UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. FEDERATION OF PHYSICIANS AND DENTISTS, et al., Defendants.	Civil Action No. 1:05CV431 Chief Judge Beckwith United States Magistrate Judge Hogan

PLAINTIFF UNITED STATES' MEMORANDUM SUPPORTING ITS MOTION FOR PARTIAL SUMMARY JUDGMENT OF LIABILITY AGAINST THE FEDERATION OF PHYSICIANS AND DENTISTS AND LYNDA ODENKIRK

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The defendants violated § 1 of the Sherman Act when they orchestrated an antitrust conspiracy among more than 120 Cincinnati-area OB-GYNs in more than 40 practice groups and forced health insurers to pay higher fees to the doctors. From the beginning of the conspiracy in spring 2002, the doctors joined the Federation of Physicians and Dentists understanding that their plan would be ineffective if undertaken individually; they needed the participation of a substantial majority of the area's OB-GYNs to leverage their negotiations with the insurers. Then, in a coordinated effort that lasted more than a year, the conspirators targeted six insurers in sequence, threatened effectively in unison to terminate their contracts with the insurers, and succeeded in extracting higher rates from the insurers. An extensive record of incriminating and undisputed e-mail messages, letters, and testimony leaves no genuine dispute of material fact that the defendants acted in concert to leverage insurers to negotiate higher fees.

The five defendants named in this action are the Federation of Physicians and Dentists; one of its employees, Lynda Odenkirk, who acted as a cartel manager; and three Federation members who participated most prominently among the physicians in the conspiracy: Dr. Warren Metherd, then practicing in a two-physician group; Dr. Michael Karram, head of the large Seven Hills group; and Dr. James Wendel, head of the large Mt. Auburn group.

The Court has already entered a consent decree against the three physicians. Dkt. Entry 36. The United States now moves for partial summary judgment under Fed. R. Civ. P. 56 against the Federation and Ms. Odenkirk on the issue of liability. Should the Court adjudge these defendants liable, the United States will seek appropriate relief in a separate filing.

I. Introduction

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1. To prove a violation of § 1, a plaintiff must satisfy three elements: First, there must be an agreement or concerted action involving more than one actor. *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005). Second, the restraint of trade imposed by the agreement or concerted action must be unreasonable. *Id.* Third, there must be an effect on interstate commerce, *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991), which defendants here have admitted.

On the first element, "it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy-certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan." *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966) (citations omitted); *accord Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996). The evidence need show only "a conscious commitment to a

common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation omitted). And in determining whether defendants acted in concert, the evidence must be viewed as a whole. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004).

On the second element, courts distinguish between restraints that are deemed *per se* illegal and those that are analyzed under the rule of reason. *See, e.g., Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1012-15 (6th Cir. 1999). *Per se* restraints, such as price fixing, are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 1012 (quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289 (1985)).

The *per se* rule applies to the conduct shown here. The law has firmly established that concerted action by competitors to raise prices is *per se* illegal, where, as here, the concerted action is not part of an efficiency-enhancing integration. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (boycott by lawyers to raise their fees was *per se* illegal); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344-45 (1982) (applying nearly a century of precedent prohibiting price-fixing and holding illegal efforts by an organization to set maximum fees for member physicians).

The undisputed evidence shows that the defendants and their conspirators were acting in concert, not independently, to raise fees paid by insurers. At the Federation's first meetings, the many OB-GYNs present recognized the importance of collective action when they decided they needed 60-70% of the OB-GYNs in the Cincinnati area to join to have an impact on the insurance companies. This membership goal was exceeded, with 75-85% joining.

To guide members in obtaining higher fees from insurers, the Federation centrally coordinated the sequence and manner in which members should approach each significant insurer in the area. Implementing this plan, the Federation circulated analyses of members' contracts with each insurer and provided members with sample letters raising concerns about their contract with each insurer, which members sent to insurers in waves, threatening a boycott if their demands were not met. The Federation also created a mass e-mail notification system that informed members of the group's overall activities, including the status of their negotiations, and that frequently reminded members to attend to various matters, including, for example, to send the sample letters to insurers at close to the same time. On occasion, members also communicated with each other directly or through the Federation. When insurers resisted dealing with the Federation acting on its members' behalf, the members agreed on a strategy to increase pressure on the insurers to renegotiate their contracts and raise their fees. Once insurers began to negotiate, the Federation acted as a "consultant" to all members and employed its "collective knowledge" of members' negotiations to advise individual members on their negotiations with insurers. Through these actions, the defendants orchestrated the actions of many conspirators—more than 40 OB-GYN groups.

The concerted action forced the insurers to acquiesce in the doctors' demands for higher fees. The alternative of having a large share of their network's OB-GYNs terminate their contracts would have angered employers and patients and damaged the insurers' businesses.

In cases with far less evidence of concerted action, courts have assessed several factors to help determine whether an antitrust conspiracy exists. *See, e.g., Re/Max Int'l, Inc.*, 173 F.3d at 1009. Applying the factors identified by the Sixth Circuit in *Re/Max* leaves no genuine dispute that the defendants in this case acted in concert:

- *Communications*: The conspirators' many meetings, newsletters, and e-mail messages about negotiations with insurers–some direct and most indirect through the Federation–provide compelling evidence of the conspiracy.

- *Foregoing competition*: Federation members reassured each other they would not try to gain at each other's expense and would protect the collective interests of both large and small groups. These steps would have made no sense if Federation members were acting independently.

- *Uniform actions:* The defendants' year-long success in orchestrating about 40 groups to be "uniform in their actions," targeting six insurers in sequence, underscores that they acted in concert.

- *Common motive*: The obvious profitability of Federation members' concerted action to raise prices supports a finding of conspiracy.

- *Concealment*: Defendants' efforts to conceal their objectives and concerted action reinforce a finding of conspiracy.

Under settled law, competitors who accept an invitation to join in a plan that will lead to a restraint of trade have unlawfully conspired in violation of the Sherman Act. *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939); *James R. Snyder Co. v. Assoc. Gen. Contractors of America*, 677 F.2d 1111, 1121-22 (6th Cir. 1982). There can be no genuine dispute that the defendants violated this standard as a matter of law.

II. Statement of Facts

A. Background

1. Physician competition in insurer networks

During the relevant time in 2002 and 2003, six health insurers provided most health care coverage in the Cincinnati area: Anthem, Inc. (currently known as "Wellpoint Health Networks"), Humana Inc. (also known around Cincinnati as "ChoiceCare"), United HealthCare Insurance Company, Cigna Corp., Aetna U.S. Healthcare Inc., and Medical Mutual of Ohio. Dkt. Entry 1, 21 ¶ 16. Anthem, United, and Humana were the major private health insurers operating

in the Cincinnati area. Snyder Deposition ("Dep.") 118:11-17 (PX 1); *see* PX 2; Karram Dep. 18:10–19:13 (PX 3); Wendell Dep. 16:22–17:20 (PX 4). To offer health care plans to employers, insurers contract with physicians, hospitals, and other providers to form a provider network (or panel). Dkt. Entry 1, 21 ¶ 18. These contracts establish the fees that the providers will accept for providing covered medical care to the insurer's subscribers. *Id.*

Competition is important to consumers in health care just as in all other parts of the economy. To offer a marketable provider network, the insurers need a substantial number of OB-GYNs in the Cincinnati area. OB-GYNs are often perceived by the insurers' customers as a foundation of a network—the most indispensable and sought-after specialty in a list of participating physicians. Snyder Declaration ("Dec.") ¶ 3 (PX 5); Buckingham Dec. ¶ 4 (PX 6); Newman Dec. ¶ 4 (PX 7). The insurers consequently seek to maintain contracts with a broad array of area OB-GYN groups. Snyder Dec. ¶ 3 (PX 5); Buckingham Dec. ¶ 4 (PX 6); Newman Dec. ¶ 4 (PX 7). To make this broad access possible for subscribers and patients at reasonable fees, the insurers depend on competition among the OB-GYNs. Snyder Dec. ¶ 3 (PX 5); Buckingham Dec. ¶ 6 (PX 6). Thus, concerted action by the physicians posed a significant threat to the insurers. As Anthem explains, "If 43 OB-GYN groups terminated their Anthem contracts, Anthem enrollees would have had a significant problem in having access to OB-GYNs in the greater Cincinnati area, which would raise further problems with groups insured by Anthem." Snyder Dec. ¶ 7, 16 (PX 5); see Newman Dec. ¶ 12 (PX 7). Federation members understood that together they had leverage against insurers. *E.g.*, PX 8 at HUM-01257; PX 9; PX 10.

2. The prior antitrust decree against the Federation

The Federation is no stranger to antitrust litigation. In August 1998, the United States sued the Federation in the United States District Court for the District of Delaware, alleging that

the Federation and Delaware orthopedic surgeons violated the antitrust laws in a way strikingly like the way defendants have in this case. PX 11. In October 2001, just six months before the Federation began organizing OB-GYNs in Cincinnati, the United States filed a proposed consent decree against the Federation that settled the Delaware case. PX 12. The Delaware consent decree was entered on November 6, 2002. PX 13.

Some documents in this case allude or refer to the Delaware consent decree. The decree draws on the requirements of the antitrust laws and enjoins the Federation from facilitating any agreement or understanding among competing physicians about any contract term offered by an insurer. *Id.* ¶ IV(A)(1). The decree also bars the Federation from negotiating with insurers on behalf of competing physicians. *Id.* ¶ IV(A)(3). Further, the decree prohibits the Federation from making recommendations to competing physicians on contract terms. *Id.* ¶ IV(A)(4). This Court need not decide whether the defendants in this case violated the Delaware consent decree.

In defending its conduct in Delaware, the Federation had asserted that it merely implemented a "third-party messenger model" that was consistent with policy statements issued by the federal antitrust enforcement agencies. *See Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care*, 4 Trade Reg. Rep. (CCH) ¶ 13,153, at 20,831; http://www.ftc.gov/reports/hlth3s.htm (Statement 9.C.) (August 28, 1996). Those statements countenance competing physicians hiring an agent, such as the Federation, to serve as a "messenger" to relay offers between insurers and doctors *only if* the procedure "do[es] not result in a collective determination by the competing network providers on prices or price-related terms." *Id.* In this case, the Federation also purported to function as a third-party messenger. However, the evidence here shows the Federation went further and

facilitated "collective decision-making" rather than "independent, unilateral decisions" by doctors on their fees. *Id.* The defendants conduct does not fit the messenger model and was not lawful.

B. The Federation organized the doctors to force insurers to renegotiate contracts.

1. A substantial majority of Cincinnati-area OB-GYNs joined the Federation to increase their negotiating leverage with health insurers and turn "bad" contracts into "good" contracts.

From the beginning, Federation members understood that increasing their bargaining power versus insurers under the Federation's guidance depended on collective action. An initial Federation membership-recruitment meeting in April 2002 at the Cincinnati Academy of Medicine featured a talk by the Federation's executive director, Jack Seddon. Metherd Dep. 9:9-16 (PX 14). At that meeting, there was discussion that a majority of area OB-GYNs needed to join the Federation and use its contract negotiation services to be able to get insurance companies' attention and obtain better contracts, with higher fees. Metherd Dep. 9:9–10:24, 12:21–15:24 (PX 14). If the physicians had intended to act independently and not coordinate their negotiations, there would have been no need for a majority of local OB-GYNs to join the Federation.

At a second Federation recruitment meeting on May 7, 2002, Federation regional director and contract analyst Lynda Odenkirk was introduced. Odenkirk Dep. 13:7–14:17 (PX 15). After lengthy discussion, the OB-GYNs present decided that they "need[ed] 60%-70% participation from the OB-GYN physicians in the [Cincinnati] area in order to have an impact on the insurance companies." PX 16. As a result, the OB-GYN who had arranged the first meeting in April, Dr. Vince Bilotta, a member of a large group in northern Kentucky, suggested that interested OB-GYNs forward their annual membership-dues checks of $688.80 to him for holding, and that he

would forward the checks to the Federation only after he received checks from a minimum of 70% of area OB-GYNs. *Id.*; PX 17; Metherd Dep. 9:9-19 (PX 14). The membership goal was soon exceeded, and ultimately over 80% of Cincinnati-area OB-GYNs joined the Federation's Cincinnati OB-GYN Chapter. PX 18 at 7H-0062; PX 19; PX 20 at TSWHA-00110; PX 21.

The Federation attracted Cincinnati-area OB-GYN members with the prospect that, if a substantial majority of the area's OB-GYNs used the Federation's services, they would enhance their negotiating position versus insurers. *See* PX 22 at FPD-111719. For example, when deciding to join the Federation after the May 7 recruitment meeting, a group noted internally: "The main purpose is to strengthen our position in negotiating with third party payers and insurers." PX 23; see also Wendel Dep. 46:23–47:4 (PX 4) (Dr. Wendel looked at the Federation as way to achieve better contracts with insurers, including higher levels of payment); Karram Dep. 38:14-23 (PX 3) (Dr. Karram hoped his group would negotiate higher fees from insurers as a result of joining the Federation).

On June 10, 2002, the Federation held an organizational meeting, which was attended by representatives from many Cincinnati-area OB-GYN practices. Dkt. Entry 1, 21 ¶ 21. At this meeting, Jack Seddon, the Federation's executive director, outlined how members would obtain better contracts. PX 24. As a Federation newsletter later reported, at the meeting, the Federation explained that the doctors could secure "good" contracts by working through the Federation, rather than independently: The Federation "encouraged [members] to maintain frequent contact with the [Federation]" and explained that member physicians would be given enough information to allow them to decide whether or not to sign a contract. *Id.* at FPD-111735. "The whole idea is to become aware of bad contracts and to work toward making them good contracts. Sometimes saying no to bad contracts is the only way to do this." *Id.* In other words, the

members all understood that the Federation would provide them with identical advice on whether to accept or reject a contract. The Federation enhanced its ability to coordinate the negotiations by "encourag[ing] member physicians to utilize the [Federation's] Negotiation Assistance Program and not negotiate on their own." *Id.* After the meeting, Federation members were eager to use the Federation's services to obtain better contracts. Metherd Dep. 56:7-19; 57:4-19 (PX 14); PX 25.

2. Through fall 2002, the Federation coordinated members' efforts to threaten boycotts and force insurers to pay higher fees.

In the months following the June 10 organizational meeting, the Federation and its members took steps to secure negotiating leverage. The newsletter reporting on that meeting had asserted that Federation members "cannot focus as a group . . . on a single insurance contract at a time," lest "[i]t might be perceived as an attempt to boycott or price-fix." PX 24. Nonetheless, during June and July 2002, Ms. Odenkirk established the "game plan"—the chronological order in which the Federation would review payment and contractual language in five area insurers' contracts with members: Anthem, Humana/Choice Care, United, Aetna, and Medical Mutual of Ohio. PX 26; PX 18 at 7H-0062; Odenkirk Dep. 136:24–137:13 (PX 15); *see* PX 27.

On September 4, 2002, Ms. Odenkirk mailed to all Federation members another newsletter, her analysis of their contracts with Anthem, and a set of proposed contract amendments that would "make the agreement more mutually beneficial." PX 28 at SELECT-105395; PX 29 (contract analysis); Odenkirk Dep. 91:20-25, 94:6-9 (PX 15). The September 4 newsletter specifically suggested that groups adapt an enclosed sample "third party messenger" letter onto their letterhead "to convey your concerns and intentions to the insurance plan."

PX 28 at SELECT-105395. The sample letter informed Anthem that the group had decided to use the Federation as a "third-party messenger" to "facilitate negotiations." *Id.* The letter also advised Anthem of the practice's "several items of concern," including "rates." The letter also threatened contract termination if Anthem did not open negotiations and agree to better terms: "(I/we) truly desire to avoid any interruption of obstetrical and gynecological services to Anthem's patients. Such a circumstance can be avoided by a meaningful and productive dialogue between Anthem and (my/our) designated 'third party messenger.'" *Id.*; Odenkirk Dep. 117:20–119:6 (PX 15). These were not one-on-one communications between consultant and client, but group communications in which each member could see that all others were receiving the same direction.

Following the September 4 newsletter, nearly all Federation member OB-GYN groups adapted verbatim the enclosed sample letter to their own letterhead, signed it, and sent it to Anthem. Dkt. Entry 1, 21 ¶ 25; Odenkirk Dep. 122:10-15, 122:18–123:1 (PX 15); PX 30; Snyder Dec. ¶ 6-7 (PX 5). Anthem understood language in the letters as the OB-GYN groups' threat to terminate their participation in Anthem's networks. *Id.* at ¶ 7. Ms. Odenkirk similarly understood how a health plan could construe the letters as a threat to terminate. Odenkirk Dep. 121:6-24 (PX 15); PX 28 at SELECT-105395.

With Ms. Odenkirk's knowledge, on September 23, Dr. Metherd organized a meeting of office managers of Federation OB-GYN practices essentially to make sure the office managers paid attention to communications from the Federation. Metherd Dep. 89:13–90:1 (PX 14); Odenkirk Dep. 130:20–131:21 (PX 15). At the meeting, Drs. Metherd and Wendel discussed the Federation's contract review and third-party messenger services. Metherd Dep. 90:8-24

(PX 14). The meeting informed the 20-30 office managers in attendance of the order in which the Federation would next review contracts over upcoming weeks: Humana and then United Healthcare. *Id.* at 90:16-20 (PX 14); PX 31 at OB/GYN-NKY-260-61.

At the meeting, Dr. Metherd also introduced the attendees to a "critical mailing alert system," which would be used to notify all members by e-mail that an important mailing had been sent by the Federation. *Id.* at OB/GYN-NKY-261; Metherd Dep. 99:20–100:22 (PX 14). Office managers were also told to encourage OB-GYN members (1) "to respond in a timely manner" to Federation mailings, and (2) to "think of the Federation at all times when dealing with insurance plans." PX 31 at OB/GYN-NKY-261-62 (emphasis in original).

Adhering to the "game plan," on September 30, Ms. Odenkirk again sent members a newsletter, sample letter, and contract analysis (including amendments) applicable to Humana. PX 32 (newsletter); PX 33 (sample letter); PX 34 (contract analysis and amendments); Odenkirk Dep. 162:11–163:5, 163:9–164:4 (PX 15). The sample letter was substantively identical to the one that Ms. Odenkirk had included with her Anthem contract analysis, including the language threatening termination if the practice's concerns were not addressed. *Id.* at 177:18-23; PX 33. By October 25, most member practice groups had adapted verbatim the sample letter to their own letterhead, signed it, and sent it to Humana. Odenkirk Dep. 254:7-19 (PX 15); Buckingham Dec. ¶ 7-8 (PX 6); PX 35.

The September 30 newsletter also informed members about the status of the Federation's efforts to coordinate their dealings with insurers: "[T]here has been a significant response to the previous Anthem contract analysis and many members have opted to utilize the full services of the Federation," meaning that many members had sent third-party messenger letters to Anthem.

PX 32 at FPD-112002; Odenkirk Dep. 173:14–175:9 (PX 15). The newsletter also notified members of the "critical mailing alert" system. PX 32 at FPD-112001; see, *e.g.*, PX 36. In practice, the Critical Federation Alerts not only notified member physicians and their office managers when important correspondence would be forthcoming, but often embodied the correspondence. Odenkirk Dep. 211:6-20 (PX 15). In addition to the newsletter's explanation of the "critical mailing alert" system, the Alerts themselves often signaled that numerous members were receiving them by either listing recipients' e-mail addresses on the Alert or being addressed generically to "office managers and physicians" or to "Federation member," or some combination. *E.g.*, PX 37; PX 38; PX 39.

Starting on October 11 through November 1, Ms. Odenkirk followed up on Federation groups' letters to Anthem. Dkt. Entry 1, 21 ¶ 27. For each practice (35 during this period), she sent Anthem a substantively identical letter enclosing a set of identical proposed contract amendments "that addresse[d] some of their concerns." *Id.*; PX 40. Each letter asked Anthem to contact her "upon receipt of this letter for further discussion." *Id.*; Snyder Dec. ¶ 8 (PX 5). Ms. Odenkirk copied each group on the letter she sent on its behalf to Anthem. *E.g.*, PX 41.

In addition, "efforts were being made by physician facilitators to encourage the return of third-party messenger notices so that negotiations could get underway," and Federation business was discussed at standing monthly Cincinnati OB/GYN Society meetings. PX 42 at 7HILLS-50025. For example, on October 18, Dr. Metherd, who functioned as Ms. Odenkirk's "liaison" with Cincinnati OB-GYNs, e-mailed to numerous member OB-GYN groups a Critical Federation Alert that informed them the Federation was contacting Anthem and would soon be contacting Humana. PX 43; Odenkirk Dep. 20:5-16, 202:13–203:12 (PX 15). The Alert reminded

members to "REMEMBER THEIR PURPOSE IN JOINING THE FEDERATION" and "STRONGLY ENCOURAGED [THEM] TO UTILIZE THE SERVICES OF THE FEDERATION TO THE FULLEST EXTENT POSSIBLE, [INCLUDING] THE FEDERATION'S NEGOTIATION ASSISTANCE PROGRAM." PX 43 at FPD-111721 (emphasis in original).

As predicted in Dr. Metherd's October 18 Alert, starting on October 25 through November 8, Ms. Odenkirk sent 29 form letters with identical proposed contract amendments to Humana on behalf of the practices that had previously sent third-party messenger letters to the insurer. PX 44; Buckingham Dec. ¶ 9 (PX 6); Odenkirk Dep. 254:7-19 (PX 15). She also informed each practice of the letter and proposed contractual amendments she had sent on the practice's behalf to Humana. *E.g.*, PX 45.

With an October 31 newsletter mailed to all members, Ms. Odenkirk sent her analysis of members' United Healthcare contract. PX 46 (newsletter and sample letter); PX 47 (contract analysis and proposed changes). The newsletter followed the pattern set with the Anthem and Humana contract reviews and enclosed a sample letter to be sent to United. Odenkirk Dep. 209:8-15, 210:19–211:5 (PX 15); PX 46. As with Anthem and Humana, over the next several weeks, most Federation OB-GYN groups adapted verbatim the sample letter to their letterhead and sent it to United. Odenkirk Dep. 254:20–255:1 (PX 15); Newman Dec. ¶ 6 (PX 7); PX 48.

The October 31 newsletter again emphasized to members the "critical mailing alert" system, which covered a "significant proportion of physician members," tallied then at 39 offices. PX 46 at FPD-112182. The newsletter updated members on their dealings with Anthem, noting that a "**VERY SIGNIFICANT**" number had already sent Anthem a third-party messenger letter. *Id.* (emphasis in original). The October 31 newsletter also noted that the Federation

would pause between its United Healthcare contract analysis and the next one analyzing Aetna's contract. *Id.* at FPD-112184; Odenkirk Dep. 217:13-21 (PX 15).

The October 31 newsletter also informed members of the Federation's plans and actions on several fronts, including initiating contact with Humana, as it had with Anthem. PX 46. Indeed, on the same day, Humana received numerous substantively identical form letters from Ms. Odenkirk attaching identical proposed changes to the Humana contract. Buckingham Dec. ¶ 9 (PX 6).

The October 31 newsletter closed with the following statement reminding members of their purpose for joining and outlining how the Federation would advise members in negotiations with insurers on whether specific contracts were "bad" or "good":

> **Finally, ALL MEMBERS ARE AGAIN REMINDED OF THEIR REASONS FOR JOINING THE LOCAL CHAPTER OF THE FEDERATION. THE OVERALL PURPOSE OF THE FEDERATION IS TO ALLOW MEMBER PHYSICIANS TO DEAL WITH THE INSURANCE INDUSTRY ON AN EQUAL BASIS. WHILE THE FEDERATION CANNOT RECOMMEND THAT PHYSICIANS SIGN OR NOT SIGN A GIVEN PROVIDER AGREEMENT, THE FEDERATION CAN ADVISE MEMBER PHYSICIANS WHEN THEY ARE BEING PRESENTED WITH A *BAD* CONTRACT. WHETHER A GIVEN MEMBER CHOOSES TO PARTICIPATE IN A *BAD* CONTRACT IS SOLELY HIS OR HER CHOICE. CERTAINLY THE FEDERATION WOULD ENCOURAGE MEMBER PHYSICIANS TO SELECT PROVIDER AGREEMENTS THAT ARE IN THEIR BEST INTERESTS AND NOT UNFAVORABLY BALANCED AGAINST THE MEMBER.**

PX 46 at FPD-112184 (capitalization and emphasis in original); see also PX 49 at FPD-111717; PX 38.

In fall 2002, Anthem rebuffed repeated attempts by the Federation to "initiate discussions" on behalf of its OB-GYN members. PX 49 at FPD-111717. Federation members directed Ms. Odenkirk to make "one last effort" by telephone to have Anthem renegotiate all

members' contracts through the Federation. PX 50; PX 51. Dr. Metherd drafted a list of nine "discussion points" for Ms. Odenkirk, including the following:

> 3.) If Anthem refuses to negotiate, refuses to provide access to their decision makers, or attempts to drag out the discussions (especially by wanting to deal with each office individually), then they need to know that the ob/gyn's are literally ready to walk away from their 'bad' contract now and will do so.
>
> 5.) Ask for reimbursements at the 160-180% level with the more realistic goal being 140% of Medicare.

PX 52; Odenkirk Dep. 239:17–241:12 (PX 15); Metherd Dep. 140:25–141:19 (PX 14). Prevailing OB-GYN fees in the Cincinnati area then ranged around 100% of Medicare fees. PX 53 at ABCBS-08824.

In a telephone conversation with Anthem on November 15, 2002, Ms. Odenkirk told the Anthem employees on the call that she represented a large number of OB-GYN practices in the Cincinnati area. PX 53; Snyder Dec. ¶ 10 (PX 5); PX 54. Ms. Odenkirk generally discussed Federation OB-GYNs in overall terms, rather than by individual groups. Snyder Dec. ¶ 10 (PX 5). Anthem responded by reiterating a point made in letters it had just sent to each OB-GYN group, stating that its contracts were directly with the group and that it would conduct negotiations and meet directly with the group. *Id.* at ¶¶ 9-10; *e.g.*, PX 55. Ms. Odenkirk then spoke, in substance, globally about Federation OB-GYN members' concern about Anthem's fees and contract language. Snyder Dec. ¶ 10 (PX 5). She stated that Federation members were seeking increased fees ranging from 150% of Medicare fees and upwards. *Id.*

On November 18, Ms. Odenkirk sent members an e-mail addressed "Dear Physician Member(s)," reporting that she had talked with Anthem, and directing them, once they had read Anthem's letter (*e.g.*, PX 55), "to contact me ASAP so that we can discuss my conversation with

Anthem and your response to their letter." PX 54; Odenkirk Dep. 235:5–237:17 (PX 15); see also PX 56.

Meanwhile, Ms. Odenkirk continued to coordinate Cincinnati OB-GYN members' attempts to engage Humana in negotiations. See, *e.g.*, PX 57; PX 58; PX 38. By mid-November, Humana also had told each OB-GYN group by letter that it wanted to deal directly with the practice, rather than with the Federation as the practice's representative. *E.g.*, PX 59. Nonetheless, in a December 3 Critical Federation Alert addressed to "Office Manager and Physicians," Ms. Odenkirk posed two options for the practice: (1) meet directly with Humana and have the Federation review any proposal from Humana, or (2) advise Humana of its desire for the Federation to speak directly with Humana as its "third-party messenger or consultant" to facilitate discussions. *E.g.*, PX 39. Responding as Ms. Odenkirk requested, most Federation member practices chose the second option, indicating they wanted the Federation to facilitate their contract negotiations with Humana, even though Humana had declined to talk with the Federation. *E.g.*, PX 60; PX 61; PX 62; PX 63; see also PX 64; PX 65.

Anthem's and Humana's refusal to deal with Ms. Odenkirk, acting on behalf of Federation members, combined with Humana's expressed willingness to consider renegotiations with specific groups (PX 66), caused concern among Federation members that some groups might reach individual deals with the insurers, which is a common problem for price-fixing conspiracies. *See, e.g., Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1388 (7th Cir. 1986). For example, on December 6, Dr. Karram reported to Ms. Odenkirk: "Right now there is a lot of apprehension and fear in the community and people feel that groups are out to make individual deals." PX 67; *see* PX 68 (Dr. Wendel writing to Ms. Odenkirk: "I hope we can all stay on the

same page."); PX 66 (Humana "willing to review reimbursements for some, but not all, OB/GYN's"); *see also* PX 69; PX 70.

In this environment, in a December 3 Critical Federation Alert, Ms. Odenkirk "strongly encouraged" all members and their office managers to attend a December 14 meeting, when a "generalized update on the local chapter's activities in regards to health insurance companies" would be provided and "[e]xtremely important issues w[ould] be discussed." PX 71; *see also* PX 72; PX 73.

Ms. Odenkirk arrived in Cincinnati on December 12, 2002, to attend meetings on December 13 between Dr. Wendel's Mt. Auburn group and Humana and Anthem, before attending the December 14 membership meeting. On the evening of December 12, she met for dinner and drinks with Drs. Metherd, Karram, Wendel, and Pranikoff. Odenkirk Dep. 314:9-18 (PX 15). "After considerable discussion on many topics, one consensus that emerged is that only Federation members and their office staff [but not three malpractice-insurance experts] should be allowed in for the first part of the [December 14th] meeting where there w[ould] be discussion of extremely sensitive issues." PX 74. During the dinner, Ms. Odenkirk and the doctors also discussed Federation groups' potential use of a "'reverse' most-favored-nation clause" by which, if a practice reached an acceptable agreement with Anthem, it could use "those rates to set a standard" with "other health plans." Odenkirk Dep. 314:19–315:4 (PX 15); PX 75.

3. At a December 14, 2002 meeting, Federation members agreed to increase pressure on insurers and use the Federation's "collective knowledge" to secure "good" contracts.

Ms. Odenkirk and most Federation members attended the full-membership meeting on Saturday morning, December 14, 2002. Odenkirk Dep. 272:5-17 (PX 15); Metherd Dep. 156:10-13 (PX 14). Ms. Odenkirk explained that insurance companies were not willing to

recognize the Federation. *Id.* at 155:5-12; PX 76 at OB-GYN-NKY-218. "[I]t became abundantly clear during the meeting that different groups would negotiate different terms with local payers," but "the OBG community, overall, was maintaining its cohesion." PX 77; PX 76 at OB-GYN-NKY-218. Dr. Metherd captured the upshot of discussion at the meeting in an e-mail he sent within hours afterward to answer another doctor's "concerns regarding how we will proceed":

> *The meeting essentially said to us how to proceed.* What we did was select the option that we felt we heard from the members. For obvious reasons, no vote or written survey can be undertaken. However, *now that we have a feeling for everyone's thoughts, a strategy can be developed* to make this happen to everyone's satisfaction. Such a strategy can be undertaken *in such a way that no one gets left behind* (remember, I too am a small player). *The key is the organization which we have joined. They have and will have a collective knowledge that individually none of us have.* That knowledge can and will be used to further the goals of the organization and all of its members . . . big and small. For example, if all proposals are submitted for review to the organization by all members (and I am very confident that this will happen) prior to any decision process being undertaken by anyone, *the organization can assure that only 'good' outcomes are obtained by all* and that they all occur in the same time frame. If you think about this, you will see how this would prevent any large member from 'hurting' any small one and vice versa.
>
> Over the next week I (with permission already given) will be putting such a strategy on paper to be sent to all. *Hopefully all will then know how to proceed.*

PX 78 (emphasis in *italics* added).

A series of "deleted" e-mails (recovered by a forensic computer expert from Dr. Metherd's computer) provide additional evidence that, at the meeting, Federation OB-GYNs reached an understanding about how to proceed with insurers. A December 17 e-mail from Dr. Straubing complimented Dr. Metherd for doing "a great job in chairing the meeting and getting a consensus without an actual vote." PX 79. In a December 15 e-mail, Dr. Wendel also reflected on the meeting: "I believe we now have a clear path on which to proceed." PX 9.

On the same date, Dr. Metherd replied to Dr. Wendel, outlining the strategy: "The scenario will be one of everyone again receiving the proposed amendments, filling in desired reimbursements, mailing to the Federation for approval, and then mailing to the insurance company with all groups doing this at pretty much the same time." *Id.* Dr. Metherd explained that the reason for having the groups acting "at pretty much the same time" was to "garner the attention of an insurance company" because "several letters will receive more attention than one letter." Metherd Dep. 178:1-10 (PX 14).

Dr. Metherd forwarded his reply to Dr. Wendel, outlining the strategy, to Dr. Karram. On December 16, Dr. Karram's reply endorsed pursuing the outlined plan for "a little longer," as opposed to submitting mass contract terminations to an insurer, "so [they] can't accuse us of colluding." PX 9.

C. The Federation used its "collective knowledge" to coordinate members' negotiations and succeeded in obtaining higher fees.

1. The Federation guided its members to "carpet bomb" Anthem with contract proposals and outlined how the Federation would coordinate the response.

Additional forensically recovered, "deleted" e-mails from Dr. Metherd's computer illuminate the steps the defendants took to coordinate Federation members' negotiations with insurers, despite insurers' attempt to negotiate with the doctors independently. By December 16, Ms. Odenkirk had edited a letter that Dr. Metherd had drafted to "send out to everyone with specific steps for each member to take" to engage Anthem. *Id.*; PX 80. In a recovered December 17 e-mail from Dr. Wendel, Dr. Metherd received comments on the draft Ms. Odenkirk had edited:

> I also think that we need to also send similar letters to choice care and united. It[']s time to carpet bomb them with these letters and demand responses in a timely fashion. This may be a way for the federation to help to facilitate the process.

PX 81; Wendel Dep. 110:21–112:3 (PX 4).

As the strategy unfolded, a December 20 Critical Federation Alert, notified members that "[a]n extremely important mailing is going out from the Connecticut Regional Headquarters today" that "will require your attention and a timely response." *E.g.*, PX 37; see also PX 82. Accordingly, on December 20, Ms. Odenkirk mass-mailed to each Federation practice a final version of the letter, which enclosed the Anthem contract amendments from her prior analysis of members' Anthem contracts. *E.g.*, PX 83; PX 84. Stating that Anthem had "become recalcitrant," each letter recommended to the practice "another tactic by which you may negotiate with Anthem," enclosing "a clear set of guidelines . . . that w[ould] hopefully lead to a productive set of discussions." *E.g.*, PX 83; Metherd Dep. 180:19–181:4 (PX 14); Odenkirk Dep. 291:2-17 (PX 15); PX 84.

The nine guidelines were set forth on a single page with the heading: "The Federation suggests the following steps." *Id.* Essentially the guidelines prescribed that by January 3, 2003, each group submit to Ms. Odenkirk its proposal, including proposed contract amendments and fees, for her review and advice, before sending it to Anthem. PX 84 at FPD-105948; *e.g.*, PX 85; see PX 37; PX 82. Any response from Anthem would then be forwarded to Ms. Odenkirk, as the group's "consultant," to help determine "whether or not it meets your concerns." PX 84 at FPD-105948. The Federation depicted the steps to members "as the means by which you are most likely to achieve your goals." *Id.* In the ensuing process, Ms. Odenkirk drew on her "collective knowledge" and advised some members on the appropriateness of the fee levels they inserted into their Anthem proposals. *E.g.*, PX 86; PX 87; Odenkirk Dep. 300:25–301:11 (PX 15).

2. The Federation intensified members' pressure on Anthem and facilitated the first contract termination by a member group.

By early January 2003, some Federation members observed that Federation members' efforts to force Anthem to renegotiate their contracts were starting to pay off. On January 8, Dr. Wendel e-mailed Dr. Metherd to report, based on a discussion with Anthem, that the large Federation groups might get a deal with Anthem that would apply to all Cincinnati-area OB-GYNs. PX 88; *see* Snyder Dec. ¶¶ 5-12 (PX 5). Dr. Metherd, who had talked with Dr. Karram earlier in the day, replied to Dr. Wendel (copying Ms. Odenkirk and Dr. Karram):

> It sounds like the Federation is enabling the big groups to talk to Anthem and that the big groups will pull along all the rest in the discussions. . . . If this works with Anthem, it will provide leverage and a model for dealing with [Humana], United and others.

PX 88. Dr. Metherd's e-mail also updated Drs. Karram and Wendel on the Federation's plan to ratchet up the pressure on Anthem by having Federation members soon send Anthem a wave of letters "that should further help the efforts of the big groups in dealing with Anthem." *Id.*; *see* Snyder Dec. ¶¶ 14-15 (PX 5).

Executing this plan, over January 10-14, Ms. Odenkirk wrote to each practice, enclosing its finalized contract proposal that she had reviewed and a sample cover letter to send to Anthem. *E.g.*, PX 89; Odenkirk Dep. 303:5–304:4 (PX 15). Ms. Odenkirk recommended to the groups: "In order to maintain the momentum of negotiations, . . . submit your proposal as soon as possible." PX 89; see also PX 90 at TSWHA-00147 (January 13 Alert notifying members of "[a]n extremely important mailing" and emphasizing the "utmost importance" of immediately submitting the proposal "[i]n order to maint[ai]n the momentum of negotiations.")

Looking ahead, on January 14, Dr. Karram, asked Ms. Odenkirk and Dr. Metherd: "[I]f we get a favorable contract with one of the plans, can we go to all the other ones and say we will

not accept anything less then what we are getting from the plan we have a contract with?" PX 75. The next day, Ms. Odenkirk confirmed this was the plan:

> Let's say you get an acceptable agreement with Anthem. Although you wouldn't be able to go to ChoiceCare or United, or anyone else, and say specifically what you are getting paid by Anthem . . . you can use those rates to set a standard and tell all other health plans that you are getting acceptable reimbursement from Anthem and you no longer will be accepting anything less than that from any other health plans.

Id.

Showing the large groups' interest in receiving the smaller groups' support for their negotiations with Anthem, on January 18, Dr. Karram sought Ms. Odenkirk's confirmation "that all the contracts have gone back to the docs and they have sent them out." PX 91. Dr. Karram's e-mail preceded a January 21 memorandum from Ms. Odenkirk, addressed to "Federation Member," that again stressed "**it is of utmost importance that you send your proposal to Anthem and forward a copy of the Cover Letter to me so that I can follow-up appropriately.**" *E.g.*, PX 92 (emphasis in original); see also PX 93.

By late January 2003, most Federation member practices had sent to Anthem substantively identical cover letters with the proposed amendments to their Anthem contracts, including substantially increased fee levels. PX 94; Odenkirk Dep. 309:23–310:15 (PX 15); Snyder Dec. ¶ 14 (PX 5). Each group's cover letter advised Anthem that "all responses from Anthem w[ould] be forwarded to the Federation of Physicians and Dentists for review, interpretation and consultation." *E.g.*, PX 95. Each group's letter also closed with the termination threat included in their letters to Anthem in September and October 2002. *Id.*; Snyder Dec. ¶ 14 (PX 5). The letters achieved their purpose; Anthem felt increased pressure to negotiate. *Id.* at ¶ 15.

On February 3, soon after most Federation groups had sent Anthem the letters threatening termination, Ms. Odenkirk sent a sample contract-termination letter to a key group in Anthem's network, OB/GYN Specialists of Northern Kentucky (Dr. Bilotta's group). PX 96; see Snyder Dec. ¶ 16 (PX 5). On February 4, the group submitted a 90-day termination notice to Anthem. PX 97. A February 7 Anthem internal document put the termination notice in perspective:

> This group is represented by a federation based in Florida which has contacted many greater Cincinnati physicians with an offer to represent them in negotiations with health plans. About 80 percent of the OB/GYNs in the Cincinnati area have contracted with the federation. OB/GYN Specialist is the first group to terminate.

PX 98 (emphasis omitted).

A February 7 Anthem internal e-mail, discussing the looming import of the termination letter, observed: "36 OBGYN groups, representing 124 physicians have gotten together and [paid dues] to have 1 negotiator represent all of them. So . . .the impact of this could be massive. This actually represents more than 50% of the OBGYN coverage in the community." PX 99; *see also* PX 100 ("this could get pretty big"); Snyder Dec. ¶ 16 (PX 5).

3. The Federation "carpet bombed" Humana with identical demands from 29 groups and coordinated members' negotiations as their joint "consultant."

In a January 16 e-mail to Ms. Odenkirk, Dr. Wendel explained that, "[i]n contrast to anthem [Humana is] not interested in the same deal for all providers, maybe only the sque[a]ky wheel will get the grease." PX 101; Wendel Dep. 126:7-18 (PX 4). Other Federation groups also reported resistance from Humana to Ms. Odenkirk and looked to her for advice concerning negotiations and reassurance against the recurring concern that some practices might be moving ahead competitively with negotiations at the expense of other practices. *E.g.*, PX 102; Odenkirk

Dep. 326:16 – 327:7 (PX 15). Seeking to stay on top of the situation, Ms. Odenkirk's January 21 memorandum to Federation members stressed: "It is critical that you keep me informed as to any response that you may receive either verbally or in writing from any of these insurance companies so that I know how best to assist you in moving forward." PX 92.

Adhering to the plan to "carpet bomb" insurers (PX 81), over January 27-31, Ms. Odenkirk herself sent Humana, on behalf of 29 member practices, substantively identical letters with proposed contract amendments, including each practice's desired fees. PX 103; Odenkirk Dep. 330:12–333:20 (PX 15). Ms. Odenkirk's letters tracked the Anthem letters and demanded "a meaningful and productive written response" from Humana to each practice by February 14. *E.g.*, PX 104. Her letters notified Humana of each practice's intent "to forward any and all responses from HUMANA to the Federation of Physicians and Dentists for review, interpretation and consultation, as they have every right to do" and contained the usual termination threat. *Id.* Ms. Odenkirk sent a copy of the applicable letter to each of the member practices. *E.g.*, PX 105.

While Ms. Odenkirk was mailing the wave of letters to Humana, a group's office manager reported to her that Humana objected to the Federation's "[c]onsultant" role. PX 106; see also PX 107. The next day, Ms. Odenkirk replied: Humana is "going to get the message very soon and big that the Federation isn't going away." PX 106. On February 7, Humana, by then in receipt of nearly 30 substantively identical letters and contract proposals from Ms. Odenkirk, explained its objection to Ms. Odenkirk consulting for all of the groups:

> It is being represented to us that Lynda/The Federation is representing each practice independently. And then Lynda, among other things, proposes the same contract revisions for each group she represents, without regard to whether the

> group's contract even contains the contract term she proposes revising. This just reinforces the overall impression that Lynda is in fact bargaining collectively for the various groups she represents.

PX 108.

Humana soon buckled under the pressure and negotiated with each practice even with Ms. Odenkirk functioning as their joint consultant. On February 11, Humana made an offer to Dr. Karram's group, Seven Hills. PX 109. On February 14, the deadline Ms. Odenkirk's wave of letters had set for a response, Humana advised each group that it was willing to meet and talk directly with the group about its contract and fee demands. *E.g.*, PX 110. And by February 18, Humana had made offers to Mt. Auburn (Dr. Wendel's group) and at least two other groups. PX 111; PX 112.

4. In spring 2003, Ms. Odenkirk continued to provide central coordination, and members continued to share sensitive information.

As negotiations progressed, Ms. Odenkirk, unable to deal directly with the insurers, instead drew on her "collective knowledge" to continue to coordinate and monitor the negotiations. *See, e.g.*, PX 113; PX 114. Federation groups also informed Ms. Odenkirk of developments and thus augmented her "collective knowledge," which she shared among groups. *See, e.g.*, PX 115; PX 116; PX 117; PX 118.

Federation members sought and received Ms. Odenkirk's advice on specific contract offers from Anthem. *E.g.*, PX 119; PX 120; PX 121; PX 122; PX 123; PX 124 (Mt. Auburn forwarding Anthem offer to Ms. Odenkirk). Federation members similarly kept Ms. Odenkirk informed of the status of their contemporaneous contract negotiations with Humana. *E.g.*, PX 125; PX 126.

On March 7, Ms. Odenkirk e-mailed a Critical Federation Alert that encouraged members to meet as soon as possible with Anthem and Humana to discuss proposed contract changes and provided guidelines on how to negotiate contract language and fees. PX 127 at FPD-111686-87; Dkt. Entry 1, 21 ¶ 43. The guidelines specifically counseled members that, in their negotiations, they could tell insurers that they were seeking increases from all major insurers and would thereby not disadvantage one over the others. PX 127 at FPD-111687.

Within a week, with Ms. Odenkirk's assistance, Dr. Bilotta sent a letter asking Anthem to reopen contract discussions with his group, the one that had previously sent Anthem its termination notice. PX 128. On March 18, Anthem made an offer to Dr. Bilotta's group, and on the same day, his group rescinded its contract-termination notice. PX 129; PX 130. Some other groups also received offers from Anthem. PX 131; PX 132. Groups forwarded the offers to update Ms. Odenkirk. *See, e.g.*, PX 133; PX 134.

Key Federation groups similarly received offers from Humana in March and April. PX 135 (Mt. Auburn); PX 136 (Seven Hills); PX 137 (Ob/Gyn of N. Ky.). Recipients of offers from Humana also sought Ms. Odenkirk's advice. *E.g.*, PX 138.

As Dr. Metherd began sensing larger groups' success in negotiations with Anthem, he sought to assure other Federation OB-GYNs in small practices that they would not be left behind. For example, on March 28, Dr. Metherd sent e-mails to solo practitioners Drs. Gildenblatt and Draznik to "fill [them] in on a conversation" he had that day with Anthem that left him with the impression that Anthem's deals with larger groups would be extended to all groups. PX 139; PX 140. On March 31, Dr. Draznik reported to Dr. Metherd that he had exchanged voice mails the prior week with Anthem, which "basically assured me that things would be 'moving' soon."

Id. Dr. Metherd's e-mails to Drs. Gildenblatt and Draznik also revealed that, on March 28, Dr. Metherd had "compared notes" in detail with Mt. Auburn's Dr. Wendel about negotiations with Anthem. *Id.*; see also PX 141.

5. By April 2003, the Federation took credit for negotiations and encouraged its members to leverage their new Anthem fee levels against other insurers.

On April 2, Ms. Odenkirk e-mailed an Alert to Federation members to respond to antitrust concerns raised by Anthem and Humana. *E.g.*, PX 10; PX 142. The Alert claimed that the antitrust laws did not prevent the Federation from providing members with "expert consultation" and imparted the Federation's "overall wisdom" to members regarding their dealings with insurers. PX 10; PX 142. Accordingly, among other points, the Alert suggested: "You may explain you are, or will be, reviewing all of your major contracts." PX 10 at FPD-111657; see PX 143.

The April 2 Alert also stated: "It appears there would be no discussions taking place if it were not for the Federation. Insurance companies generally do not desire major interruptions to their provider panels because of patient access, choice and continuity of care." PX 10; see also PX 144 (May 16 Alert stating "insurance companies are speaking to you, such as they've never done in the past, and you are achieving improved agreements"). The April 2 Alert then added, to reassure small groups, "it seems that eventual discussions with all current providers will all have similar results." PX 10.

By May 1, Anthem had sent to all Federation members a contract amendment raising fees over a three-year period to 120% of Medicare fees in July 2003, 125% in January 2004, and 130% in January 2005. Dkt. Entry 1, 21 ¶ 47. By comparison, Anthem's OB-GYN fees effective January 1, 2003, were about 107% of Medicare, and other insurers' fees then were at about 100% of Medicare. PX 53 at ABCBS-08824.

As Federation groups achieved success with Anthem, they attempted to leverage their Anthem fees in negotiations with other insurers. *E.g.*, PX 145; PX 146; PX 147. Seeking Ms. Odenkirk's advice, *e.g.*, PX 148; PX 149, by mid-April, several of the larger Federation member groups also reached agreement with Humana. Dkt. Entry 1, 21 ¶46.

On May 6, Ms. Odenkirk e-mailed Federation members another Alert that discussed Anthem's new contract provision titled "Comparable Provider Rate for Professional Services." PX 150; PX 151. Ms. Odenkirk explained that "this new Section suggests most favored nation, whereby if you accept a lesser rate from another comparable payor, Anthem would be entitled as well to that lesser amount." *Id.* The May 6 Alert explained how Federation members could use the new Section in negotiations with other insurers:

> Of course, you could also use this concept as a negotiating tool, in that you can let other payors know that you have an offer from another major payor that pays (such and such amount), and you cannot go below that. . . . But, you don't actually NEED the language of a '*Comparable Provider Rate*' provision to be able to use the concept.

Id. (emphasis in original).

A May 16 Federation Alert to members included Ms. Odenkirk's explicit advice that the Anthem contract, with clarifications she encouraged members to request, was "likely as good as it's going to get." *E.g.*, PX 144. The Alert also observed that Anthem's contract provided a "benchmark to follow when negotiating with other comparable health plans." *Id.*

Ms. Odenkirk also continued to track and record members' contract negotiations, asking members in a May 23 Alert to inform her when they reached agreement with Anthem and Humana. PX 152; see also PX 153; PX 154.

Humana continued to object to Ms. Odenkirk's consulting for members on negotiations, including on fees. PX 155. For example, on May 8, Dr. Johnson of the Samaritan OB/GYN

group e-mailed Humana and defended Ms. Odenkirk's consulting role "to review proposed changes in the legal language and fee schedule and indicate whether we are 'in the ballpark' after compiling data from this market and other similar markets." PX 156. Ms. Odenkirk, who received a copy of Dr. Johnson's e-mail, replied to him, "BRAVO!!!!!!" PX 157 at FPD-110131.

Humana's response to Dr. Johnson objected to his drawing on Ms. Odenkirk's collective knowledge:

> The problem is, who is defining the 'Ball Park'? That 'Ball Park' is being defined by someone with the knowledge of what is going on with negotiations with other providers and payers. . . . Especially in light of the fact that everyone (the physicians) seems to know what everyone else is doing.

PX 158. After receiving Humana's response, Ms. Odenkirk advised that Dr. Johnson should "explain that there is NO reason why I can't let you know if you are within market range." PX 159.

6. In May 2003, as groups continued negotiating with Humana and set sights on United, the defendants organized members' public endorsement of insurers that paid all members acceptable fees.

By May, the large groups began to shift their focus to United Healthcare. In a meeting with United on May 8, 2003, Dr. Wendel said that his Mt. Auburn group had obtained higher rates with the other two top payers in Cincinnati and demanded higher rates from United. PX 160. During the meeting, Dr. Wendel threatened to terminate United if it failed to offer Mt. Auburn a satisfactory deal. *Id.* Similarly, Seven Hills called a meeting with United also on May 8, and Dr. Karram conveyed the same message to United that Dr. Wendel had given earlier in the day. PX 161; PX 162. In internal documents, United noted that Seven Hills and Mt. Auburn sought identical fees and that Seven Hills had also asked for the same case rates at

the meeting but subsequently modified them in a letter. PX 163. On May 28, Dr. Metherd and Dr. Bilotta's group made similar presentations to United. PX 164; PX 2; PX 165; PX 166.

By the end of May, United realized where its negotiations with Federation groups were headed. In a May 30 e-mail, a United provider-relations employee updated United managers on Cincinnati OB-GYNs' coordinated messages and contract termination threats:

> We have met with about 6 groups and at least two more have called. The message is the same with some minor differences. The Federation was involved with Anthem and Humana to the same extent as with us. . . . It is clear that Anthem has reached a deal with everyone. . . . It also seems that Humana has reached agreement with the larger groups, but has not with some of the smaller. . . . They are now coming to us and telling us what the deal is, wanting the same effective date, mostly stating it is non negotiable and that they will term[inate] if they do not get it. In this case, I believe we will get the term[ination]s, but their expectation will be that either this will not be necessary or that it will merely be an ugly step in the process of getting what they want.
>
> * * *
>
> The 'deal' is 120% of 2002 Medicare effective 7/1/03, 125% 1/1/04 and 130% 1/1/05. The delivery rates vary slightly within a range of $50. **[Confidential information redacted]**

PX 167.

In early May, Dr. Metherd sought to capitalize on Anthem's new fee levels and the Federation's membership numbers to convince Humana to improve its contract offer to him. After conferring with Drs. Karram and Wendel, on May 2, Dr. Metherd e-mailed Humana: "Were ChoiceCare to offer a fair and equitable reimbursement plan (such as that which I have mentioned), it is feasible that both I and the Federation could become your allies and encourage the local members to look favorably on the proposal." PX 168; see also PX 169. In a subsequent exchange, on May 12, Dr. Metherd attempted to leverage the new Anthem agreement, suggesting

Humana "could solve its problem with the ob/gyn community at large . . . were it to match its competitor's offer." PX 170. Dr. Metherd's May 12 e-mail also threatened that Federation members would boycott Humana if it did not meet his and other OB-GYNs' fee demands. *Id.* at FPD-108600.

On May 20, Dr. Metherd even more blatantly invoked the power of concerted action. He sought Federation members' views on a proposal that would offer a carrot to supplement the stick that he and other Federation members already had been wielding in negotiations with insurers. E.g., PX 171. The proposal was that, once an insurer offered acceptable fees to all Federation members, the members would then publicly endorse and promote the insurer's health plan. *Id.* Dr. Metherd later described the endorsement idea as "a tool that lies somewhere between the verbal art of persuasion and the act of termination." PX 172.

Within days, Dr. Metherd raised the endorsement idea with United. After he met with United on May 28 to discuss his contract demands, he e-mailed United and reemphasized the need for United to "to offer an acceptable contract to all members as we discussed," if United desired Federation members' "endorsement and promotion." PX 173.

On June 23, Humana met at Dr. Metherd's request with Drs. Karram, Metherd and Wendel to learn more about the "endorsement campaign." PX 174. According to a contemporaneous account of the discussion made by Humana, Dr. Metherd described the endorsement as both public and private support of those managed care organizations that satisfied the OB-GYNs' minimum reimbursement rates. *Id.* Dr. Metherd explained: "'the community OB/GYNs have established a rate of reimbursement and the other large payor has responded and we expect[] the other one to do the same in the near future.'" *Id.* Then,

"Dr. Karram and Wendel pointed out the need for all OB/GYN's to be compensated fairly. Pointing the need for even small groups to receive increases up to the minimum." *Id.* When "asked how they would confirm that [Humana] had extended the minimum threshold rates to all the affiliated OB/GYN practices[,] Dr. Wendel indicated that he was sure that they would know but would [not] really elaborate on how he would know." *Id.*; see also PX 172. Humana understood that any endorsement required that it meet the OB-GYNs' payment "'floor.'" PX 175 at HUM-000028.

The Federation approved the endorsement campaign, as Dr. Metherd later explained to another physician who had raised concern: "[T]his has been discussed with both Lynda [Odenkirk] and [Federation Executive Director] Jack [Seddon]. As long as we do not speak ill of any one company, we are clearly able to 'promote and endorse.' They have actually said that they think this is a good approach." PX 172 at SAM-102489; see PX 176 (Ms. Odenkirk wrote "the Federation does think that [Federation endorsement] can be a very effective way of dealing with health plans"); Seddon Dep. 215:9–216:7 (PX 177).

Federation members took several steps in the fall of 2003 to endorse Anthem. For example, Drs. Metherd, Karram, and Wendel met with Procter & Gamble officials to try to persuade P&G to change its health insurer in Cincinnati from Humana to Anthem. PX 178. Dr. Metherd observed: "Just by having this meeting, the ob/gyn's will accomplish our main goal of promoting Anthem at the unstated expense of Anthem's competitors." *Id.* In the fall, Anthem published an "open letter" to the community that endorsed it over a list of Federation members' names in the Cincinnati Enquirer and twice in the Cincinnati Business Courier. PX 179; PX 180; PX 181.

7. During summer 2003, Ms. Odenkirk continued to orchestrate members' contract negotiations.

By the end of May 2003, some large Federation groups were beginning to look toward negotiations with the next insurer. On May 29, Dr. Karram e-mailed Ms. Odenkirk with the subject "MMO" and asked:

> Are we ready to move on to the next player. I think that is Medical Mutual of Ohio. . . . Also I agree with [Dr. Metherd]. We need to get everyone moving faster and to become more persistent otherwise they will not get increases in 03. I am sure that is what CC [Humana/ChoiceCare] is doing. Just think of the money they will save if they keep delaying people till 04.

PX 182. Ms. Odenkirk agreed that Federation members "should be moving faster and be more persistent." *Id.*

By letters dated June 13, 2003, Ms. Odenkirk sent to United identical proposed contractual amendments for nearly all Federation member groups. Dkt. Entry 1, 23 ¶ 57; *e.g.*, PX 183. On June 17, she routinely provided the groups with copies of the contract amendment and informed them of the letters she had submitted to United on their behalf. *E.g.*, PX 184; see Dkt. Entry 1, 23 ¶ 57.

During June 2003, Ms. Odenkirk continued to advise members on negotiations, including how to use their new Anthem agreement to their advantage. *E.g.*, PX 185; PX 186; *see also, e.g.*, PX 187; PX 188. For example, on June 5, Dr. Gildenblatt e-mailed Ms. Odenkirk and asked "is it safe to assume that contracts are being signed with Anthem? (am I allowed to ask that?)" PX 189. Ms. Odenkirk's reply, echoing her May 16 Federation Alert, gave her overall assessment of the Anthem contract and addressed Dr. Gildenblatt's inquiry about other groups' status:

> All in all I feel Anthem has indeed made good in clarifying their intent with this Amendment and I think it is as good as it's going to get, which is the message that I am conveying to all Federation members. Although I am prohibited from telling you that doctors are signing, I can tell you that I feel the general concensus [sic] is that most doctors are satisfied with it.

Id.; *see* PX 144; *see also* PX 190 (Ms. Odenkirk advises another practice: "I can tell you that the general consensus is that most are happy with the most recent [Anthem] proposal and if I were to take a guess I would say that most probably will sign.").

As another example, in late June, Ms. Odenkirk continued providing advice to Dr. Bilotta of OB/GYN Specialists of Northern Kentucky in his negotiations with United. After reviewing United's proposal, Ms. Odenkirk gave specific advice on the terms: "I think you know that not only should the minimum standard now be the fees matching Anthem's, but also their language." PX 191.

On July 9, Ms. Odenkirk circulated a Federation Alert advising members on United negotiations. She compared United to Humana and recommended that the doctors follow the same strategy: "[Y]ou may certainly let them know that you have been able to achieve a significantly better agreement with one of their competitors, and are currently in discussions with another competitor, so if they want to remain competitive they need to answer you." E.g., PX 192; see also PX 193 at TSWHA-00179.

On September 4, Dr. Metherd e-mailed all Federation members a letter, signed by Drs. Metherd, Wendel, Karram, and Pranikoff, reminding them of the importance of immediately responding to all Federation mailings: "The failure of any office to act in a timely manner not only inhibits its ability to achieve the goals of the Federation, but it also jeopardizes the ability of ALL OTHER MEMBER OFFICES to do the same." PX 194 at TWSHA-00077; see PX 195.

8. By fall 2003, Federation members targeted additional insurers.

On September 18, Ms. Odenkirk sent a memorandum to members that advised them to continue negotiations in light of other members' "successful outcomes" and coordinated their focus toward additional insurers with "sample third party letters." *E.g.*, PX 196. Flush with success, Ms. Odenkirk's comments to Federation members recognized the effects of their collective stance and boycott threats toward insurers. On September 16, she e-mailed Mt. Auburn's practice administrator, thanked her for a recent update, and noted, "Aetna best realize there's a new market in town, lest they end up having to pack their bags. Will be curious to see how interested Aetna is in staying competitive." PX 197. Similarly, after Mt. Auburn's practice administrator reported to Ms. Odenkirk that Medical Mutual of Ohio had said that it could not meet Mt. Auburn's demands and that Mt. Auburn should submit its request for termination, on October 1, Ms. Odenkirk responded: "Wonder if they'll be saying that to everyone - might they not be out of business if they have no OBGYN panel?" PX 198.

Throughout the fall, Ms. Odenkirk advised members even more explicitly on their contract negotiations with additional insurers. For example, on October 17, Ms. Odenkirk e-mailed an Alert instructing the membership that Aetna's fee proposal was

> considerably less than you have successfully been able to negotiate with Anthem, United and Humana, meaning that it is NOT 'reasonable for the Cincinnati market.' They need to be made aware of this. They need to know that under at least one of the new contracts you've just negotiated with one of their competitors, you have a 'comparable rate provision' that prevents you from accepting anything less than their rates. Since Aetna's fees do NOT represent such a 'comparable rate' you are unable to accept their new fee schedule.

E.g., PX 199. Ms. Odenkirk subsequently testified that Anthem's comparable rate provision–contrary to her assertion in the Alert– did not actually "prevent" Federation members from accepting lower fees from Aetna. Odenkirk Dep. 437:1–438:6 (PX 15).

Ms. Odenkirk's October 17 Alert next turned to Medical Mutual of Ohio's fee terms. Urging members to act quickly, Ms. Odenkirk directed:

> [S]imply fashion a proposal after your Anthem proposal. By now you should understand that it is absolutely reasonable to *request what is at or above the new market rate*. And be sure to include language that fixes the new fees for the extent of the new term, allows for re-negotiation at the end of the term and that automatically increases fees by at least the rate of inflation, no matter what. Remember, this is the ONLY way you're going to keep an upward trend.

E.g., PX 199 (emphasis added).

On November 7, Ms. Odenkirk e-mailed another Alert updating members on Medical Mutual of Ohio, CIGNA, and Aetna. Medical Mutual, she explained, had sent out a new fee schedule, which, in part, "[t]hey have been advised . . . is unacceptable." *E.g.*, PX 200. The Alert added that Medical Mutual's proposal "must" eliminate the company's ability to modify the rates and address renewal negotiations and an annual fee escalator clause. *Id.* Turning to Aetna, Ms. Odenkirk's Alert complained about Aetna's recalcitrance and wrote that members had submitted to Aetna "multiple terminations" in response. But recent signs of change caused her to urge Federation members to engage Aetna in discussions. *Id.* at OGPC-112950. Ms. Odenkirk attached a sample letter for members' use. *Id.* at OGPC-112950-51.

On November 19, Ms. Odenkirk e-mailed another Alert providing Federation members updates on the status of negotiations with Medical Mutual of Ohio, CIGNA, and Aetna. PX 201. Ms. Odenkirk generally approved of the latest version of the Medical Mutual contract as "in line with agreements you've recently negotiated with other companies." *Id.* She specifically instructed Federation members on "two critical points to make to Aetna:

> First [and] foremost at this point, especially now in light of MMO's proposal, Aetna is considerably below the current Cincinnati OH - Northern Kentucky market with their reimbursements. Secondly, there's no longer any fiscal reason why you should have to keep participating in plans with disproportionate fee schedules. I mean, now, it would make perfectly good business sense if you decided to clear your appointment book of low paying plans to easily replace them with plans who understand that to provide quality care costs money. The fact that Anthem, Humana, United (and now MMO) have reset area reimbursement rates enable you to do this, and you should certainly point this out to Ms. Daniels.

Id.

Ms. Odenkirk's November 19 Alert closed by reminding members to send third-party letters to CIGNA and to use all of the points mentioned concerning Aetna with CIGNA. *Id.* at FPD-108350. She added a general comment regarding insurers with a smaller presence in the area, such as Aetna, Cigna, and Medical Mutual: "[Y]ou are in such a position with the bigger companies that you NO LONGER have to accept UNFAIR contracts from these smaller companies." *Id.* (emphasis in original); see PX 202.

In late December 2003, the Antitrust Division served civil investigative demands on the Federation and most of its OB-GYN member practices in Cincinnati. *E.g.*, PX 203.

III. Argument

A. Summary judgment standards

Summary judgment is appropriate when the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 857 (6th Cir. 2005). The same summary-judgment standards used in other civil cases govern antitrust litigation; no special or heightened requirements apply. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468-69 (1992); *Ezzo's Invs., Inc. v. Royal Beauty Supply, Inc.*, 94 F.3d 1032, 1035-36 (6th Cir. 1996).

Moreover, both plaintiffs and defendants may use summary judgment. *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 521-22 (4th Cir. 2003). *See United States v. North Dakota Hosp. Ass'n*, 640 F. Supp. 1028 (D.N.D. 1986) (granting summary judgment to the United States as antitrust plaintiff). A plaintiff, like a defendant, must simply satisfy the requirements of Rule 56. Genuine factual disputes may not be resolved, and in reviewing the evidence, "all justifiable inferences are to be drawn in . . . favor" of the nonmoving party. *Eastman Kodak Co.*, 504 U.S. at 456 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

B. Antitrust legal standards

To establish a violation of § 1 of the Sherman Act, the United States must show the following three elements: (1) an unreasonable restraint of trade; (2) an agreement or a conscious commitment to a common scheme that results in the restraint of trade; (3) an effect on interstate commerce.

1. Defendants' concerted action aimed at raising prices is *per se* illegal.

The restraint of trade challenged in this case is unreasonable and illegal. It is well settled that the Federation may not lawfully organize competing physicians to threaten in concert to terminate their insurance-company customers in order to increase their fees. In an analogous case, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Supreme Court held *per se* illegal an agreement by criminal-defense lawyers to stop accepting new indigent clients until the government increased their fees: "The agreement among the [defense] lawyers was designed to obtain higher prices for their services and was implemented by a refusal to serve an important customer in the market. . . . The horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output." 493 U.S. at 422-23 (citations omitted).

Likewise, naked concerted action by competing physicians to obtain higher fees from insurers for their services is *per se* illegal. *See, e.g., United States v. Alston*, 974 F.2d 1206, 1208-09 (9th Cir. 1992) (applying *Trial Lawyers* to a criminal prosecution of dentists who in concert requested higher co-payment fees from insurers). The Supreme Court has repeatedly held that conspiracies among competitors to raise their prices are illegal, whether accomplished through an explicit agreement to charge a fixed price, or through concerted action like refusing to deal with buyers that are unwilling to pay the higher price. *See, e.g., Maricopa County Med. Soc'y*, 457 U.S. at 344-45 (reviewing nearly a century of precedent making price-fixing illegal and applying *per se* rule to physicians' agreement on maximum prices). *Cf. Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1091 (6th Cir. 1996) (determining pattern of referrals by OB-GYNs was not *per se* illegal given lack of economic motivation or effect, but, citing *Trial Lawyers* and *Maricopa County*, agreeing with principle that concerted action by competitors to raise prices would be *per se* illegal: "it is quite true that price restraints warrant application of the *per se* rule").

Conduct like price-fixing agreements or boycotts intended to affect prices have long been classified as *per se* illegal not only as a matter of administrative convenience for clarifying the bounds of permissible conduct under the antitrust laws, but also to "reflect a longstanding judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" *Trial Lawyers*, 493 U.S. at 433 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984)). Consequently, once a plaintiff establishes a conspiracy to carry out the restraint, the violation is proved; there is no need to show economic effects from the restraint. *See, e.g., Summit Health, Ltd.*, 500 U.S. at 330 ("the essence of any violation of § 1 is

the illegal agreement itself"); *United States v. Hayter Oil Co., Inc. of Greenville, Tenn.*, 51 F.3d 1265, 1270 (6th Cir. 1995) ("the price-fixing agreement itself constitutes the crime").

Finally, the fact that Ms. Odenkirk and the Federation do not compete with the OB-GYNs does not matter: "[A] noncompetitor can join a Sherman Act [price-fixing] conspiracy among competitors." *United States v. MMR Corp.*, 907 F.2d 489, 498 (5th Cir. 1990). Indeed, as in this case, the "noncompetitor" may play an important role in furthering the conspiracy. *Cf. In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997) ("There is nothing new about the idea that a cartel might 'hire' a customer to help police the cartel."); *Brown v. Donco Enters.*, 783 F.2d 644, 646 (6th Cir. 1986) ("It is undisputed that a corporation's officers and agents may be held individually liable for corporate actions that violate the antitrust laws if they authorize or participate in the unlawful acts.")

2. No explicit agreement is necessary to violate § 1 of the Sherman Act.

Section 1 does not require an express agreement or contract. "[I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan." *General Motors Corp.* 384 U.S. at 142-43; *accord Brown*, 518 U.S. at 241 (citing *General Motors* with approval). All that is necessary is that the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.*, 465 U.S. at 764 (citation omitted). Defendants need have had only "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Id.* (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

It is no defense that the OB-GYNs relied largely on the Federation to coordinate their concerted demands on insurers. As the Supreme Court said long ago, "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939). *Cf. Brown*, 518 U.S. at 241 (citing *Interstate Circuit* with approval in defining concerted action); *James R. Snyder Co. v. Assoc. Gen. Contractors of America*, 677 F.2d 1111, 1121-22 (6th Cir. 1982) (quoting passage above from *Interstate Circuit*).

These principles are in keeping with the statutory language, which is not limited to express contracts and applies to "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1.

3. Concerted action may be proved through circumstantial or direct evidence, and the evidence must be viewed as a whole.

To prove that defendants had an "understanding" or "conscious commitment to a common scheme" to increase fees paid by insurers, the United States may rely on circumstantial or direct evidence. *Re/Max Int'l, Inc.*, 173 F.3d at 1009. But with either type of evidence, or a combination of the two, the totality of the evidence must demonstrate that it is more likely than not that the defendants were acting in concert and not independently. "[C]ircumstantial evidence can support a conspiracy claim, so long as the evidence is not 'equally consistent with independent conduct.'" *Nat'l Hockey League Players Ass'n*, 419 F.3d at 475 (quoting *Re/Max Int'l, Inc.*, 173 F.3d at 1009).

Moreover, in determining whether a conspiracy existed, courts "must look to the evidence as a whole and consider any single piece of evidence in the context of other evidence." *In re Flat*

Glass Antitrust Litig., 385 F.3d 350, 369 (3d Cir. 2004) (citations omitted). As courts have noted, "[s]eemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 255 (2d Cir. 1987). *See also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56, 661-62 (7th Cir. 2002) (evidence of an antitrust conspiracy must be viewed as a whole).

C. Summary of evidence showing concerted action

The undisputed evidence in this case is more than sufficient to satisfy the standards for summary judgment and firmly establishes that the Federation and its members acted in concert with a conscious commitment to increase their fees. The conspirators' joint and collaborative action was pervasive in its initiation, execution, and fulfillment of their plan to increase fees for the OB-GYNs. *General Motors Corp.* 384 U.S. at 142-43. As the Supreme Court observed in *Interstate Circuit*, they accepted an invitation to participate in a plan that had the necessary consequence of restraining interstate commerce. 306 U.S. at 227.

At the Federation's first meetings bringing competing OB-GYNs together, the Federation attracted Cincinnati-area OB-GYN members with the prospect of improving their negotiating position versus insurers. PX 22 at FPD-111719. The need for collective action was clear from the outset: The doctors recognized that they needed 60-70% of the area's OB-GYNs to join "in order to have an impact on the insurance companies." PX 16. Soon after these meetings, Ms. Odenkirk established the collective "game plan," or the order in which Federation members would approach the insurers to renegotiate their contracts. PX 26.

Following the game plan, she sequentially circulated to the members her analyses of insurers' contracts, proposed changes to "make the agreement more mutually beneficial," and

provided the members with sample letters to send to the insurer that raised their concerns about fee levels and threatened a boycott. See pp. 10-18, *supra*. Through the Federation's newsletters and a mass e-mail notification system, Ms. Odenkirk informed the conspirators of when they should send their letters to each insurer and provided reminders to ensure that few lagged. Guided by the newsletters and the mass e-mail system, which also informed Federation groups about the negotiating status of other groups, most groups sent substantively identical letters within a few weeks of each other in waves to insurers requesting contract renegotiations. *Id.* Timing and collective action were stressed throughout this process. For example, at the meeting held on September 23, 2002, office managers were told (1) "to respond in a timely manner" to Federation mailings, and (2) to "think of the Federation at all times when dealing with insurance plans." PX 31 at OB/GYN-NKY-261-62 (emphasis in original).

To deal with insurers declining to negotiate with Federation members collectively through Ms. Odenkirk, and also to address the "apprehension and fear . . . that groups [we]re out to make individual deals," the conspirators held a meeting on December 14, 2002. Within hours after the meeting, Dr. Metherd sent an e-mail saying that the meeting "essentially said to us how to proceed." PX 78. As Dr. Metherd noted, they adopted "a strategy" that "c[ould] be undertaken in such a way that no one gets left behind. . . . The key is the organization which we have joined." *Id.*

Implementing the strategy to increase pressure on insurers, Federation members forwarded their Anthem contract proposals to the Federation for review and then mailed the Federation-approved proposals to Anthem "with all groups doing this at pretty much the same time." PX 9. To assure maximum effect on negotiations, Ms. Odenkirk stressed to the members

to "submit your proposal as soon as possible." PX 89; PX 90 at TSWHA-00147. During the process, Ms. Odenkirk drew on her collective knowledge and advised some members on the appropriateness of the fee levels they sought from Anthem. PX 86; PX 87; Odenkirk Dep. 300:25–301:11 (PX 15).

Tracking the approach with Anthem, Ms. Odenkirk herself also "carpet bombed" Humana by sending the insurer nearly 30 substantively identical proposals on behalf of member groups and included each practice's desired fees. See p. 25, *supra.* Ms. Odenkirk's letters to Humana insisted on "a meaningful and productive written response" to each practice within two weeks and notified Humana of each practice's intent to forward the insurer's response to the Federation for "review, interpretation and consultation." *E.g.*, PX 104.

By April 2003, the Federation took credit for its members' success in negotiations, while recognizing the effect of members' collective termination threats: "It appears there would be no discussion taking place if it were not for the Federation. Insurance companies generally do not desire major interruptions to their provider panels because of patient access, choice and continuity of care." PX 10; see PX 144. Into the fall, Ms. Odenkirk continued to advise members on their contract negotiations, and her Alerts to members in fall 2003 directly instructed them en masse on how to negotiate higher fees from insurers then targeted. See pp. 36-38, *supra.*

Viewing the evidence as a whole, as it must be viewed, *In re Flat Glass Antitrust Litig.*, 385 F.3d at 369; *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 655-56, 661-62; *Apex Oil Co.*, 822 F.2d at 255, there can be no genuine dispute that the defendants and their conspirators acted in concert, not independently, to obtain higher fees from insurers. Indeed, with such undisputed record evidence, the Court's analysis need not proceed any further to find a *per se* illegal conspiracy as a matter of law.

D. Factors for inferring a conspiracy

In cases with far less evidence of concerted action, the Sixth Circuit and other courts have used several factors to assist in determining whether defendants have acted in concert or independently. *See, e.g., Nat'l Hockey League Players Ass'n*, 419 F.3d at 475; *Re/Max Int'l, Inc.*, 173 F.3d at 1009; *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995). Although one does not need a weathervane to know which way the wind blows in this case, applying the factors to the evidence here underscores the conclusion that defendants conspired.

In *Re/Max*, the Sixth Circuit listed four factors that could be used to infer a conspiracy: communications, uniform actions, common motive, and actions that forego competition and would be contrary to the conspirators' economic self-interest if taken independently. *Re/Max Int'l, Inc.*, 173 F.3d at 1009. Each of these factors applies in this case and is discussed briefly below, along with one additional factor, concealment.

1. *Communications*: The undisputed evidence of the defendants' many communications requires a finding of conspiracy.

Communications can provide compelling evidence that competitors either did actually enter into an explicit agreement or acted in concert with an understanding or conscious commitment to a common scheme, rather than independently. For example, in *General Motors*, the Supreme Court concluded that a group of dealers acted in concert when they waged a letter-writing campaign to convince General Motors to stop sales to discounters. 384 U.S. at 140-45. *See also Monsanto Co.*, 465 U.S. at 765 (upholding finding of conspiracy based on nature of communications among a manufacturer and its distributors); *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 554 (8th Cir. 1991) (antitrust conspiracy among car dealers that opposed entry of a new competitor was properly supported by the defendants' two meetings, their collective hiring

of an attorney to advise them, their joint funding of a market study, and their sending uniform letters to car manufacturers complaining about the new competitor).

In *Interstate Circuit*, the Supreme Court likewise relied prominently on a single letter broadcast to all conspirators to uphold finding that an antitrust conspiracy existed among eight distributors of movies and two affiliated companies that operated movie theaters. The manager of the two theater companies sent a letter to all eight distributors, listing them all as addressees, and asked them to comply with two new conditions aimed at limiting competition from second-run theaters. *Interstate Circuit*, 306 U.S. at 216-17. The Supreme Court agreed with the trial court that a conspiracy could be inferred from the "nature of the proposals" made in the letter, the "substantial unanimity of action" by the distributors after the letter, and the fact that the distributors failed to call as witnesses any of the people who negotiated contracts between the distributors and the two companies that ran the theaters. *Id.* at 221; *see also Brown*, 518 U.S. at 241 (citing *Interstate Circuit* with approval); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000) (upholding the FTC's theory as "a modern equivalent of the old *Interstate Circuit* decision"); *James R. Snyder Co.*, 677 F.2d at 1121-22 (quoting *Interstate Circuit*'s standard for finding concerted action without an explicit agreement).

The evidence in this case, far more than in either *Interstate Circuit* or *General Motors,* leaves no genuine dispute that the defendants acted in concert. The communications here include many meetings, mass Federation Alerts, and e-mails among members, and the content of those communications was aimed at orchestrating the members' negotiations with the insurers. The communications dealt with the illegal objective of the conspiracy and were of the essence in facilitating concerted action.

2. *Foregoing competition*: The Federation members' undisputed efforts to avoid "individual deals" that would have hurt other members demonstrates they were acting in concert.

In general, after a cartel has raised prices, there is always the risk that one member of the cartel will "cheat" on the cartel, sell below the cartel price, and increase its sales volume. As Judge Posner has explained, "a precondition to effective collusion" is that the participants "overcome the temptation to steal a march on a fellow colluder by undercutting him slightly." *Hospital Corp. of America*, 807 F.2d at 1388.

In this case, the OB-GYN conspirators similarly overcame small groups' persistent worries that large groups would negotiate "individual deals" at the small groups' expense. For example, at the meeting on December 14, 2002, the members discussed that different groups would negotiate different terms with local payers, but "the OBG community, overall, was maintaining its cohesion." PX 77; PX 76 at OB-GYN-NKY-218. In describing the results of the meeting, Dr. Metherd allayed a sole practitioner's concerns about the large groups cheating with the reassurance that the agreed upon "strategy c[ould] be undertaken in such a way that no one gets left behind (remember, I too am a small player)." PX 78.

Ms. Odenkirk also addressed the problem. In an e-mail on January 21, 2003, she wrote to one member: "Just keep in mind, just because some groups are meeting with Anthem doesn't necessarily mean that those groups are going to pit against you. Of course that's what Anthem would have you believe." PX 102. See also Odenkirk Dep. 327:3-7 (PX 15).

Tensions nevertheless continued. On April 1, 2003, Dr. Metherd wrote to Jack Seddon and Ms. Odenkirk, "It is becoming extremely important to somehow inform the smaller groups and solo practitioners that the large groups are not achieving favorable contracts at the expense of

the small groups." PX 204; see also Metherd Dep. 214:7–215:18 (PX 14). Dr. Metherd returned to this point when he e-mailed Ms. Odenkirk a few weeks later: "Since you know what everyone is getting we need you to make sure that the small groups are pushing to end up in reasonable proximity (5% for example) to the larger groups in regards to reimbursements." PX 205; Metherd Dep. 223:2–224:3 (PX 14); see also PX 182; PX 206; PX 207.

The endorsement campaign underscored the tensions between small and large groups, and the Federation's success at overcoming those tensions. When one member expressed concern that only Anthem was receiving an endorsement, even though United and Humana-Choice Care had increased their fees, Dr. Metherd reminded him that only Anthem had provided fee increases for all members: "They have to get ALL the members up to the new market level as set by Anthem . . . which Choice Care definitely is refusing to do." PX 208. *See also* PX 174. Moreover, even after Drs. Karram and Wendel's groups obtained higher fees from Humana, those two doctors continued to pressure Humana on behalf of other groups, saying that it could obtain an endorsement from Federation members only if it paid all Federation members at acceptable levels. *Id.*

3. *Uniform actions*: More than 120 doctors in over 40 practices acting in unison, over a year, to target sequentially six separate insurers requires a conclusion that they could not be acting independently.

The mere fact that so many participants repeatedly acted in the same manner, despite their incentives to break ranks, strongly suggests that they had a conscious commitment to a common scheme. Ordinarily, coordination becomes more difficult as the number of participants who must act in concert increases and opportunities for breaking ranks from the cartel increase. For these reasons, courts conclude: "Generally speaking, the possibility of anticompetitive collusive

practices is most realistic in concentrated industries." *Todd v. Exxon Corp.*, 275 F.3d 191, 208 (2d Cir. 2001).

But there are ways to overcome the difficulties of coordinating large numbers of conspirators. *Id.* For example, communication among the conspirators–or relying on an agent to coordinate the conspirators–can permit successful concerted action even among many players. *Cf. In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 655 ("almost any market can be cartelized if the law permits sellers to establish formal, overt mechanisms for colluding, such as exclusive sales agencies."). Indeed, when the market facts make collusion more difficult, or the number of participants is large, evidence that the defendants have acted uniformly in a noncompetitive way increases the strength of the inference that a conspiracy exists.

In this case, the uniform actions arise against a background where the doctors understood that they needed a substantial majority of the physicians to make the Federation effective in dealing with insurers. The Federation then held together approximately 40 practices, covering a total of about 120 OB-GYNs around Cincinnati, through detailed concerted action for over a year, targeted in sequence up to six separate insurers through substantively identical waves of detailed communications, and intensified their demands to exert pressure at critical junctures during negotiations.

Those acts cannot have occurred coincidentally through independent actions, even if one were not to consider the many incriminating communications in the record. The sheer difficulty of orchestrating that many conspirators, for that length of time, against six insurers in sequence with substantively identical communications, requires a finding that the Federation organized and facilitated an "understanding" or a "conscious commitment to a common scheme" among Federation members to increase their fees.

4. *Common motive*: Concerted action to raise prices is highly profitable, creating a strong motive to engage in concerted conduct.

The strength of the motive to conspire of course depends in part on the plausibility of the conspiracy and its likely profitability. When the goal of the conspiracy is less obviously plausible and profitable, courts require greater evidence of concerted action to compensate. *Matsushita Elec. Indus.*, 475 U.S. at 596-97; *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 661.

Price-fixing and boycotts among competitors to increase prices, however, are both plausible and profitable, as this case, *Trial Lawyers*, and countless criminal antitrust prosecutions show. *E.g., United States v. Alston, supra.* As the Sixth Circuit has observed, there is "nothing implausible or unlikely" about an attempt by competitors to "set[] prices at an artificially high level." *Ezzo's Invs., Inc.*, 94 F.3d at 1036.

5. *Concealment*: Undisputed facts show the defendants tried to conceal their objectives, which reinforces other evidence that a conspiracy existed.

Courts routinely rely on evidence that the defendants tried to conceal their activities to support a finding of a conspiracy. *See, e.g., United States v. Okayfor*, 996 F.2d 116, 120 (6th Cir. 1993) (efforts at concealment, like using fake IDs or aliases, show consciousness of guilt and participation in a conspiracy); *United States v. Zichettello*, 208 F.3d 72, 105 (2d Cir. 2000) (a defendant's "strong intentions to conceal the scheme, evidencing consciousness of guilt regarding the agreement to make quarterly payments . . . supported the jury's finding that [he] was a member of the conspiracy"). *Cf. United States v. Andreas*, 216 F.3d 646, 653 (7th Cir. 2000) (antitrust defendants created fake agendas for meetings and a fictitious trade association to conceal the true purpose of meetings that were part of an illegal market-allocation scheme).

In this case, the conspirators tried to conceal their intentions and were conscious of their wrongdoing, from the inception of the conspiracy to its end. After the Federation organizational meeting on June 10, 2002, Dr. Metherd summarized discussions at the meeting to use in a newsletter to send to all members and answered a question about how the Federation could "wield . . . power over negotiations and reimbursements." PX 209 at M-0239. In a draft, Dr. Metherd paraphrased, as accurately as he could, Mr. Seddon's answers to a list of questions that he received at the meeting. PX 209; Metherd Dep. 25:7–27:7, 32:17–33:14 (PX 14). Ms. Odenkirk responded to Dr. Metherd's draft by emphasizing that they could not put in writing what he had written: "I understand how you really want to include those things you mentioned, but we just can NOT have anything, especially in writing, that would suggest, or give anyone the reason to think, there was collusion, which is exactly what can be perceived from what you want in the newsletter." PX 210 (capitalization in original); see PX 211. Throughout the conspiracy, Ms. Odenkirk continued to instruct on "being careful not to give ANY appearance of any type of coordinated activity." PX 176 (capitalization in original).

Nevertheless, throughout the conspiracy, Federation members did put their intentions in writing, while at the same time stressing that those communications should be destroyed. When Dr. Metherd sent an OB-GYN in Dayton, Dr. Thesing, a forensically recovered e-mail describing the rate increases that the Federation had been able to achieve in Cincinnati, Dr. Metherd added, "You may pass this information along to your colleagues, however, please don't do so in writing and please delete my name as well as this e-mail." PX 212; Metherd Dep. 232:3–233:2 (PX 14). Dr. Thesing's congratulatory reply reassured Metherd that "your news has been destroyed as in Mission Impossible!" PX 212.

Federation members also demonstrated a consciousness of wrongdoing and concealment of collusion at and following the meeting on December 14, 2002 where there was "discussion of extremely sensitive issues" limited to Federation members and their office staff. PX 74. At that meeting, Federation members settled on their strategy for responding to insurers that refused to bargain through the Federation. PX 78. Soon after the meeting, Dr. Straubing congratulated Dr. Metherd, "You did a great job in chairing the meeting and getting a consensus without an actual vote." PX 79. Dr. Metherd echoed these points in his own e-mail reflecting on the meeting: "For obvious reasons, no vote or written survey can be undertaken." PX 78. Just days after the meeting, Dr. Karram e-mailed Dr. Metherd and said that he thought they would have to terminate an insurer to "show everyone we are serious and that we do have the numbers." PX 9. But he agreed that they should hold off "a little longer so [they] can't accuse us of colluding." *Id.*

Dr. Metherd's attempt to delete files from his own computer provides another illustration. Several of the e-mails cited in this brief were erased by Dr. Metherd and recovered by the United States only through computer forensic techniques. PX 213.

Application of the factors to the evidence conclusively demonstrates that the defendants were not acting independently and requires a conclusion of concerted action as a matter of law on this record.

E. Interstate commerce is admitted

The defendants' answers to the complaint admit that the Sherman Act's interstate-commerce requirement is satisfied in this case. Dkt. Entry 1, 21, 23 ¶ 12. Admissions in a defendant's responsive pleading are binding. *See, e.g., Crest Hill Land Development, LLC v. City of Joliet*, 396 F.3d 801, 805 (7th Cir. 2005) (affirming summary judgment against party and relying on its "binding judicial admission in its answer").

IV. Conclusion

For the foregoing reasons, the United States' motion for partial summary judgment of liability as a matter of law against defendants Lynda Odenkirk and the Federation of Physicians and Dentists should be granted. The United States is prepared to address appropriate relief in a separate briefing.

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Respectfully submitted,

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