UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and STATE OF MICHIGAN,

Plaintiffs,

v.

W.A. FOOTE MEMORIAL HOSPITAL, D/B/A ALLEGIANCE HEALTH,

Defendant.

Case No.: 5:15-cv-12311-JEL-DRG
Judge Judith E. Levy
Magistrate Judge David R. Grand

Plaintiffs' Response to July 20, 2017, Order Requiring Parties to Submit Supplemental Briefing

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Statement of Issues

I. Is there a live case or controversy before this Court?

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Cases

Other Authorities

* Denotes controlling or most appropriate authority for relief sought. LR 7.1(d)(2).

This Court requested briefing regarding whether there remains a live case or controversy before it. The answer to that question is yes. HCHC's decision to end its agreement with Allegiance does not deprive this Court of jurisdiction, and this Court still may grant effective relief against Allegiance. Moreover, extending the reach of the mootness doctrine to cases like this one would have serious negative policy consequences, including encouraging defendants to hold out from settling.

I. Allegiance's Conduct is Ongoing, but Even if it Were Not, Cessation of Unlawful Conduct Prior to Final Judgment Does Not Moot a Case

Plaintiffs recognize that HCHC has agreed to cease any conduct pursuant to the particular agreement with Allegiance alleged in the Complaint. At no point in this litigation, however, has Allegiance claimed that it has altered its behavior that resulted from that agreement; that is, at no point has Allegiance claimed to have modified its marketing in Hillsdale County to compete with HCHC and its affiliated physicians. To the contrary, after HCHC settled this case, thereby ending its agreement with Allegiance, Allegiance's CEO confirmed that "[i]t continues to be our strategy" to avoid marketing competing services in Hillsdale County in certain ways.[1] But even if Allegiance were to claim to have voluntarily ceased its anticompetitive conduct, this would not moot the case.[2]

[1] Ex. A, Fojtasek Dep. (Sept. 20, 2016) at 87:8-23.
[2] *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

A. Allegiance's Agreement with HCHC Continues to Affect Competition

Allegiance's discussions about its marketing with its direct competitor were pervasive and long-lasting, with at least five of its marketing or senior level employees regularly communicating with HCHC's CEO.[3] In the at least six years during which these discussions occurred, Allegiance developed an understanding of the limitations on Allegiance's marketing that HCHC wanted.[4] Without a judgment against it, Allegiance could use this understanding to extend the effects of the arrangement and to continue to limit competition in Hillsdale County.[5]

HCHC's consent decree does not terminate any continuing effect of Allegiance's conduct, and this Court has the authority to issue injunctive relief to counteract the lingering effects of the agreement.[6] Indeed, to conclude that it lacks jurisdiction, this Court would need to find that Allegiance's prior conduct has "no 'demonstrable continuing effect.'"[7] The question is not whether Allegiance (or

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[3] *See, e.g.*, Pls.' Mot. Summ. J. Exs. F-1, F-2, F-3 (ECF No. 73-7 to -9), O-3, O-4, O-9, O-10, O-11, O-16, O-17, O-18 (ECF No. 99-10).
[4] *See, e.g.*, Ex. B, Fojtasek Dep. (Dec. 12, 2014) at 311:24-312:9 ("I have a long history with Hillsdale. I know what our strategy is, and I don't – I don't need to go find out the specifics.").
[5] *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1175 (6th Cir. 1978) (approving injunctive relief because "the effects of Rubbermaid's illegal agreements . . . may tend to be perpetuated in practice unless affirmative measures are taken to eradicate them").
[6] *See, e.g., United States v. U.S. Gypsum Co.*, 340 U.S. 76, 88-89 (1950).
[7] *Sherwood v. Tenn. Valley Auth.*, 842 F.3d 400, 405 (6th Cir. 2016).

HCHC) has "formally abandoned" the conduct, but whether it has taken steps to "revert[] back" to lawful practices.[8] Here, even though it was the agreement that made Allegiance's conduct unlawful, relief in an antitrust case may include enjoining "[a]cts entirely proper when viewed alone," because conspirators must "be denied future benefits from their forbidden conduct."[9] Thus, the technical end of the Allegiance-HCHC agreement does not moot this action.

B. If Not Enjoined, Allegiance is Likely to Engage in Anticompetitive Behavior Again

In addition to finding no continuing effect of Allegiance's unlawful conduct, the Court would need to find that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" before this case could be dismissed as moot.[10] As the Supreme Court has recognized, when a defendant "continues to defend the legality" of its conduct, a case should not be dismissed as moot because "it is not clear why the [defendant] would necessarily refrain from [similar conduct] in the future."[11]

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[8] *Id.*
[9] *U.S. Gypsum Co.*, 340 U.S. at 89-90.
[10] *See Friends of the Earth*, 528 U.S. at 189-90.
[11] *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-08 (2012); *see also Walling v. Helmerich & Payne*, 323 U.S. 37, 42-43 (1944) (refusing to allow voluntary cessation to moot case because "Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made").

Allegiance has not committed to changing its conduct. To the contrary, Allegiance repeatedly has asserted that it has done nothing wrong and that its conduct is a central part of its strategic vision.[12] Allegiance's long history of conspiring with HCHC, combined with its refusal to acknowledge the illegality of its conduct, makes it more likely that Allegiance will repeat the conduct[13]—either with HCHC or others.[14] Because there is a significant likelihood that Allegiance will repeat its unlawful conduct if not enjoined by this Court, the case is not moot.

C. *Zynda* and *Warrior Sports* Do Not Deprive this Court of Subject Matter Jurisdiction

The continuing effects of Allegiance's agreement make this case similar to *Zynda*, where the court found that it had jurisdiction because a plaintiff was "presently feeling the impact" of the alleged conduct.[15] *Zynda* also recognizes that the likelihood that Allegiance will repeat its unlawful conduct is an independent

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[12] *See, e.g.*, Allegiance's Answer (ECF No. 24), at 2; Allegiance's Mot. Summ. J. (ECF No. 68), at 1.

[13] *See Armster v. U.S. Dist. Court for Cent. Dist. of Cal.*, 806 F.2d 1347, 1359 (9th Cir. 1986) ("It has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct.").

[14] *See, e.g.*, Pls.' Mot. Summ. J. Ex. O-14 (ECF No. 99-10) ("High level discussions with potential partners in Coldwater and Marshall prohibit marketing activities in these communities."); *see also TRW, Inc. v. FTC*, 647 F.2d 942, 953 (9th Cir. 1981) (noting that when determining whether a case is moot, "the concern is with repeated violations of the same law, and not merely with repetition of the same offensive conduct" (internal quotations and citation omitted)).

[15] *Zynda v. Arwood*, 175 F. Supp. 3d 791, 803 (E.D. Mich. 2016).

basis for jurisdiction.[16] Additionally, unlike in *Warrior Sports*, Plaintiffs are not asking this Court "to render an opinion advising what the law would be upon a hypothetical state of facts."[17] Plaintiffs have not brought a claim requiring jurisdiction under the Declaratory Judgment Act. Instead, this Court has jurisdiction to determine whether Allegiance's conduct violates the antitrust laws, and has the authority to grant relief, even if the illegal conduct has ceased.[18]

II. Plaintiffs' Claims Against Allegiance Continue to Present a Live Case or Controversy Because this Court May Still Grant Effective Relief

A case ceases to present a live controversy and becomes moot only when it is "impossible for the court to grant any effectual relief whatever."[19] As this Court noted, Plaintiffs already have obtained relief that should effectively end the particular agreement between Allegiance and HCHC alleged in the Complaint. But relief in an antitrust case is often broader than ending or prohibiting the agreement alleged in the complaint.[20] Instead, injunctive relief in an antitrust case

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[16] *Id.* at 806 (requiring "ongoing harm or real and immediate threat of repeated injury" for injunctive relief).
[17] *Warrior Sports, Inc. v. STX, L.L.C.*, 596 F. Supp. 2d 1070, 1077 (E.D. Mich. 2009).
[18] *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).
[19] *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 458 (6th Cir. 2004) (noting that the "heavy burden" of demonstrating mootness requires showing that "no effective relief for the alleged violation can be given").
[20] *See W.T. Grant Co.*, 345 U.S. at 633 ("[T]he court's power to grant injunctive relief survives discontinuance of the illegal conduct."); *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988) ("The fact that the alleged violation has itself ceased is not sufficient to render a case moot.").

is intended to "unfetter a market from anticompetitive conduct,"[21] and to "pry open to competition a market that has been closed by defendants' illegal restraints."[22] Once the court finds illegal conduct, it has "the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance."[23]

Here, the consent decree entered against HCHC does not provide critical components of the relief that Plaintiffs seek against Allegiance. The precise scope of this relief will depend on the antitrust violation proven at trial, but there is no doubt that this Court has the power to grant an injunction that provides effective relief beyond what is already covered by the consent decree with HCHC.

A. This Court May Issue an Injunction Against Allegiance that Expands Beyond the Relief Provided by HCHC's Consent Decree

The imposition of an effective corporate antitrust compliance program, including the appointment of an independent compliance officer, is one example of relief against Allegiance that HCHC's consent decree does not address.[24] This

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[21] *Ford Motor Co. v. United States*, 405 U.S. 562, 577-78 (1972).
[22] *Int'l Salt Co. v. United States*, 332 U.S. 392, 401 (1947).
[23] *U.S. Gypsum Co.*, 340 U.S. at 88-89.
[24] *See United States v. Apple, Inc.*, 2015 WL 5970345, at *1 (S.D.N.Y. Oct. 13, 2015) (describing scope of antitrust compliance program imposed on Apple following finding of antitrust liability); Ex. C, Sentencing Tr. (ECF No. 963), *United States v. AU Optronics Corp.*, No. 09-cr-110 (N.D. Cal. Sept. 21, 2012) (imposing compliance program, including the appointment of an independent monitor, despite defendant's voluntary development of internal compliance program).

relief is particularly important as to Allegiance, which is the most recalcitrant of the defendants and continues to maintain the lawfulness of its conduct.

After finding an antitrust violation, this Court could also enjoin Allegiance from entering into similar unlawful conduct with hospitals other than HCHC. This Court is not limited to enjoining "open and formal implementation of agreements exactly like those entered into in the past."[25] As the Supreme Court explained, "[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed."[26] This Court can and should ensure that Allegiance does not turn to its neighbors to the north, east, or west if it finds itself stymied in its attempts to allocate customers in Hillsdale County to the south.[27]

Further, any injunction entered against Allegiance could last longer than the consent decree against HCHC. To determine that it still has jurisdiction over the case, this Court need only conclude that "it is within its power to grant an injunction that extends past" any existing restriction.[28] Allegiance has a long

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[25] *Rubbermaid*, 575 F.2d at 1172-73; *United States v. Packorp, Inc.*, 246 F. Supp. 963, 967 (W.D. Mich. 1965) ("The complaint alleges a violation of the antitrust laws, and although the facts set forth are confined to a specific geographic area, the scope of any decree would not be so confined.").
[26] *Int'l Salt*, 332 U.S. at 400.
[27] *See, e.g.*, Final Judgment ("HCHC Consent Decree") (ECF No. 36) § IV(A)(2).
[28] *In re Androgel Antitrust Litig.*, 2017 WL 2404941, at *3 (N.D. Ga. Jun. 1, 2017) (refusing to dismiss case as moot despite existence of injunction covering part of relief sought).

history of anticompetitive behavior, which warrants relief that extends beyond the expiration of HCHC's consent decree in 2021.

B. An Injunction Would Allow Plaintiffs to Enforce a Judgment Directly Against Allegiance

Injunctive relief against Allegiance would permit enforcement of the judgment against Allegiance, rather than just against HCHC. As it currently stands, however, if HCHC and Allegiance were to enter into another unlawful allocation agreement, Plaintiffs could turn to this Court to seek relief against HCHC under the consent decree,[29] but would be required to initiate an entirely new action against Allegiance, at significant expense to the government. The additional benefit of direct enforcement against Allegiance is effective relief beyond the scope of the consent decree with HCHC. Thus, Plaintiffs' claims against Allegiance continue to present a live case and controversy.

III. Significant Policy Concerns Militate Against Extending the Mootness Doctrine to this Case

Dismissing Plaintiffs' case as moot would undermine the "clear policy of favoring settlement of all lawsuits."[30] Here, on the same day that Plaintiffs filed

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[29] *See generally Pedreira v. Sunrise Children's Servs., Inc.*, 802 F.3d 865, 871 (6th Cir. 2015) (describing retention of jurisdiction over the parties as one of "two key attributes" of consent decrees).

[30] *Marek v. Chesny*, 473 U.S. 1, 10 (1985); *see also United States v. Lexington-Fayette Urban Cty. Gov't*, 591 F.3d 484, 490 (6th Cir. 2010) ("[P]ublic policy generally supports 'a presumption in favor of voluntary settlement' of litigation.").

their Complaint, HCHC settled this case by agreeing to a series of enforceable limitations on its conduct—including a compliance program and officer[31]—thereby saving this Court and the parties significant time and resources. If this Court were to extend the mootness doctrine to Plaintiffs' claims against Allegiance, Allegiance would walk away from this case scot-free, without any enforceable change to its behavior. In other words, dismissing the case at this stage would reward Allegiance for holding out, in effect excusing its behavior because its co-conspirator agreed to remedy some of the harm. Such a dismissal rewarding the hold-out would actively discourage settlement. Adopting this approach would also distort the government's ability and incentives to settle litigation. If a settlement with one defendant could foreclose future relief against others, Plaintiffs would be forced to decide whether a settlement with fewer than all defendants provides appropriate remedies from the appropriate wrongdoers and adequately protects the public from future conduct by all defendants.

In addition to the harm that a finding of mootness would have on settlement incentives, such a decision would harm the "public interest in having the legality of . . . practices settled."[32] The conduct at issue in this case is not only capable of repetition by Allegiance, but capable of repetition by other hospitals around the

[31] HCHC Consent Decree (ECF No. 36) § V.
[32] *W.T. Grant*, 345 U.S. at 632.

country. For example, the United States recently prosecuted and settled similar allegations in West Virginia.[33] A finding by this Court that Allegiance and HCHC's agreement violates the antitrust laws will further the public interest by clarifying the issue for hospitals nationwide. Conversely, an extension of the mootness doctrine resulting in dismissal would stunt Plaintiffs' ability to develop and restore competitive markets.[34]

Conclusion

For the foregoing reasons, Plaintiffs respectfully submit that this Court retains jurisdiction over this case.

Dated: August 7, 2017 Respectfully submitted,

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[33] *See* Ex. D, Final Judgment (ECF No. 11), *United States v. Charleston Area Med. Ctr., Inc.*, No. 16-3664 (S.D.W. Va. Oct. 21, 2016) (settling allegations of allocation agreement between hospitals to restrict print and outdoor advertising of competing healthcare services in each other's territories).

[34] Ex. E, Areeda & Hovenkamp, *Antitrust Law* § 325a (4th ed.) (noting the important role that government equity suits play in furthering the public interest).

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Certificate of Service

I hereby certify that on August 7, 2017, I electronically filed the foregoing paper with the Clerk of 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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