UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, Plaintiff, FEDERATION OF PHYSICIANS AND DENTISTS, INC., Defendant.	)	Civil Action No. 98-475 (JJF)

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS
MOTION FOR ENTRY OF ITS PROPOSED PROTECTIVE ORDER

Dated: December 30, 1998

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UNITED STATES OF AMERICA

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I. STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

On August 12, 1998, the United States filed its complaint (D.I. 1) against defendant, the Federation of Physicians and Dentists ("Federation"), seeking equitable and other relief to enjoin defendant and its Delaware orthopedic surgeon members' violation of Section 1 of the Sherman Act. The complaint alleges that defendant, in coordination with its 44 members located in Delaware, organized and became the hub of a price-fixing conspiracy to oppose and prevent proposed reductions in payments for orthopedic services by Blue Cross and Blue Shield of Delaware ("Blue Cross"). In implementing this conspiracy, defendant orchestrated an understanding among its members, who otherwise compete in the market for sale of their professional services, that they would negotiate fees with Blue Cross only through defendant in order to extract higher fees than Blue Cross had offered and thus to prevent Blue Cross and other health care insurers in Delaware from seeking to reduce their fees paid to orthopedic surgeons.

On October 14, 1998, defendant filed an amended answer (D.I. 11). On October 19, the parties filed with the Court a Proposed Discovery Plan (D.I. 13), which incorporates their substantially differing proposals regarding the scheduling of discovery and the commencement of trial. The parties have since filed competing scheduling motions and fully briefed the scheduling issue, which awaits the Court's decision and scheduling order.

The United States has been conducting pretrial discovery and submits this brief in support of its motion for entry of the proposed, Rule 26(c)(7) umbrella protective order to ensure that, during pretrial proceedings, disclosure of confidential commercial information that has been or will be produced by the parties and non-parties is appropriately limited.

II. SUMMARY OF ARGUMENT

The United States' proposed umbrella protective order appropriately limits pretrial disclosure of information that a producing party or non-party to this case designates, pursuant to the order, as confidential. It affords the parties' counsel and testifying and consulting experts full access to confidential information and establishes a procedure for disclosure of confidential information to potential and actual trial witnesses.

The United States opposes defendant's efforts to insert into the protective order a provision allowing its agents and employees "full access" to non-parties' confidential information. Such disclosure is unnecessary to allow defendant to prepare for trial because defendant's central role in the challenged conduct renders it intimately familiar with the fundamental facts and events that underlie the alleged price fixing and boycott activities at issue in this case. Moreover, incorporation of the "full access" provision would disclose to defendant, which insists that it can negotiate with health care insurers on behalf of nearly all Delaware orthopedic surgeons, the most sensitive information used by those insurers in contracting with defendant's competing orthopedic surgeon members. In view of defendant's role as a cartel manager for its members' price fixing and boycotting activities directed against insurers, a provision allowing defendant's employees "full access" to competing orthopedic surgeons' confidential information raises obvious risks to the preservation of competition among those orthopedic surgeons and would impede the ability of health care insurers to purchase orthopedic services in a competitive market.

III. STATEMENT OF FACTS

This motion follows the United States' repeated attempts to stipulate with counsel for the Federation on an umbrella protective order to be proposed to the Court for entry in this action.[1] Both plaintiff and defendant agree that an umbrella protective order limiting disclosure of confidential information is essential to facilitate the timely production of documents and information that defendant and non-parties believe contain confidential commercial information.[2] The parties indeed have reached agreement on the terms of the proposed order with the exception of the one subparagraph that defendant now insists be included--after defense counsel agreed in principle to a draft order that did not include the paragraph. According to defense counsel, the additional provision would "allow employees and agents of the Defendant full access to the confidential information produced by non-parties as is required for the defense of

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[1] Defendant's dilatory response to plaintiff's attempts to stipulate to a Rule 26(c)(7) protective order epitomizes defendant's approach to preparation of this case for trial, which is embodied in defendant's proposed, two-year pretrial schedule. On September 15, 1998, plaintiff sent a draft, proposed protective order to defense counsel, with the expressed intent of filing a stipulated order with the Court, accompanying the parties' Proposed Discovery Plan, pursuant to Fed. R. Civ. P. 26(f). At the parties' October 1, 1998, Rule 26(f) conference, defense counsel said he had found nothing objectionable about the draft order, but was awaiting his client's approval. Following 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--later the same day, defendant's counsel first raised concerns about the proposed order that precluded filing the order for the Court's consideration along with the Proposed Discovery Plan. This motion follows the parties' further unsuccessful efforts to fully resolve defendant's "eleventh-hour" concerns.

[2] Non-parties that have already produced some apparently confidential commercial information during the investigation leading to this case and that will likely produce subpoenaed confidential information in this action include at least the four major private health care insurers operating in Delaware and defendant's 44 present and former member orthopedic surgeons in Delaware. An umbrella protective order, of course, also removes any burden on non-parties to seek a protective order and should minimize any need for the Court to consider a series of proposed protective orders advanced by non-parties.

this action."[3] Defendant's insistence on the inclusion of such a provision has necessitated the filing of plaintiff's motion for entry of the proposed order, which simply omits the objectionable provision.

Health care insurers oppose the inclusion of a provision allowing defendant's employees "full access" to their confidential information. In this action, health care insurers will be required to produce documents relating to their strategies for contracting with defendant's Delaware orthopedic surgeon members, including their contracts with these surgeons and the fee levels that they pay to each surgeon. The attached declarations from three of the four major non-governmental health care insurers operating in Delaware clearly demonstrate the insurers' concerns that allowing defendant's employees "full access" to their confidential information will result in serious injury to their efforts to purchase orthopedic surgical services in Delaware at competitive rates.[4]

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[3] Letter from Mary Beth Fitzgibbons (counsel for defendant) to Michael Farber (counsel for plaintiff) (Dec. 2, 1998). (Appendix A1-A4 at A1). The specific, "full access" provision that defendant insists on including in the protective order provides:

> The defendant and employees or agents of the defendant where deemed necessary to assist outside counsel acting for the defendant in defense of this action or in preparation for hearings or depositions in this action.

Id. at A2. Defendant proposes that this provision be inserted as paragraph 7(g), and to re-designate the United States' paragraph 7(g) as paragraph 7(h). Id. After plaintiff raised its initial objection to such a provision, defendant added a certification for its employees to execute, stating that they would use the disclosed confidential information only for purposes of this litigation.

[4] Declaration of Paul C. King, Jr. (Appendix A5-A#); Declaration of Marcy Wilkinson (Appendix A#-A#).

The position of most of defendant's Delaware orthopedic surgeon members on allowing defendant's employees full access to their own confidential information is unclear. Defendant's counsel also represents nearly all of these orthopedic surgeons and--despite plaintiff's requests--has failed to communicate its physician clients' viewpoints--assuming the issue has been broached--concerning the "full access" provision in dispute. Notably, however, counsel for the only two orthopedic groups whose physicians have retained counsel other than defense counsel, including one group whose physicians have withdrawn from membership in the Federation, have expressed opposition to defendant's proposed subparagraph.[5]

Defense counsel has inappropriately used the parties' disagreement on a protective order to delay plaintiff's discovery, in apparent contravention of this Court's local rules. After taking a month to find disagreement with plaintiff's draft protective order and then extending negotiations over the disputed provision for over another month, on December 11, 1998, defendant objected to plaintiff's document requests and interrogatories, asserting that defendant's disclosure of responsive confidential documents and information "is contingent upon the parties' stipulation to a confidentiality agreement and entry by the Court of an order approving the parties' confidentiality agreement, or entry of some other appropriate protective order."[6] Although such an objection appears to flout D. Del. LR 26.2,[7] defendant's counsel, in

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[5] "Disclosure of my clients' confidential financial and business information to the Federation or its representatives is unwarranted and potentially detrimental to my clients' business interests." Letter from James J. O'Toole, Jr., (counsel for Drs. Mattern & Piccioni) to Steven Kramer (counsel for plaintiff) (Dec. 4, 1998) (Appendix A#-A# at A#). Similarly, counsel for First State Orthopaedics has written to express his clients' opposition to defendant's "full access" provision. (Appendix A#).

[6] Defendant's Objections and Responses to Plaintiff's First Request for Documents at p. 4, ¶ 8 (Appendix A#-A# at A#); Defendant's Renewed and Continuing Objections and

its dual capacity as counsel for most of defendant's orthopedic surgeon members in Delaware, has similarly objected to producing those surgeons' subpoenaed documents until the Court has entered a protective order.

IV. ARGUMENT

"Under Fed.R.Civ.P. 26(c)(7), the district court for good cause shown, may grant a protective order requiring that 'a trade secret or other confidential . . . commercial information not be disclosed or be disclosed only in a designated way.' " Leucadia, Inc. v. Applied Extrusion Technologies, 998 F.2d 157, 166 (3d Cir. 1993). " ' "Umbrella" protective orders, carefully drafted to suit the circumstances of the case, greatly expedite the flow of discovery material while affording protection against unwarranted disclosures.' " Cipollone v. Liggett Group, Inc. 785 F.2d 1108, 1123 n.19 (3d Cir. 1986); accord, Standard Chlorine of Delaware, Inc. v. Sinibaldi, 821 F. Supp. 232, 256 (D. Del. 1992). The parties agree that entry of a protective order limiting pretrial disclosure of commercial information, designated as "confidential" in accordance with the order by the producing party (or non-party), will facilitate discovery of

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Supplemental Responses to Plaintiff's First Requests for Answers to Interrogatories at p. 2, ¶ 3 (Appendix A#-A#at A#).

[7] D. Del. LR 26.2 provides:

> If any documents are deemed confidential by the producing party and the parties have not been able to agree on an appropriate protective order, until a protective order is in effect, disclosure should be limited to members and employees of the firm of trial counsel who have entered an appearance, and, where appropriate, have been admitted pro hac vice. Such persons are under an obligation to keep such documents confidential and to use them only for purposes of litigating the case.

documents and testimony containing confidential commercial information. The proposed umbrella protective order facilitates the parties' discovery of non-parties' confidential commercial documents by limiting disclosure of such information in general to the Court, the parties' counsel, testifying and consulting experts, and, with appropriate restrictions, to actual and potential witnesses. Proposed Protective Order at ¶¶ 7, 8.

A. Plaintiff's Proposed Umbrella Protective Order Provides for Adequate Discovery and Appropriate Protection of the Confidential Information Produced in This Action

The defendant refuses to agree to the proposed umbrella protective order because it claims its employees and representatives need "full access" to non-parties' confidential information to be able to defend itself in this action. Defendant's position is misguided because it ignores two key points: First, as the Complaint alleges, this case focuses on concerted price fixing and boycott activities in which defendant actively participated and indeed substantially coordinated. Complaint, ¶ 1. Defendant's central role in the challenged conduct ensures that its employees and agents are already well aware of the basic facts in dispute. Second, the proposed protective order allows defendant's counsel and its testifying or consulting experts "full access" to non-parties' confidential information, and the proposed order also provides a procedure by which any person who testifies, or may testify, at trial, can obtain access to confidential information to prepare for trial. Proposed Protective Order at ¶¶ 7-8. These measures ensure that defendant will be able to mount a defense--to the extent it has one--while properly balancing "the goals of full disclosure of relevant information and reasonable protection against economic

injury." Safe Flight Instrument Corp. v. Sundstrand Data Control Inc., 682 F. Supp. 20, 23 (D. Del. 1988); see Phillips Petroleum Co. v. Rexene Products Co., 158 F.R.D. 43 (D. Del. 1994).

B. Defendant's Insistence That Its Employees Have "Full Access" to Non-Parties' Confidential Commercial Information Will Jeopardize Competition in the Markets for the Sale of Orthopedic Surgical Services in Delaware

Plaintiff's opposition to allowing defendant's employees "full access" to non-parties' confidential information is rooted in plaintiff's fundamental disagreement with defendant on an issue that is at the heart of this lawsuit: The defendant adheres to the misguided position that it "can serve as a legitimate negotiating agent on behalf of one or more individual groups,"[8] which defendant admits includes nearly all orthopedic surgeons who practice in Delaware.[9] Thus, despite the Sherman Act's prohibition of price fixing by competitors, defendant claims that it can negotiate fee levels in contracts with health care insurers on behalf of nearly all Delaware orthopedic surgeons--precisely the conduct that the United States has challenged in its Complaint as price fixing and boycott activities.

As counsel for plaintiff has stated to defense counsel, defendant's insistence that Federation agents and employees, such as its Executive Director, Jack Seddon, must have "full

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[8] Defendant's Amended Answer and Defenses (D.I. 11) at ¶ 63.

[9] See Id. at ¶ 35 (admitting Complaint, (D.I. 1) at ¶ 35, which asserts):

> By early November 1997, nearly all of Delaware's orthopedic surgical groups in active practice, including all three of the New Castle County orthopedic surgical groups and all of the downstate groups, had become Federation members. All of them had also officially written notices to Blue Cross appointing [the Federation's executive director] Mr. Seddon as their 'third-party messenger' for all Blue Cross contractual negotiations.

access" to health insurers' and orthopedic surgeons' confidential information, while serving as the orthopedic surgeons' negotiating agent with those insurers, is objectionable on two distinct grounds.[10] First, an order permitting defendant's employees "full access" to health insurers' confidential information would allow disclosure to those persons who, according to defendant, can negotiate contractual price terms with insurers on behalf of nearly all orthopedic surgeons in Delaware. Such disclosure would allow sellers (Delaware orthopedic surgeons), through their contract negotiating agent (defendant), full access to purchasers' (the insurers') strategic purchasing documents and place the insurers at a significant competitive disadvantage in their contractual dealings with defendant, acting on behalf of competing Delaware orthopedic surgeons.

The second basis for not including defendant's "full access" provision relates to confidential, competitively sensitive information that Delaware orthopedic surgeons themselves have already produced, or will be required to produce, concerning their contracting with health care insurers and the finances of their respective practices. Allowing defendant's employees' access to such information, while defendant maintains the ability to function as the negotiating agent of nearly all Delaware orthopedic surgeons with health care insurers, can only further facilitate defendant's illegal conduct as a "cartel manager" for Delaware orthopedic surgeons. Such a result would flow from defendant's "full access" to competing orthopedic surgeons' confidential information because defendant's role as a negotiator with health care insurers on

[10] Letter from Steven Kramer (counsel for plaintiff) to Mary Beth Fitzgibbons (counsel for defendant) at p. 2 (October 29 ,1998). (Appendix A#-A# at A#).

behalf of any particular orthopedic surgeon must inevitably take into account information that defendant has also received from that surgeon's competitors when acting as their negotiator.

This concern is amply supported by case law to the effect that allowing competitors, such as competing orthopedic surgeons, to share competitively sensitive information, such as the terms of their current, individual contracts with insurers, the terms on which they are willing to contract with insurers, and cost and other price data, facilitates collusion and raises obvious antitrust concerns. See, e.g., United States v. United States Gypsum Co., 422 U.S. 422, 457 (1978) ("most likely consequence of any such agreement to exchange price information would be the stabilization of industry prices"); In re Coordinated Pretrial Proceeding in Petroleum Products Antitrust Litigation, 906 F.2d 432, 448 (9th Cir. 1990) (competitors' dissemination of pricing information "served little purpose other than to facilitate interdependent or collusive price coordination"). Similarly, disclosure to defendant's employees and agents of information concerning the contracting decisions of competing orthopedic surgeons could further enhance defendant's ability to coordinate its members' negotiations with health care insurers and is thus inimical to "faith in price competition as a market force." Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348 (1982). Under such circumstances, "the injury that would flow from

disclosure is patent."[11] Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F.Supp. 866, 891 (E.D. Pa. 1981).

Indeed, the very conduct challenged in this case demonstrates that, as a consequence of competing Delaware orthopedic surgeons joining the Federation and using the same negotiating agent, defendant became the central repository of competitively sensitive information for nearly all Delaware orthopedic surgeons. Access to competing surgeons' contracting information rendered it impossible for the Federation as their negotiating agent to ever truly represent the interest of any single surgeon or group in isolation from the interests and competitively sensitive information that the Federation had concerning all other orthopedic surgeons that it represented.

The same logic applies to strategic purchasing and contracting information developed by health care insurers in negotiating contracts with competing Delaware orthopedic surgeons. The defendant could not reasonably argue that any orthopedic surgeon himself should have "full access" to any health care insurers' confidential information used in contracting with the surgeon. That being the case, neither should employees of the Federation--the surgeons' appointed agent to negotiate with health care insurers--have "full access" to any such

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[11] In an attempt to address this obvious problem, defendant has proposed that its employees certify that they will review confidential information only for purposes of preparing for litigation, subject to contempt sanctions should they fail to so limit their use of the confidential information. This proposal, however, does not address the problem that defendant's employees' knowledge of Delaware orthopedic surgeons' and health care insurers' confidential information, even if learned only "for purposes of preparing for litigation," cannot be forgotten by the employees in contemporaneous or future negotiations. See Safe Flight Instrument Corp. v. Sundstrand Data Control, Inc., 682 F. Supp. 20, 22 (D. Del. 1988) (noting that even a person of "great moral fiber" may have trouble mentally segregating competitors' confidential information in future); Phillips Petroleum, 158 F.R.D. at 46 (noting concern for "unconscious, but improper use" of confidential information despite any protective order). This very real problem renders defendant's effort to palliate its objectionable provision unworkable.

confidential information. Yet, the disputed provision that defendant insists be included in the protective order would allow its employees "full access" to exactly such confidential commercial information. As the attached declarations from major health insurers in Delaware demonstrate, allowing defendant's employees "full access" to health care insurers' purchasing strategies and confidential contracting information that they could use as a negotiating agent for Delaware orthopedic groups would "cause a recognized harm, competitive disadvantage, under Rule 26(c)." Phillips Petroleum, 158 F.R.D. at 47.

V. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court grant its motion and enter the proposed protective order at the earliest appropriate opportunity in view of defense counsel's attempt to delay long overdue production of assertedly confidential

documents and information--notwithstanding D. Del. LR 26.2--in the absence of a protective order entered by the Court.

Dated: December 30, 1998

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