerning Federation activities “regardless of whether those activities are the kind alleged to have violated the antitrust laws.” The overbreadth objection is unreasonable because it essentially requires that the request should have asked the subpoena recipient to draw unworkable legal conclusions regarding its activities in producing the documents. In any event, the information sought is relevant because, as noted before, evidence of -- or a lack of -- communications between Federation representatives and Federation members at or near the time of significant events are relevant to establishing the existence of a conspiracy. Finally, the practice groups cannot legitimately claim undue burden because not only has the United States modified significantly the time frame of this request, it also has offered to eliminate any search burden by offering to review the raw phone bills to cull out responsive information.

. **Dr. Michael Connair**

As alleged in the complaint, Dr. Connair played a key role at the onset of the conspiracy and thereafter. As part of the Federation’s recruiting efforts in Delaware, he was featured as a speaker at a Federation recruiting event in Delaware where he told about the Federation’s success in Connecticut in negotiating favorable rates with health care insurers there. Dr. Connair also spoke to Delaware orthopedic surgeons at a meeting on October 22,

1997 in Wilmington, and at the request of Dr. William Newcomb (of First State Orthopaedics), in early November, 1997, he urged some Delaware orthopedic groups to stand firm in insisting that Blue Cross deal with them only through Mr. Seddon. In view of Dr. Connair's substantial involvement in the alleged conspiracy, the United States seeks information in his possession relating to the Federation's activities in Delaware, including the Federation's dealings with payers, physician fees, his communications with the Federation, and any reimbursement of expenses received by him from the Federation, whether the information is contained in phone logs, diaries, appointment books, notes, or articles and outlines prepared by him. The information is relevant to understanding the development of the conspiracy and therefore should not be withheld.

* * *

To sum up the preceding discussion, the United States believes that the information it seeks from the Federation and the practice groups is clearly relevant, especially in view of the Federation's denial of concerted action as well as its affirmative claims. No reasonable view of the withheld information permits a conclusion that the information sought has no possible bearing upon the subject matter of the action. Moreover, the United States has made significant modifications to its discovery requests and other attempts to alleviate the alleged burden, and yet has received only limited production from the Federation and no production at all from the practice groups. The delay demonstrates an overall pattern to stonewall discovery, with the clear effect of impeding the United States' ability to prepare adequately for a trial. The United States therefore respectfully request that this Court order the Federation and the practice groups to comply promptly with the discovery requests as modified by the United States.

Respectfully submitted,

_____/S/_____
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the United States of America

Enclosures

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