

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 1:05-cv-431
vs.	)	
	)	Hon. Sandra S. Beckwith, C.J.
FEDERATION OF PHYSICIANS AND	)	
DENTISTS, <i>et al.</i> ,	)	Hon. Timothy S. Hogan, M.J.
	)	
Defendants.	)	

**Rule 26(f) Report Submitted by Plaintiff United States and  
Defendants Federation of Physicians and Dentists and Lynda Odenkirk**

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on August 19, 2005, and was attended by:

Counsel for Plaintiff: Steven Kramer and John Lohrer

Counsel for Defendants Federation of Physicians and Dentists (“FPD”) and Lynda

Odenkirk (“Odenkirk”): Kimberly L. King

2. The parties:

\_\_\_ have exchanged the discovery disclosures required by Rule 26(a)(1);

X will exchange such disclosures by September 2, 2005;

\_\_\_ are exempt from disclosure under Rule 26(a)(1)(E); and/or

\_\_\_ have agreed not to make initial disclosures.

3. The parties:

unanimously consent to the jurisdiction of, and entry of judgment by, the United States Magistrate Judge pursuant to 28 USC 636(c); and/or

do not unanimously consent to the jurisdiction of and entry of judgment by the United States Magistrate Judge pursuant to 28 USC 636(c)

4. Recommended cut-off date for filing any motion to amend the pleadings and/or to add additional parties:

December 29, 2005

5. Is the case appropriate for mediation after a limited discovery period?

Possibly

Will the parties request the services of a court mediator?

No

Has a settlement demand been made?

Yes. Before filing the Complaint, Plaintiff made an oral settlement offer to counsel then representing the Federation, who did not respond to the offer. Since the Complaint was filed, Plaintiff has outlined terms on which it would enter into settlement discussions with Defendants Federation and Odenkirk. Defendants Federation and Odenkirk have not yet had access to the testimony and documents Plaintiff gathered from other persons pursuant to Plaintiff's pre-Complaint civil investigative demands. Most or all of those materials are to be produced by Plaintiff in response to Defendants' upcoming Rule 34 request, subject to a protective order the parties have filed with the Court for entry. Said Defendants

have advised Plaintiff that they will review and evaluate those materials upon receipt and will present a settlement proposal to Plaintiff within two weeks after receipt.

Date by which a settlement demand can be made?

Not applicable. Terms of settlement have been outlined by Plaintiff to Defendants.

Date by which a response can be made to settlement demand?

Defendants FPD and Odenkirk have advised Plaintiff that they plan to present a settlement proposal to Plaintiff within two weeks after receipt from Plaintiff of Plaintiff's Rule 34 production.

6. Recommended Discovery Plan:

a. Describe the subjects on which discovery is to be sought and the nature and extent of discovery that each party needs to: (1) make a settlement evaluation, (2) prepare for case dispositive motions, and (3) prepare for trial:

(1) Plaintiff does not need any discovery to make a settlement evaluation.

Defendants do not need any discovery (other than Plaintiff's Rule 34 production) to make a settlement evaluation.

(2) Plaintiff aims to file a motion for summary judgment by mid-November, 2005, and does not expect that it will need any significant discovery to prepare for the motion. At this point in time, Defendants expect that they may need to take a few depositions in order to prepare the case for dispositive motions.

(3) To prepare for trial, Plaintiff expects to conduct limited discovery from the Federation, some medical group members, and perhaps some health care insurers to help support its allegations of anticompetitive purpose and concerted action. Such discovery would consist primarily of five to ten depositions and likely include some interrogatories and requests for admission. Defendants expect to conduct discovery of representatives of the health care insurers and physicians identified in the Complaint, and select other persons who provided information upon which Plaintiff based its Complaint. At this point in time, Defendants are not able to evaluate the number of depositions or other discovery activities that will be necessary in order to prepare its defense.

b. What changes should be made, if any, in the limitations on discovery imposed under the Fed. R. Civ. P. or the S.D. Ohio Civ. Rules, including the limitations to twenty-five (25) interrogatories, forty (40) requests for admissions, and the limitation of ten (10) depositions, each lasting no more than one seven-hour day?

Plaintiff requests three changes in the limitations on discovery to prepare for trial: First, that it be allowed to take a deposition of any person on Defendants' witness list, who has not been previously deposed in this action, even if the resulting total number of depositions taken would exceed the ten (10) depositions that Plaintiff may take to support its case involving an alleged conspiracy covering numerous participants. Second, Plaintiff seeks to be able to depose persons solely to establish a foundation for admission of evidence, if necessary, without such depositions counting against the limitation on the number

of depositions. Third, Plaintiff requests the Court's permission to conduct Defendant Odenkirk's deposition in this action for up to ten (10) hours over two non-consecutive days if needed. Under this arrangement, Plaintiff stipulates that Ms. Odenkirk's deposition will be taken in a city or cities designated by Ms. Odenkirk, which may include Tallahassee, Florida. Defendants do not object to these requests.

Defendants FPD and Odenkirk request that the limitations on discovery imposed under the Fed. R. Civ. P. or the S.D. Ohio Civ. Rules, including the limitations to twenty-five (25) interrogatories, forty (40) requests for admissions, and the limitation of ten (10) depositions, apply to each Defendant separately, so that, for example, FPD be allowed to take ten (10) depositions and Odenkirk be allowed to take an additional ten (10) depositions. Defendants further request that they be allowed to take a deposition of any person on Plaintiff's witness list, who has not been previously deposed in this action, even if the resulting total number of depositions taken would exceed the twenty (20) depositions that Defendants may take. Defendants further request that all Rule 30(b)(6) witnesses produced by a single entity, such as a health insurer, count as but one deposition (for up to seven hours on the record) for purposes of these limitations. Under this arrangement, Defendants have agreed that with respect to the written discovery (interrogatories and requests for admission) Plaintiff should also have the ability to propound a total of fifty (50) interrogatories and eighty (80) requests for admission. Plaintiff does not seek to enlarge the number of deposition it may take

other than in the stipulated manner described in the preceding paragraph.

c. Additional recommended limitations on expansions of discovery:

None.

d. Describe the areas for which expert testimony is expected and indicate whether each expert will be specifically retained within the meaning of Fed. R. Civ. P. 26(a)(2):

Plaintiff seeks to reserve the option to call an expert, retained within the meaning of Fed. R. Civ. P. 26(a)(2), who would explain that the alleged conspiracy involves concerted, rather than individual, action. Defendant seeks to reserve the option to call one or more experts retained within the meaning of Fed. R. Civ. P. 26(a)(2), who would explain aspects of health care economics, including the behavior of health care insurers in procuring health care goods and services, and rebut any expert testimony offered by Plaintiff.

e. Recommended date for identifying primary experts:

February 1, 2006

f. Recommended date for producing primary expert reports:

February 28, 2006

g. Recommended date for identifying rebuttal experts:

March 17, 2006

h. Recommended date for producing rebuttal expert reports:

March 31, 2006

I. Recommended discovery cut-off date:

April 14, 2006

j. Recommended date for disclosure of all other case-in-chief witnesses:

March 10, 2006

7. Recommended dispositive motion deadline:

January 12, 2006

8. Recommended date for final pretrial conference:

May 12, 2006

9. Recommended date for trial:

June 12, 2006

10. Other matters for the attention of the Court:

- a. Defendants Warren Metherd, Michael Karram, and James Wendel (the “Settling Defendants”) have entered into Plaintiffs’ Stipulation with Settling Physician Defendants (Dkt. 4), consenting to the entry of a Final Judgment in the form attached to the stipulation (Dkt. 6), which will settle all claims against the Settling Defendants. In accordance with the Antitrust Procedures and Penalties Act, the United States will file a motion for entry of the Final Judgment once the requirements of the Act have been met. The United States anticipates filing this motion during October 2005. In this circumstance, all parties agree the Settling Defendants need not participate in this Rule 26(f) conference and need not provide Rule 26(a) disclosures.
- b. To assist the Court in docketing this action for trial, the parties advise the Court that they currently estimate that each side (plaintiff and the two Defendants combined) would each

need one week to present their respective cases, for a total estimated trial length of two weeks.

September 1, 2005

Respectfully submitted,

/s/ Gerald Francis Kaminski  
Gerald Francis Kaminski (0012532)

Assistant U. S. Attorney  
Atrium II  
221 East Fourth Street, Suite 400  
Cincinnati, Ohio 45202  
(513) 684-3711

/s/ Steven Kramer  
Steven Kramer  
John Lohrer  
Paul Torzilli

Antitrust Division  
U.S. Department of Justice  
1401 H Street, N.W., Suite 4000  
Washington, D.C. 20530  
(202) 514-8349  
(202) 307-5802 (Fax)  
[paul.torzilli@usdoj.gov](mailto:paul.torzilli@usdoj.gov)

**Attorneys for Plaintiff United States**

/s/ Donald J. Mooney, Jr.  
Donald J. Mooney, Jr. (0014202)

ULMER & BERNE LLP  
600 Vine Street, Suite 2800  
Cincinnati, Ohio 45202  
(513) 698-5070  
(513) 698-5071 (Fax)  
[dmooney@ulmer.com](mailto:dmooney@ulmer.com)

/s/ Kimberly L. King  
Kimberly L. King

Hayward & Grant, P.A.  
2121-G Killarney Way  
Tallahassee, FL 32309  
(850) 386-4400  
(850) 205-4501 (Fax)  
[kking@kkinglaw.com](mailto:kking@kkinglaw.com)

**Attorneys for Defendants Federation  
of Physicians and Dentists  
and Lynda Odenkirk**



**CERTIFICATE OF SERVICE**

I hereby certify that on September 1, 2005, I electronically filed the foregoing Rule 26(f) Report Submitted by Plaintiff United States and Defendants Federation of Physicians and Dentists and Lynda Odenkirk with the Clerk of the Court using CM/ECF system which will send notification of such filing to G. Jack Donson, Esq. (Attorney for Defendant Dr. Michael Karram), and Donald J. Mooney, Jr., Esq. (Attorney for Defendant Federation of Physicians and Dentists, and Defendant Lynda Odenkirk). I further certify that I have caused the document to be sent via first-class United States Mail, postage prepaid, to the following non-CM/ECF participants:

Michael E. DeFrank, Esq.  
Scott R. Thomas, Esq.  
Hemmer Pangburn DeFrank PLLC  
Suite 200  
250 Grandview Drive  
Fort Mitchell, KY 41017  
Trial Attorneys for Defendant Dr. James Wendel

Jeffrey M. Johnston, Esq.  
37 North Orange Avenue  
Suite 500  
Orlando, FL 32801  
Attorney for Defendant Dr. Warren Metherd

Kimberly L. King  
Hayward & Grant, P.A.  
2121-G Killarney Way  
Tallahassee, FL 32309  
Attorney for Defendant Federation of Physicians and Dentists  
Attorney for Defendant Lynda Odenkirk

s/ Paul Torzilli  
Paul Torzilli  
Attorney for the United States of America  
United States Department of Justice  
Antitrust Division  
1401 H Street, NW, Suite 4000  
Washington, DC 20530  
Phone: 202-514-8349  
Fax: 202-307-5802  
E-Mail: paul.torzilli@usdoj.gov