**U.S. Department of Justice**

Antitrust Division

*Liberty Place Building*
*325 Seventh Street NW*
*Washington, DC 20530*

November 20, 2000

BY HAND DELIVERY

Honorable Joseph J. Farnan, Jr.
United States District Court
for the District of Delaware
Federal Building, Room 6325
844 King Street
Wilmington, DE 19801

Re: United States v. Federation of Physicians and Dentists, 98-CV-475

Dear Judge Farnan:

Pursuant to Local Rule 7.1.5 and to Your Honor's instruction at the February 16, 1999, scheduling conference, the United States respectfully submits this letter, in lieu of a formal motion, requesting reargument (and reconsideration by the Court) of the motions filed by defendant Federation of Physicians and Dentists (D.I. 145) and by individual non-parties (D.I. 149). Those motions are the subject of this Court's Memorandum Opinion (D.I. 201) filed on November 7, 2000, explaining the Court's prior entry of protective orders (D.I. 198, 199) quashing 23 depositions noticed by the United States in this case. Reargument is appropriate to address facts that contradict the Court's conclusions that (1) "allowing the Government to proceed with another round of depositions would essentially be Court authorization for the Government to manipulate the discovery rules," (D.I. 201 at 6); and (2) "the Government still has ample opportunity to conduct further discovery." Id. at 5. See Dentsply Int'l., Inc. v. Kerr Manufacturing Co., 42 F.Supp.2d 385, 419 (D. Del. 1999) (under Local Rule 7.1.5, court may grant reargument "where the court has made an error not of reasoning, but of apprehension").

## I. Key Facts Regarding the Timing and Scope of CID Discovery During the Investigation that Preceded the Filing of this Case Warrant Reconsideration

Although this Court acknowledged that pre-complaint, investigative depositions taken pursuant to civil investigative demands ("CIDs") "do not automatically replace pretrial

depositions,"[1] the Court nonetheless quashed the 23 pretrial depositions. (D.I. 198, 199). The reason that the Court gave for this drastic ruling[2] was its belief that "allowing the Government to proceed with another round of depositions would essentially be Court authorization for the Government to manipulate the discovery rules." (D.I. 201 at 6). In support of this view, the Court opined:

> Even more telling is the Government's admission that the decision to initiate this litigation occurred on June 1, 1998. (D.I. 157 at 8 n.12). The Government, however, did not actually file its complaint until August 12, 1998. (D.I. 157 at 8 n.12). The Court agrees with the Movants that this delay in bringing suit suggests that "the Government was simply using the CID process to obtain as much unfettered discovery as possible before it ultimately brought an action in which it would be subject to reasonable discovery orders and limitations of this Court." (D.I. 159 at 8). The Court cannot condone such manipulation of the discovery rules, especially when the burden of the Government's tactics would fall on nonparties. The Court therefore finds that the Protective Order the Movants seek is appropriate under these circumstances.

D.I. 201 at 6-7 (case citation omitted). Thus, the Court believed that the Government initiated significant CID discovery after it had decided to file this case to avoid reasonable discovery orders and limitations by the Court. This is not the case.

If such a belief were accurate, it would constitute a finding of highly inappropriate conduct by the Antitrust Division. But the facts are that (1) the decision to bring this action was ***not*** made not in June, but in August, 1998; and (2) the only two CID depositions the Government took during the period from June through August, 1998, were taken on June 9, after being postponed from April, for the convenience of defendant's counsel and the deponents. With regard to the first point, the Court was under a mistaken impression when it concluded that the "more telling" ground for determining that the Government was manipulating the discovery rules was "the Government's [purported] admission that the decision to initiate this litigation occurred on June 1, 1998." Id. at 6, citing footnote 12 of the Government's opposition brief (D.I. 157 at 8). That citation contains no such admission.

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[1] Indeed, courts have unanimously agreed that CID depositions do not render pretrial depositions duplicative or unduly burdensome because "the Justice Department's objective at the pre-complaint stage of the investigation is not to 'prove' its case but rather to make an informed decision on whether or not to file a complaint." United States v. GAF Corp., 596 F.2d 10, 14 (2d Cir. 1979).

[2] "It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." Slater v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979), citing 4 J.Moore & J.Lucas, Moore's Federal Practice ¶ 26.69 (3d ed. 1976); 8 C.Wright & A.Miller, Federal Practice & Procedure § 2037 (1970). .

Rather, in elaborating on the rapid pace of the CID investigation, the brief there states accurately that "[b]y June 1, 1998, the ***Division staff recommended*** that suit be filed."[3] (D.I. 157 at 8 n.12) (emphasis added).

The Antitrust Division staff's recommendation to file suit was but a preliminary step toward the decision ultimately made by the Assistant Attorney General in charge of the Antitrust Division to file this case--a decision that is committed by law ***solely*** to the Assistant Attorney General's discretion. See 15 U.S.C. § 4, 28 C.F.R. § 0.40(a). Indeed, on June 16, 1998, over two weeks after the staff had forwarded its recommendation, the Assistant Attorney General met with counsel for the Federation and for two individuals, whom the staff had recommended be named as defendants. (Attached Declaration of Steven Kramer, ¶ 8). The purpose of the meeting was to allow counsel to advocate against the staff's recommendation to file suit against their clients--a recommendation about which staff had apprised counsel on June 1. (Id. at ¶ 6). Not until August, 1998, following resolution of a number of issues, did the Assistant Attorney General accept, ***in part***, the staff's recommendation and decide to file suit against solely the defendant Federation--a decision embodied in the Complaint filed with this Court on August 12, 1998. (Id. at ¶ 9). These facts belie the Court's misapprehension that the Government decided to bring this suit on June 1, 1998.

Even if there were any factual basis for the conclusion that a decision to sue was made in June, the fact is that the Government took only two CID depositions after the June 1 staff recommendation, each lasting a half day on June 9. (See D.I. 157, Attachment 2 at ¶ 5).

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[3] In citing the Government's purported admission, the Court appears to have relied on defendant's baseless claims--raised for the first time in its reply brief--that

> the Government made the decision to bring this action before it ceased use of the CID discovery. Filing of the complaint was therefore delayed several months. See Government's opposition at [8] n. 12.

(D.I. 159 at 8). The footnote cited by defense counsel to support these claims is the same one cited by the Court, and similarly does not support defendant's claims which are based on the distortion of a fact known to defense counsel since June 1, 1998, when the Antitrust staff informed them of the ***staff's recommendation--not of a decision made***--to file suit. By raising these claims for the first time in its reply brief, defendant not only deprived the Government of a fair opportunity to respond, but also violated D. Del. LR 7.1.3(c)(2) ("The party filing the opening brief shall not reserve material for the reply brief which should have been included in a full and fair opening brief."). Consequently, the Court should not have considered defendant's claims. See, e.g., Jordan v. Bellinger, 2000 WL 1456297 (D. Del. 2000); Whitfield v. Pathmark Stores, Inc., 971 F.Supp. 851, 852 (D.Del. 1997). This point is particularly important here because where the Court "has decided an issue not properly before it, . . . the Court should not hesitate to grant reargument." Helman v. Murry's Steaks, Inc., 743 F.Supp. 289, 291 (D. Del. 1990).

One session simply completed a deposition commenced on March 19, 1998, which the Government had previously sought to complete in April, 1998. (Attached Declaration of Steven Kramer, ¶ 3). The other June 9 deposition had been originally scheduled for April 23, 1998. (Id. at ¶ 4). Both were rescheduled in June solely to accommodate the scheduling preferences of the deponents and their counsel.[4] Their postponement to June involved absolutely no consideration by the Government of manipulating the CID discovery process because, if the depositions had proceeded when the Government sought to schedule them, they would have been completed several weeks before the staff recommendation on June 1. Moreover, ***no other CID discovery of any kind*** was conducted during June through August 1998. (Id. at ¶ 5; see D.I. 157, Attachment 2 at ¶¶ 4-5).

In any event, the June 9 depositions were entirely lawful under the Antitrust Civil Process Act, which expressly authorizes the taking of CID depositions "***prior to the institution of a civil or criminal proceeding***."[5] 15 U.S.C. § 1312(a). The statute plainly authorizes CID depositions to be taken up to the filing of a case, and for good reason: Additional information obtained by CIDs may assist the Assistant Attorney General in determining whether to file a case and whom to include as defendants. Thus, the extremely limited CID discovery taken on June 9, which was postponed from April at defense counsel's request, was in full compliance with the CID statute, having occurred not only before this civil proceeding was instituted on August 12, as authorized by the statute, but also before a decision was made by the Assistant Attorney General to file this case in August, 1998.

Accordingly, there is no factual basis for the Court's ruling that "allowing the Government to proceed with another round of depositions would essentially be Court authorization for the Government to manipulate the discovery rules." (D.I. 201). In the

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[4] The details of why these two depositions were scheduled after June 1 are set forth in an attached declaration. It is worth noting that neither of the June 9 deponents, Dr. Freedman nor Mr. Stokes, is a movant in the motions leading to this decision. Dr. Freedman has not been noticed for a pretrial deposition in this case. A pretrial deposition of Mr. Stokes was noticed some time after the subject motions were filed, and subsequently became the subject of another motion to quash, which remains unresolved by the Court. See D.I. 172, 175.

[5] The statute provides, in relevant part:

> Whenever . . . the Assistant Attorney General in charge of the Antitrust Division . . . has reason to believe that any person . . . may have any information relevant to a civil antitrust investigation . . . , he may, **prior to the institution of a civil or criminal proceeding by the United States thereon**, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to give oral testimony.

15 U.S.C. § 1312(a).

absence of such a finding, there is nothing in the Court's opinion that approaches the "extraordinary circumstances" that courts have required movants to show on a specific, individualized basis before quashing a deposition subpoena. See D.I. 157 at 4-5.

## II. The Government Does Not Have Ample Discovery Alternatives

In the process of explaining its decision to quash the 23 depositions that the Government had noticed--nearly all of the pretrial deposition discovery sought by the United States in this case--the Court observed that "the Government has either deposed all of the Movants, sought documents from them, or deposed employees from the Movant's practice group." (D.I. 201 at 5). Nonetheless, the Court next stated: "The Government still has ample opportunity to conduct further discovery." Id. According to the Court, the Government "can depose witnesses who were allegedly involved in the 'conspiracy' from whom it has yet to seek discovery, or it can depose employees of the insurance companies." Id.

The Court's observation that the Government has ample opportunity to conduct further deposition discovery misapprehends the situation in several respects. First, there are no Federation physician members involved in the alleged conspiracy--or their office managers--from whose practice the United States has not yet sought CID and/or pretrial document discovery. Similarly, the Government has obtained CID discovery and pretrial document discovery from the Federation and some of its officials. Consequently, under the standard set by the Court, there are no alleged conspirators from whom the United States can seek pretrial deposition testimony. Thus, under the Court's protective orders, as they now stand, the United States will have no opportunity to conduct further discovery of the alleged conspirators, which means essentially no pretrial deposition discovery of any unnamed conspirator.

Equally important, the 23 persons whom the United States selected to depose appear to be among the persons with the most involvement and/or knowledge of the alleged conspiratorial acts. Other than the two individuals on whose behalf defense counsel filed an unresolved motion to quash their depositions (D.I. 172, 175), the United States is simply unaware of additional unnamed conspirators or practice managers who are likely to have useful information. Insurance company employees, of course, have some useful information, but ***Blue Cross was the victim--not the perpetrator--***of the alleged conspiracy. Its employees have knowledge of the alleged conspiracy only insofar as they were parties to communications made to them by the alleged conspirators. Such knowledge is no substitute for the alleged conspirators' first-hand knowledge of their conspiratorial meetings, communications, actions, and motives. The Court's protective orders, therefore, ironically accomplish what the Court's observation regarding the Government's "ample opportunity to conduct further discovery" suggests it did not intend to do: foreclose the Government's opportunity to effectively prepare its case for trial. Moreover, the Court's order directly contradicts the Court's recognition in a prior ruling that this case warrants 35-50 depositions (D.I. 64 at 28-29), which is further reflected in the Court's Scheduling Order allowing each side up to 30 non-expert depositions. (D.I. 71 at 3).

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For all of the reasons stated above, the United States respectfully requests that this Court grant reconsideration and reverse its two orders quashing 23 pretrial depositions noticed by the United States in this case.

Respectfully submitted,

_____/S/_____
Virginia Gibson-Mason
Assistant U.S. Attorney
Chief, Civil Division

_____/S/_____
Steven Kramer
Richard S. Martin
Trial Attorneys
Antitrust Division
Department of Justice

cc: Hal K. Litchford, Esq. (via U.S. Mail and e-mail)
Litchford & Christopher
Perry F. Goldlust, Esq. (via hand delivery)
Heiman, Aber, Goldlust & Baker

**ATTACHMENT TO PLAINTIFF'S NOVEMBER 20, 2000, LETTER TO THE COURT**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>FEDERATION OF PHYSICIANS AND DENTISTS, INC.,<br><br>Defendant. | ) | Civil Action No. 98-475 (JJF) |

**DECLARATION OF STEVEN KRAMER**

I, Steven Kramer, declare:

1. I am a trial attorney employed in that capacity by the Antitrust Division of the Department of Justice since 1980. Over the 20 years I have been employed at the Antitrust Division, I have worked on numerous civil investigations in which civil investigative demands have been served and after which cases have been filed. Through personal experience, I have become fully conversant with the rights and limitations imposed by the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14, on the Antitrust Division's use of civil investigative demands ("CIDs").

2. From the opening of the investigation in late February, 1998, that led to the filing of this case, through the conclusion of the investigation, I worked on the investigation and supervised two other attorneys and two paralegals who also worked on the investigation. I have personal knowledge of the facts averred to in this declaration. I also certify that the attached exhibits A-D are true and correct copies of the original documents. The general timing and scope of CID discovery during the investigation is outlined in the Declaration of Kathy Seldin, filed with the Court on September 15, 1999, (D.I. 157, Attachment 2 at ¶¶ 4-5).

3. On March 19, 1998, I began the CID deposition of Joseph Stokes, the first deposition taken during the investigation, with the expectation that it would be completed on that date. When it became obvious to me during the CID deposition 19 that it would not be completed in the half-day period allotted, I adjourned the deposition. In an April 17, 1998, letter to the Federation's counsel, who was acting also as Mr. Stokes' counsel, I sought to schedule the completion of Mr. Stokes's CID deposition. (Attached Ex. A at 2). I completed Mr. Stokes' CID deposition on June 9, which was the first date that the Federation's counsel made Mr. Stokes available, after I had first requested completing his deposition in April, 1998.

4. On April 6, 1998, with agreement of the Federation's counsel, I served a CID to take Dr. Harry Freedman's deposition on April 23, 1998. (Attached Ex. B). In a letter to me dated April 14, 1998, counsel for the Federation, who also represented Dr. Freedman, wrote that counsel had a longstanding scheduling conflict that precluded the taking of Dr. Freedman's CID deposition on April 23, as noticed. (Attached Ex. C). Accordingly, Dr. Freedman's CID deposition was also eventually rescheduled to June 9 to accommodate both Dr. Freedman's and his counsel's schedule.

5. No other CID discovery was conducted in this investigation after June 9, 1998.

6. On June 1, 1998, the Antitrust Division staff assigned to the investigation submitted a recommendation to file suit against the Federation of Physicians and Dentists and two individuals. On the same day, I telephoned counsel for the putative defendants to inform them of the recommendation and to offer to schedule a meeting, at their option, with then Assistant Attorney General Joel Klein to allow counsel to attempt to convince Mr. Klein not to accept the staff's recommendation. During one such telephone conversation with counsel for the Federation, I also sought to schedule the long delayed completion of Mr. Stokes' and Dr. Freedman's CID depositions. I believed, and still believe, that scheduling those depositions for June 9 was fully authorized by the Antitrust Civil Process Act because the Act, at 15 U.S.C. § 1312(a), allows CID discovery to be taken in an antitrust investigation up to the time an action is filed. By June 9, no case had been filed; nor had the Assistant Attorney General made any decision on whether to bring a case.

8. At counsel's request, a meeting was scheduled for the putative defendants' counsel to meet with the Assistant Attorney General on June 16, 1998. (Attached Ex. D). I was among those in attendance at the meeting. At the June 16 meeting, following the parties' presentations, I distinctly recall Mr. Klein telling counsel for the putative defendants, in substance, that he was disturbed by the events outlined in the staff's recommendation, but had made no decision about whether to bring a case or about whom to name as a defendant if a case were brought.

9. During June and July, 1998, officials in the Front Office of the Antitrust Division sought additional information and analysis from the staff to assist the Assistant Attorney General in making his pending decision. In early August, 1998, I received word that the Assistant Attorney General had decided to file this case against the Federation of Physicians and Dentists, but not against the two individuals whom the staff had recommended also be named as

defendants.

Following final preparation and review of the papers for filing and coordination with the United States Attorney's Office in Wilmington, the Complaint was filed on August 12, 1998.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 11/17/00

/S/
Steven Kramer