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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	CA 98-475 JJF
Plaintiff,	)	
vs.	)	
FEDERATION OF PHYSICIANS AND DENTISTS, INC.,	)	
Defendant.	)	

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR ENTRY OF DEFENDANT'S PROPOSED SCHEDULING ORDER

Dated: November 13, 1998

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I. Introduction

The United States submits this answering brief in opposition to defendant Federation of Physicians and Dentists' (the "Federation's") motion for entry of its proposed discovery schedule. (D.I. 18). The United States strenuously opposes defendant's extended schedule because (1) there is simply no need to take anywhere close to 18 months to prepare this case for trial, and (2) the public will be disserved by such an unnecessary delay in resolution of a case that affects the availability and cost of health care for the citizens of Delaware and the American public generally. The only material factual dispute in this case is whether defendant and nearly all orthopedists in Delaware, who joined defendant, acted in concert to avoid a reduction in their fees by collectively boycotting Blue Cross Blue Shield of Delaware ("Blue Cross"). The evidence cited in the complaint makes that concerted action plain, and the indisputable fact is that defendant and its members--nearly all of whom defendant's counsel represents--presently have (and have had) that information in their possession. The only other substantive discovery that defendant claims a need for is from Blue Cross; that can be accomplished within a few months.

Defendant's proposed pretrial order is based almost entirely on its contention that the United States has been investigating the activities that are the subject of this case since November 1997. That contention is both false and irrelevant. In reality, the Department of Justice's (the "Department's") investigative discovery of defendant's and its members' activities in Delaware took place over only about four months--not ten months, as asserted by defendant. Moreover, virtually all of that four months of discovery focused on obtaining documents and testimony from the very orthopedists and Federation management whom defense counsel

represents.

Defendant's proposed discovery schedule is not only based on a false premise, but it is hopelessly inconsistent. The defendant seeks to limit depositions to 10 per side while claiming that the defendant needs 18 months to accomplish this task. If a 10-deposition limit were appropriate (which it is not), these could easily be completed in 18 weeks, not 18 months. There is simply no valid reason for defendant's requested certification of "complexity" and the protracted delay defendant proposes.

II. Defendant's Proposed Schedule is Premised on Incorrect Assumptions

A. Defendant's Depiction of the Length of the Government's Pre-Complaint Investigation is Incorrect

Defendant's claimed need for an August 2000 trial date is premised on the notion that it should have a period of time for discovery equal to the amount of time that the United States took to investigate this case. In support of this argument, defendant wrongly asserts that, "[S]ince November 1997, the Government has been issuing document requests and taking depositions to gather information and prepare its case against the FPD." Defendant's Brief (D.I. 19) at 2. It is true that the United States has investigated the Federation since November 1997. However, the investigation that commenced in November, 1997, focused on the activities of the Federation and its members in New Haven, Connecticut--not Delaware. Indeed, the United States was unaware of defendant's anticompetitive activities in Delaware until late February 1998.

Issuance of civil investigative demands ("CIDs"), as authorized by the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, to obtain information about the activities underlying this

case, first occurred on February 25, 1998.[1] Initial production of documents by most parties, including the vast majority of Delaware Federation members represented by defense counsel, occurred on March 17, 1998. All investigative discovery concluded when the final two investigative depositions were completed on June 9, 1998.

The fact is that the Department investigated those activities for a little over four months, from the end of February, 1998, until early June 1998.[2] Therefore, even accepting defendant's premise that it needs discovery of what it already knows, the United States' proposed pretrial schedule provides defendant with even more time than the Department took to obtain its pre-complaint discovery.

B. The Substance of the Department's Short, Pre-Complaint Investigation is Already Known to Defendant's Counsel

Not only was the Department's pre-complaint investigation far shorter than defendant asserts, but the vast majority of the information obtained by the Department during its brief investigation is already in defense counsel's files. Defendant's counsel represents 40 of the 45 Delaware orthopedic surgeons to whom CIDs for documents were issued in late February 1998. All but 326 pages of documents produced by physicians to the Department during its investigation have been produced by physicians represented by defendant's counsel. During its

[1] A CID is a form of administrative subpoena, that is used as "a pre-complaint discovery tool" and is "made available by statute in several different contexts," including antitrust investigations. United States v. Witmer, 835 F. Supp. 201, 203-05 (M.D. Pa. 1993), vacated on other grounds, 835 F. Supp. 208, aff'd, 30 F.3d 1489 (3rd Cir. 1994).

[2] During this four-month period, defense counsel delayed, for a month, the investigative deposition of the Federation's Executive Director, Jack Seddon.

investigation, the Department also obtained 1,154 pages of documents from the four major health insurers

operating in Delaware. Had defendant agreed to a protective order in a timely fashion,[3] the United States would have voluntarily produced, weeks ago, all of the documents obtained thus far.

During the spring of 1998, the Department took investigative depositions of 18 persons. With one exception, all were defendant's employees or representatives, defendant's members, or the office managers of defendant's members. Defendant's counsel represented 15 of those deposed, attended the depositions of 14 of them, took extensive notes during the depositions attended, and accompanied almost all persons deposed when they reviewed their transcripts. Pursuant to Rule 26(a)(1)(B), the United States has since voluntarily provided to defendant's counsel transcripts of those 15 investigative depositions.[4]

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[3] Defendant's dilatory responses to plaintiff's attempts to agree on a Rule 26(c)(7) umbrella protective order are instructive because they appear symptomatic of an overall lackadaisical approach to this case that is embodied in defendant's proposed 18-month discovery schedule. The United States sent defendant's counsel a draft Rule 26(c)(7) protective order on September 15, 1998, in part, to promote expedited disclosure to defendant of the limited amount of information produced by some non-parties during the investigation. At the October 1 Rule 26(f) conference among counsel, defense counsel said he had found nothing disagreeable in the proposed protective order, but was awaiting his client's approval. After additional requests from the United States for a formal response to the proposed protective order, and after finally agreeing in principle to the United States' proposed draft on the morning of October 14, on the afternoon of October 14, defendant's counsel raised "concerns" about the proposed order that precluded filing the order for the Court's consideration along with the Proposed Discovery Plan. (D.I. 13). Defendant's counsel finally conveyed its proposed revisions to the United States on October 21, but was unavailable to confer until October 28. On October 29, the United States sent its counterproposal to defendant, but it has not heard further from defense counsel on whether the parties have an agreement. Defendant's inaction continues to delay disclosure to defendant, pursuant to Rule 26(a)(1)(B), of documents obtained during the government's investigation from third parties that are not represented by defense counsel.

[4] Two of the three depositions taken of persons not represented by defendant's counsel are depositions of defendant's members and together total 250 pages of testimony. The transcript of the third deposition--the only one taken of someone unconnected with defendant--totals 15 pages of testimony. As with the documents of the few third parties not represented by

C. The Primary Issue In Dispute Is Defendant's Concerted Action

This case hinges on whether plaintiff can prove that defendant and its members acted in concert in opposing Blue Cross's offer of reduced fees for orthopedic services. Defendant's only suggestions to the contrary (in its brief in support of its discovery schedule (D.I. 19)) are its allusions to purported defenses requiring discovery of: (1) the United States' policies on unionization of physicians and antitrust enforcement in health care, including "the facts underlying the Government's promulgation, interpretation, and enforcement of the [third-party messenger] system set forth in the [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 (August 28, 1996)]" (the "Policy Statements"), Defendant's Brief at 9-10; and (2) "issues relating to the structure, vagaries, and dynamics of the health care market and the conduct of health care providers and insurers." Defendant's Brief at 10.

These purported discovery needs do not conceivably justify defendant's proposed 18-month discovery schedule. The only issue is whether defendant and its members acted jointly to boycott Blue Cross's efforts to lower fees it paid to Delaware orthopedists. The very Policy Statements on which defendant seeks to rely emphasize that this is a question of fact in each case:

> The key issue in any messenger model arrangement is whether the arrangement creates or facilitates an agreement among competitors on prices or price-related terms. Determining whether there is such an agreement is a question of fact in each case.

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defense counsel, the United States will voluntarily provide defendant the three transcripts presently not in the possession of defense counsel after defendant agrees to a protective order and the deponents have had a reasonable opportunity to designate confidential information.

Policy Statements at 20,831. To assist in evaluating this question, the Policy Statements set forth a framework for analysis to determine

> whether the agent facilitates collective decision-making by network providers, rather than independent, unilateral, decisions. In particular, the Agencies will examine whether the agent coordinates the providers' responses to a particular proposal, disseminates to network providers the views or intentions of other network providers as to the proposal, expresses an opinion on the terms offered, collectively negotiates for the providers . . . . If the agent engages in such activities, the arrangement may amount to a per se illegal price-fixing agreement.

Id. (footnote omitted). See Federal Trade Comm'n. v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411, 432-36 (1990). Thus, the Policy Statements demonstrate that the central issue in this case is whether the activities of the defendant and its members amount to concerted action, which they in no sense condone. The course of drafting of the Policy Statements, which in any event cannot--and do not purport to--displace this Court's application of Section 1 of the Sherman Act, is patently immaterial and irrelevant to this issue.[5]

Similarly, defendant's asserted need for broad discovery "relating to the structure, vagaries, and dynamics of the health care market and the conduct of health care providers and insurers" is a transparent effort to justify the dilatory discovery schedule it seeks. The primary issue in dispute in this case is whether defendant and its Delaware members engaged in concerted action; defendant's claimed need to engage in the quoted, far ranging discovery is simply a red herring. The nature of competition in these markets has no bearing on the

[5] Moreover, the Department has no policy concerning the unionization of physicians and the Department's antitrust enforcement history in the health care industry is a matter of public record. Therefore, even if there were any relevance to such information (and there is none), there is no need for discovery to determine the Department's actions in this area.

[il]legality of defendant's actions. See Id.; see also, F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447 (1986) (rejecting as a matter of law that Federation's efforts to assert "quality of care" defenses to its members concerted refusal to provide patient x-rays to insurers); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) (rejecting alleged justifications for concerted, anticompetitive actions which were not related to the promotion of competition in the particular market at issue).

III. Defendant's Proposed Order Setting Limits on Depositions Would Unjustly Hinder the United States' Ability to Prepare for Trial

While claiming that this case is complex, defendant nevertheless proposes that the Court establish a presumptive limit of ten depositions per side. In support of this proposal, defendant argues that, because the Department took CID depositions during its investigation, allowing plaintiff more than ten depositions in this case would be "unreasonably cumulative and duplicative." Defendant's Brief at 14. The defendant also proposes, "for similar reasons," that the Court issue an order prohibiting plaintiff from "deposing the [defendant] or [defendant's] members and associated persons that it previously deposed through the issuance of CIDs." Id. at 15. Neither of defendant's proposed limitations is suited to this case.

In conducting its investigation of whether the Federation and its Delaware orthopedic surgeon members had violated the antitrust laws, the Department deposed 18 individuals, pursuant to CIDs, between March 14, 1998 and May 20, 1998. The information obtained during its investigation not only enabled the United States to allege with great specificity the misdeeds of defendant in the complaint, but will doubtless also be the source of evidence at trial. But the investigative depositions are no substitute for post-complaint depositions in preparation for trial.

The plaintiff is certainly not seeking "unreasonably cumulative or duplicative" discovery by seeking to preserve the ability to take, in preparation for trial, more than ten depositions, or to depose individuals who have been deposed pursuant to CIDs during the Department's investigation. The defendant simply has no basis for asserting otherwise.[6] There is no dispute among the parties that at least 50-60 individuals, including Federation representatives, Federation members, and office managers that work with Federation members likely have information related to disputed issues in this case.[7] The United States does not anticipate that it will need to take the depositions of all of these individuals, but the number of individuals involved in the concerted action and their varying involvement in and recollections of specific activities compel the United States to preserve the ability to take more than ten depositions in order to adequately prepare for trial--a trial for which defendant has reserved the right to present

[6] The plaintiff has not yet served on defendant any notices of depositions of any of its members or representatives. It is premature, therefore, to argue that plaintiff will seek "unreasonably cumulative or duplicative" discovery. Addressing defendant's proposed limitations on depositions at this point in the litigation is premature because the Court "has not been presented with legal issues grounded in established facts that require a judicial decision in order to settle a dispute." DuPont Merck Pharmaceutical Co. v. Bristol-Myers Squibb Co., 894 F. Supp. 804, 809 (D. Del. 1995), aff'd on other grounds, 62 F.3d 1397 (Fed. Cir. 1995); see also Scovill v. Sunbeam Corp., 61 F.R.D. 598, 603 (D. Del. 1973) (refusing to enter a protective order under Fed. R. Civ. P. 26(c) preventing deposition on the grounds that it would be premature to do so). The defendant can move for a protective order under Fed. R. Civ. P. 26(c) if it believes that the particular discovery sought by plaintiff is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. See Fed. R. Civ. P. 26(b)(2).

[7] Defendant's Initial Rule 26(a)(1) Disclosures list among those likely to have discoverable information: all Delaware members of the [Federation] and their office managers." Defendant's Initial Rule 26(a)(1) Disclosures at 2. These groups alone total over 50 persons, aside from defendant's own employees and representatives.

a witness list of up to 20 persons, while rejecting United States' proposal for exchanges of witness lists during discovery to help focus discovery.

The United States must also retain the ability to depose some of the individuals that it initially deposed pursuant to CID during the course of its investigation to ensure "full, fair, and complete discovery," In re ML-LEE ACQUISITION FUND II, L.P., 859 F. Supp. 765, 768 (D. Del. 1994), in this action. Depositions taken in preparation for trial are different in nature and purpose than those taken pursuant to CIDs in the course of this investigation. In the investigation of the Federation and its Delaware members, the Department used CID investigative depositions to gather as much information as quickly and efficiently as possible to determine whether a violation had occurred during a time when the possible need for expedited proceedings and preliminary injunctive relief loomed large.[8] In this situation, many of the investigative depositions were taken without any systematic review of all potentially relevant documents and without knowledge of defendant's factual defenses now reflected in its Amended Answer.

The United States will use post-complaint depositions of some persons who were deposed during the investigation--several of whom are central figures in the conspiracy--to prepare the case adequately for trial. Among other functions, case depositions will enable plaintiff to:

[8] This type of investigative activity is what Congress sought to promote in authorizing the issuance of CIDs. See Witmer, 835 F. Supp. at 206 (stating, in analyzing the CID authorization contained in the False Claims Act, that "Congress intended the CID to be a tool that would allow the Government to gather information about potential fraud against the Government quickly and efficiently.").

(1) gather additional facts following a systematic analysis of all relevant documents (including additional documents from defendant and non-parties) and defendant's claims, (2) establish foundations for the admission of evidence, (3) test defendant's now-asserted defenses, and (4) pin down potential witnesses on points that may be used by the United States in cross-examination. For these basic reasons, the Court should reject defendant's proposed limitations on depositions.

Moreover, any ruling limiting plaintiff's ability to take case depositions of those deposed during the investigation would have the perverse future effects of (1) unduly protracting investigative depositions to assure fuller coverage of the issues, at the cost of efficiency and burden on both the Department and the witness; and (2) forcing the Department not to depose, during an investigation, most of those persons who appear to be most centrally involved to avoid being precluded from taking their depositions, after their defenses are fully asserted, in a resulting federal court litigation.

IV. Defendant's Proposal to Designate this Case as Complex Should Be Rejected

The purpose of defendant's freshly minted view of the supposed "complexity" of this case is to rationalize its extraordinarily lengthy discovery schedule, leading to trial commencing in August 2000.[9] However, as defendant knows, unless this case is certified as "complex," defendant's discovery schedule will not comply with the requirements of D. Del. LR 16.2(c) and

[9] The defendant, in its brief supporting its proposed discovery schedule, for the first time seeks to certify this case as "complex" pursuant to D. Del. LR 16.1(a). Defendant opted not to seek such a certification in either its answer (D.I. 7), filed on September 22, 1998; at the Rule 26(f) conference of counsel held on October 1, 1998; or in its amended answer (D.I. 11), filed on October 13, 1998. In fact, it was not until well after the Rule 26(f) conference – at which defendant proposed its discovery schedule – that defendant first raised the "complexity" of the case as a reason for its proposed schedule.

the Civil Justice Reform Act ("CJRA").[10] See United States v. Diamond Industries, Inc., 145 F.R.D. 48, 49 (D. Del. 1992).

When a party seeks a determination of "complexity," the district court "is obligated to engage in an analysis of certain considerations which are set forth in the Local Rules for the District of Delaware." Id., citing D. Del. LR 16.1(a)(1) and (2). "[T]he Court must respond to the dictates of the CJRA and only determine a case complex when such a finding is clearly warranted on the factors enumerated in Local Rule 16.1(a)(2)." United States v. Diamond Industries, Inc., 145 F.R.D. at 50. A brief application of these factors to this case shows defendant's request for a certification of complexity falls far short of meeting this standard and confirms that defendant's request stems from its attempt to rationalize its apparent desire to put off trial as long as possible.

A. Type of Action

The defendant suggests that the case should be certified as complex because it is an antitrust enforcement action. This Court, however, has recognized that "[t]he nature of an enforcement action does not alone merit a determination of complexity." Diamond Industries, 145 F.R.D. at 49. Indeed, some antitrust cases are of "Doric simplicity," Vogel v. American Soc'y of Appraisers, 744 F.2d 598 (7th Cir. 1984), and this case, for reasons discussed above, falls toward the simple, rather than complex, end of the spectrum.

[10] The CJRA requires district courts to schedule cases for trial "within eighteen months after the filing of the complaint, unless a judicial officer certifies that (i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or (ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases." 28 U.S.C. § 473(a)(2)(B)(i) and (ii).

B. Number of Parties

In this action, the United States is suing only one entity, the Federation of Physicians and Dentists. Thus, the number of parties creates no complexity.

C. Nature and Number of Issues Pled

As noted previously, defendant's amended answer (D.I. 11) confirms that the only real issue in dispute is whether the Federation and its members acted in concert. Resolution of this straightforward legal issue surely does not warrant a determination of complexity. See Diamond Industries, 145 F.R.D. at 49.

D. Nature of Factual Issues

Although the evidence recited in the United States' complaint raises serious doubt about whether there is any genuine factual issue in dispute, even giving full credence to the factual assertions in the amended answer, there is a need to resolve here only whether the actions of the Federation and its members over several months were concerted. The resolution of any such factual issues does not approach the level of complexity justifying a trial scheduled two years after the case was filed. Id.

E. Nature and Extent of Discovery

Defendant's claims about the "mounds and mounds" of evidence to be obtained and the "substantial discovery" to be undertaken in this case, Defendant's Brief at 20, are particularly suspect when viewed alongside its concurrently proposed, presumptive limit on the number of depositions to be taken by both sides. Id. at 13-14. Moreover, as explained in section II of this brief, most of the information related to the allegedly disputed facts in this action involves defendant and its Delaware members and is already in possession of defense counsel.

Defendant's only significant discovery target is Blue Cross. Defendant's anticipation that Blue Cross or any other discovery target will be a "hostile" source, id. at 10, is "typical of most cases filed in district courts and certainly do[es] not support a determination that the discovery process in this case is so unique as to merit a designation of this case as complex." Diamond Industries, 145 F.R.D. at at 50. No such antagonism, assuming it occurred, could necessitate delay for more than a year.

F. Need for Experts

The parties have, in their respective proposed discovery schedules, provided for discovery related to experts. Should there be a genuine factual dispute about the concerted acts of defendant's members so that a trial is necessary, some expert testimony may be adduced by both sides. But as this Court has observed, "[M]ost cases in district courts rely on expert testimony, however, this does not render a case complex." Id.

G. Nature and Extent of Pre-Trial Issues or Other Special Difficulties

In support of its request for a determination of complexity, defendant has cited no anticipated pretrial issues or other special difficulties that would warrant a determination of complexity.

V. Conclusion

Plaintiff, for the reasons specified above, requests that the Court reject defendant's request for an 18-month discovery schedule, its related request for a certification of complexity, and its contradictory proposed limitation on depositions. The defendant has been aware that this case was likely headed to Court since June 1, 1998, and it has had virtually all of the relevant information in its possession since the government began its inquiry. There is no need to

prolong this case past the Court's standard schedule and there are many reasons to expedite this matter of substantial importance to consumers of physicians' services in Delaware and elsewhere. For all

the reasons described above, the United States requests that the Court reject defendant's proposed scheduling order and enter the United States' proposed scheduling order to govern pretrial activities in this case.

Dated: November 13, 1998

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