UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and STATE OF MICHIGAN, *Plaintiffs,* v. HILLSDALE COMMUNITY HEALTH CENTER, W.A. FOOTE MEMORIAL HOSPITAL, D/B/A ALLEGIANCE HEALTH, COMMUNITY HEALTH CENTER OF BRANCH COUNTY, and PROMEDICA HEALTH SYSTEM, INC., *Defendants.*	Case No.: 5:15-cv-12311-JEL-DRG Judge Judith E. Levy Magistrate Judge David R. Grand

REPLY BRIEF IN SUPPORT OF PLAINTIFF UNITED STATES' MOTION FOR ENTRY OF THE PROPOSED FINAL JUDGMENT AND IN OPPOSITION TO ALLEGIANCE'S REQUEST THAT THE COURT IMPOSE DISCOVERY CONDITIONS

Allegiance does not oppose the Court immediately entering the proposed Final Judgment for Settling Defendants Hillsdale Community Health Center, Community Health Center of Branch County, and ProMedica Health System, Inc. Allegiance Br. (Dkt. No. 31) at 3, 9. The Court should enter the Final Judgment because doing so will promote judicial efficiency and benefit consumers by fully implementing the terms of the Final Judgment. *See* United States Mot. (Dkt. No.

29) at 5-10.

Allegiance requests that the Court order that the Settling Defendants be treated as parties for discovery purposes even after the Court enters the proposed Final Judgment. But the Court should not impose such an order because Allegiance has not articulated what discovery it needs that it could not obtain if the Settling Defendants are non-parties. Allegiance will be able to obtain the discovery it needs through Fed. R. Civ. P. 45 subpoenas to the Settling Defendants. Finally, treating the Settling Defendants as parties would deprive them of achieving important benefits from settling, namely, having full dismissal from the case and avoiding litigation costs. For these reasons, the United States requests that the Court enter the proposed Final Judgment and not impose discovery conditions on the Settling Defendants.

I. The Court should enter the proposed Final Judgment because it is in the public interest, no party opposes its entry, and the equities under Rule 54(b) warrant entry

Allegiance itself states that it "does not object to its co-defendants settling Plaintiffs' claims" and that it "did not oppose Plaintiffs' motion" to enter the proposed Final Judgment for any reason. Allegiance Br. (Dkt. No. 31) at 3.

As discussed in more detail in the United States' Motion (Dkt. No. 29), the Court should find that the proposed Final Judgment is in the public interest under

the Tunney Act, 15 U.S.C. § 16(e). No party or member of the public objected to the Final Judgment during the comment period.

Allegiance now asserts that the Court has the authority to require the United States to modify the Final Judgment under the Tunney Act. Allegiance Br. (Dkt. No. 31) at 8-9. But the Tunney Act does not give the Court this authority. Rather, the Court can only decide to reject the Final Judgment based on its consideration of whether the Final Judgment is in the public interest. *See, e.g., United States v. InBev N.V./S.A.*, No. 08-cv-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (court review of a final judgment under the Tunney Act is limited to "whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

The Court should consider Allegiance's discovery argument not in a vacuum, as Allegiance suggests, but as an assessment of the equities under Rule 54(b) that weighs the considerable benefits that come from entering the Final Judgment. A weighing of the equities under Rule 54(b) shows that there is no just reason for delaying entry of the Final Judgment. *See Curtiss-Wright Corp. v. Gen'l Elec. Co.*, 446 U.S. 1, 8 (1980) (Rule 54(b) requires that the Court consider "judicial administrative interests and the equities involved" in deciding whether to enter a Final Judgment that applies only to some of the parties in an action.). No

harm would come from entering the Final Judgment because Allegiance would be able to secure the discovery that it needs using the non-party discovery provisions of Fed. R. Civ. P. 45. And entering the Final Judgment would be beneficial in numerous ways.

Entering the Final Judgment would fully implement relief that would benefit patients, physicians, and employers in the hospitals' service areas. This relief includes the appointment of an antitrust compliance officer, who will help ensure that the Settling Defendants do not re-enter illegal agreements. Entering the proposed Final Judgment would also enhance judicial efficiency by promoting settlement. Finally, it would provide the Settling Defendants with the benefit of their bargains. *See United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 643 (S.D.N.Y. 2012) ("Settling Defendants have elected to settle this dispute and save themselves the expense of engaging in discovery. They are entitled to the benefits of that choice and the certainty of a final judgment."); *United States v. Bristol-Myers Co.*, 82 F.R.D. 655, 662 (D.D.C. 1979) ("The objections raised by Bristol [the litigating defendant] on its own behalf certainly do not warrant depriving the people (or Beecham [the settling defendant]) of the benefit of this bargain.").

II. The Court should not order that the Settling Defendants be treated as parties for discovery purposes

Allegiance requests that the Court require that all Settling Defendants be

"treated as parties for discovery purposes for the remainder of the discovery period." Allegiance Br. (Dkt. No. 31) at 2. But Allegiance does not cite a single case holding that a court has the power to make entry of the final judgment conditional on requiring the settling parties to be treated as parties in discovery. As one judge in the Eastern District of Michigan explained in a case Allegiance cites, "non-parties who were originally parties—for example, a defaulting defendant—is nonetheless still treated as a non-party" for discovery purposes. *Harco Nat'l Ins. Co. v. Sleegers Eng'g, Inc.*, No. 06-cv-11314, 2014 U.S. Dist. LEXIS 150201, at *10 (E.D. Mich. Oct. 22, 2014). Furthermore, Rule 41(a) governs voluntary dismissals, and thus neither Rule 41(a) nor cases interpreting it provide authority for the Court to condition entry of the final judgment here. Rather, Rule 54(b) applies because it directly governs the determination of whether to dismiss settling defendants.

Allegiance says that it will be disadvantaged in discovery unless the Settling Defendants are treated as parties for discovery purposes. But Allegiance has not articulated what discovery it needs that it would not be able to obtain if the Settling Defendants are treated as normal dismissed parties, *i.e.*, non-parties for all purposes including discovery. Allegiance will be able to obtain the discovery it needs through Fed. R. Civ. P. 45 subpoenas to Settling Defendants, including document requests and depositions of the Settling Defendants' employees.

Additionally, in response to its discovery requests on Plaintiffs, Allegiance will receive all relevant unprivileged documents and transcripts that Plaintiffs received during the pre-complaint investigation, and any materials provided to Plaintiffs under the cooperation provisions of the Final Judgment.

Finally, the Settling Defendants should not be treated as parties for discovery purposes because doing so would deprive them of full dismissal from the case and the ability to avoid litigation costs. These are important benefits that encourage parties to settle claims and that promote judicial efficiency. Depriving Settling Defendants of this result could reduce the incentive for parties to reach settlements in the future.

For the reasons set forth in the United States' Motion (Dkt. 29) and in this Reply, Plaintiffs request that the Court enter the Final Judgment now, without conditions.

Dated: October 16, 2015 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 5:15-cv-12311-JEL-DRG, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants.

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