UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

PLAINTIFF UNITED STATES' BRIEF IN SUPPORT OF ITS MOTION FOR ENTRY OF ITS PROPOSED DISCOVERY SCHEDULING ORDER

Dated: October 30, 1998

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I. Introduction

The United States submits this brief in support of its motion for entry of the attached, proposed discovery scheduling order to govern pretrial proceedings in this case. Plaintiff's proposed scheduling order has been drafted to meet twin goals: allowing the just and speedy resolution of the case, while affording both parties enough time to conduct diligent discovery to prepare for trial. Defendant's proposed two year pretrial schedule serves neither goal.

II. Background

A. Procedural History

On August 12, 1998, the United States filed its complaint (D.I. 1) against defendant, the Federation of Physicians and Dentists, seeking equitable and other relief to enjoin defendant and its orthopedic surgeon members' violation of Section 1 of the Sherman Act. Defendant served its Answer (D.I. 7) on September 22.[1] Counsel for the parties met pursuant to Fed. R. Civ. P.

[1] Defendant's Answer was due to be served on September 8, 1998, but defendant requested and received plaintiff's assurance that it would not object to a two-week extension.

26(f), on October 1, but were unable then or in a subsequent telephone conference on October 12 to agree upon a discovery schedule. The principal--but not the only--stumbling block to agreement was defendant's insistence on putting off trial of the case for nearly two years.

On October 13, defendant filed an amended answer (D.I. 11). On October 19, the parties filed with the Court a Proposed Discovery Plan (D.I. 13), incorporating the parties' significantly different discovery schedules and giving rise to this motion. See General Signal Corp. v. Applied Materials, Inc., CA No. 94-461-JJF, 1995 WL 469620, at *2 (D.Del. June 30, 1995).

B. The Nature of the Case

The United States will demonstrate at trial that defendant, in coordination with its 44 member orthopedic surgeons located in Delaware, 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 defendant orchestrated a boycott by which its members, who are independent orthopedic surgeons who are supposed to compete in the market for sale of their professional services, reached an understanding that they would negotiate with Blue Cross only through the Federation in order to extract higher fees than Blue Cross had offered and thus to prevent other health care insurers in Delaware from seeking to reduce their fees paid to orthopedic surgeons.

The Federation's amended answer reveals that the only real issue in dispute is whether the Federation and its members acted in concert.[2] As is typical in antitrust cases, most of the information relevant to this issue is already in the possession of defendant and its members. E.g., Big Apple BMW, Inc. v. BMW of North America, 974 F.2d 1358, 1362 (3d Cir. 1992). Most of the persons identified by plaintiff in its initial disclosures, made pursuant to Fed. R. Civ. P. 26(a)(1)(A), are defendant's employees, defendant's members and employees of defendant's members. Similarly, most of the documents identified by plaintiff in its initial disclosures are documents that were produced from the Federation's files or from the files of Federation members. Thus, most of the information related to the disputed facts in this action is already in the hands of the defendant and its 44 Delaware members.[3] The defendant needs no discovery to gather this information.

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[2] The defendant has alleged thirteen "defenses" in its amended answer, filed on October 13. Virtually all of these purported defenses are variations of defendant's central claim that it and its members' actions do not constitute concerted action in unreasonable restraint of trade. But defendant's verbose denial of concerted action under a barrage of separately denominated "defenses" should not conceal the very narrow scope of its defense and the reality that the facts related to that defense are in defendant's control.

Moreover, defendant's efforts to inject other purported defenses, such as the notion that it was assisting the surgeons to defend themselves from allegedly harmful actions by health care insurers, should not affect the discovery schedule here, not only because the defenses are improper as a matter of law (e.g. F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 462-64 (1976)) but also because those purported defenses require no significant additional discovery by defendant.

[3] Moreover, defendant's counsel has advised that it continues to represent most of defendant's 44 members, whom they represented during the Justice Department's investigation, and thus it already has copies of documents produced by them during the investigation to the Justice Department. In addition, pursuant to Rule 26(a)(1)(B), the United States has voluntarily provided to defendant's counsel transcripts of 15 investigative depositions taken of persons represented by defendant's counsel, including defendant's employees, members, and some members' employees.

As part of its investigative authority under the antitrust laws, the United States has already gathered a significant number of documents and taken testimony--some of which is cited in the complaint--that demonstrate the extraordinary joint behavior by the Federation and its members to thwart any effort to reduce their fees in Delaware.[4] But plaintiff must now gather additional discovery materials and take depositions pursuant to the federal rules for possible use at trial. This is plaintiff's burden and will be undertaken promptly. There is no reason to believe it cannot be done within the time frames set forth here by plaintiff's proposed order. Moreover, the slight risk that the available time might be insufficient will be almost entirely borne by plaintiff, which must depose many hostile witnesses, rather than defendant, whose counsel has ready access to nearly all of these witnesses. Indeed, defendant's only significant discovery target is Blue Cross Blue Shield of Delaware. Surely document and deposition discovery of that organization can be accomplished within the plaintiff's suggested schedule.

III. Plaintiff's Proposed Schedule Will Efficiently Guide the Case to Trial

The United States proposes a reasonable discovery schedule that would allow the case to be tried on or after June 1, 1999. [5] The defendant proposes a discovery schedule that would

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[4] Plaintiff, pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, obtained documents from defendant and its members (and testimony from some of defendant's employees and members) before filing its complaint. Those depositions, taken in the course of investigating whether a violation of the antitrust laws had taken place, are no substitute for "full, fair and complete discovery," In re ML-LEE ACQUISITION FUND II, L.P., 859 F.Supp. 765, 768 (D.Del. 1994), in this action.

[5] Plaintiff recognizes that the demands of the Court's docket may require some modification of plaintiff's proposed schedule, and Plaintiff recognizes also that the specific dates it has proposed are not of particular significance. Rather, plaintiff's overall schedule attempts to set a reasonable time frame for pretrial proceedings.

delay commencement of trial until on or after August 1, 2000. The specific differences in the parties' respective schedules, such as the deadline to amend the pleadings, the exchange of witness lists, the discovery closing date, and other deadlines, stem largely from the defendant's proposed trial date, nearly two years after the case commenced.

There is simply no need for the delay sought by defendant. Far more complex, recent antitrust actions brought by the United States, such as the Lockheed Martin/Northrop Grumman merger case (involving 11 different product markets) and the Microsoft case were scheduled by Court order for trial in far less than a year after the complaints were filed; there is surely no reason for the lengthy delay defendant proposes in this comparatively simple matter. The public interest would certainly not be served if the propriety of the activities at issue here were left unresolved for years.[6]

Plaintiff's proposed schedule does not place any serious burden on defendant or otherwise disadvantage it. Moreover, plaintiff has proposed the good-faith exchange of preliminary and "final" witness lists (subject to limited substitution), which would help focus discovery at an early stage on those persons likely to be most knowledgeable about the disputed

[6] Plaintiff's proposed schedule also comports with D. Del. LR 16.2(c), which provides that, in the absence of the Court's certification otherwise, "trial shall be scheduled to occur within 12 months, if practicable, and no later than 18 months, after the filing of the complaint ." See United States v. Diamond Industries, Inc., 145 F.R.D. 48 (D.Del. 1992).

issues in the case.[7] This approach would further reduce the already limited discovery burdens defendant now faces.

At the Rule 26(f) conference, defendant justified its proposed discovery schedule leading to an August 1, 2000 trial on two grounds: (1) surmised difficulty in obtaining discovery from one non-party, Blue Cross Blue Shield of Delaware; and (2) anticipated congestion on the Court's docket preventing this case from being called for trial before August 2000. Neither of these purported explanations, based entirely on speculation, has merit. First, there is no reason to expect any problems with discovery from Blue Cross, and even if there were, they surely can be resolved in months, not years. Second, the Court's docket is also unlikely to be completely booked for two years, and, in any event, openings undoubtedly arise because of unanticipated settlements and plea bargains. There is no reason not to prepare the case for a prompt trial at the earliest date the Court's calendar permits.

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[7] Defendant, in its own proposed schedule, reflected in the Proposed Discovery Plan, while seeking to limit the number of depositions taken in this action, has rejected plaintiff's proposed method to help focus discovery by providing for exchanges of witness lists during discovery.

In a similar attempt to focus discovery, as contemplated by Rule 26(a)(2)(C), plaintiff's proposed schedule contemplates the exchange by both parties of any expert reports followed by an exchange of any rebuttal expert reports. See The Liposome Co., Inc. v. Vestar, Inc., CA No. 92-332-RRM, 1994 WL 738952, at *10 (D.Del. Dec. 20, 1994) (Court's scheduling order providing for subsequent designation of rebuttal witnesses). On the other hand, defendant's proposed schedule seeks to have plaintiff submit its expert reports two months before defendant's expert reports are to be submitted, regardless of whether either party's experts are rebuttal experts.

It is also worth highlighting here the inherent contradiction in defendant's simultaneously proposed positions: The defendant claims it needs two years to prepare for trial and yet seeks to limit the number of depositions to only ten per side. This patent inconsistency lays bare defendant's real motivation: to delay the resolution of the case.[8] Given the importance to the public of competition among physicians in Delaware (and elsewhere), such tactics should be promptly rejected by the Court.

[8] Our concern in this regard is heightened by defendant's dilatory response to a draft Rule 26(c)(7) protective order proposed by plaintiff on September 15, in part, to promote expedited disclosure to defendant of information produced by some third parties during the investigation. At the October 1 Rule 26(f) conference, defense counsel said he had found nothing disagreeable in the proposed protective order, but was awaiting his client's approval. After additional requests from Plaintiff for a formal response to the proposed protective order, and after finally agreeing in principle to Plaintiff's proposed draft on the morning of October 14, on the afternoon of October 14, defendant's counsel raised "concerns" about the proposed order that precluded filing the order for the Court's consideration along with the Proposed Discovery Plan. Presently, plaintiff is seeking to determine if the parties can resolve defendant's concerns. Defendant's delay, however, has delayed plaintiff's voluntary disclosure to defendant, pursuant to Rule 26(a)(1)(B), of documents obtained during the investigation from third parties that are not represented by defense counsel.

III. Conclusion

For the reasons stated above, the United States requests that the Court enter the attached proposed Scheduling Order to govern pre-trial activities in this case.

Dated: October 30, 1998

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