U.S. Department of Justice

Antitrust Division

Liberty Place Building
325 Seventh Street NW
Washington, DC 20530

May 13, 1999

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:

This letter responds to the Federation's letter brief, dated April 29, 1999, in which the Federation claims to have obtained "newly discovered evidence" relevant to this Court's determination of the United States' pending motions to compel heard on April 20, 1999. The allegedly "critical information," filed under seal, is purported to be evidence of the Government's "collusion" with Blue Cross and Blue Shield of Delaware (Blue Cross), which the Federation claims is the real party in interest in this case. Besides supposedly indicating an "unholy alliance," the Federation claims that the document proves that the Government was serving as Blue Cross's "puppet" when it propounded the document requests at issue. In addition, the Federation accuses the United States of being dilatory in its document production, which it claims led to the late discovery of the sealed information.

For the reasons stated below, the United States respectfully submits that the "newly discovered evidence" provides no support whatever for defendant's accusations.[*] More important, the Federation conveniently side-steps the central issue before this Court by utterly

[*] The Federation insinuates that the document should have been produced in October, 1998, and was withheld unduly to keep its contents unknown to defendant. The truth is that the document was produced in due course after entry of the protective order on March 3, 1998.

failing to explain why the information sought by the United States in its motion is irrelevant both to the existence of the alleged conspiracy and to rebuttal of the Federation's purported affirmative defenses. In fact, despite the Federation's innuendo and insinuation, the sealed information actually underscores the merit of the Government's pending motion to compel.

The sealed document, a copy of which is attached, is an e-mail from Paul King, Jr., then Senior Vice President of Provider Relations and Contracting for Blue Cross, to other Blue Cross employees, reporting on his February 6, 1998, telephone conversation with

[REDACTED]

Shortly thereafter, the Government opened an investigation in Delaware, and upon uncovering substantial evidence of a price-fixing and boycott conspiracy among the Federation and nearly all Delaware orthopedic surgeons, the Government filed this action six months later. That action was filed pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, by the Department of Justice to halt the Federation's illegal activities -- activities that had the immediate impact of threatening consumer welfare-- and to enjoin, among other things, the Federation from collectively bargaining on behalf of its members.

As the Government has already stated in response to a question by the Court at oral argument, Blue Cross was the chief complainant that pointed out the Federation's boycott and led to the Government's investigation. As the principal, immediate target of the boycott, such complaints by the victim are hardly surprising. The Government acted quickly upon Blue Cross's complaint because of the urgency of the matter -- the imminent disruption of patient care that the group boycott threatened in February 1998. By then, virtually all Delaware orthopedic doctors had sent termination notices to Blue Cross through the Federation, and none was willing to negotiate with Blue Cross except through the Federation's Executive Director, Jack Seddon. Blue Cross patients' access to care was placed in serious jeopardy and the patients' risk of being balanced billed for high, non-contractual fees was immediate.

Rather than lend the slightest support to the Federation's allegations, Mr. King's e-mail, in fact, lends further support to the allegations of the Complaint.

[REDACTED]

[REDACTED]

the document offers not one iota of evidence that Blue Cross had any influence over any official of the Department of Justice, let alone the Attorney General and her subordinates, who made the ultimate decision to bring this action.

This document, in fact, evidences no more than what is true in virtually every investigation in which the Antitrust Division is involved: some persons or entities complain because allegedly illegal actions are taken to their economic detriment. It is the Government's duty to investigate those complaints, determine if there is merit to them and a sufficient threat to consumer interests to warrant litigation by the United States. Thus, in every case the Government litigates, every defendant can, and often does, claim the Government is a "stalking horse" for some private person or company. The fact of the matter is, however, that such a claim is as untrue as it is totally irrelevant. There is not the slightest evidence that the Government brought this action for any reason but one: to protect consumers of the Federation physicians' services. The Government's investigation has already served the interests of consumers by breaking up the Federation's boycott; the remaining question at issue here is whether defendant should be permanently enjoined from continuing or renewing its illegal combination of independent physicians. Who brought the illegal acts to the Government's attention is completely beside the point. The Federation's attempt to vilify the Government in order to obscure its indefensible opposition to the pending motions to compel, as well as the merits of this action, is not only a red herring but a waste of this Court's time.

The United States, therefore, respectfully requests that this Court order the Federation and the practice groups to comply promptly with the discovery requests at issue, as modified by the United States.

Respectfully submitted,

_____/S/_____
Virginia Gibson-Mason

_____/S/_____
Melvin A. Schwarz
Steven Kramer

cc: Hal K. Litchford, Esq.
Mary Beth Fitzgibbons, Esq.
Litchford & Christopher

Perry F. Goldlust, Esq.
Heiman, Aber, Goldlust & Baker