UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, Plaintiffs, vs. BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation, Defendant.	Civil Action No. 10-cv-14155-DPH-MKM Judge Denise Page Hood Magistrate Judge Mona K. Majzoub

REPLY BRIEF IN SUPPORT OF DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S MOTION TO COMPEL RESPONSES TO INTERROGATORIES

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Blue Cross does not need to "borrow wits" from its "adversary." But it is entitled to learn what material facts DOJ possessed at the time it made the broad, sweeping allegations against Blue Cross.[1] This Court, like the courts before it that have considered these very interrogatories, should compel a response.

A. Three Federal Courts Have Rejected DOJ's Argument That Facts Learned by the United States in Non-Party Interviews are Protected Work Product.

Neither *Hickman* nor *Upjohn* stands for the proposition that DOJ may use the work-product doctrine to shield from discovery the facts that form the basis of its antitrust lawsuit. Yet that is precisely what DOJ is attempting to do. DOJ has made this argument to preclude its adversaries from learning discoverable facts in at least three prior antitrust suits, and each time the federal district courts have rejected it. *See* Dkt. 80, at 4-6.

Here, DOJ tries yet again. It asks this Court to ignore *AMR Corp.*, *Dentsply* and *Dean Foods* — all of which addressed precisely the issue before this Court in antitrust lawsuits brought by DOJ — because they were decided "by out-of-circuit district courts" that purportedly "misapply *Hickman*, and ignore *Upjohn*." Dkt. 88, at 11. But when three separate courts consider the very same issue and, in all three instances reach the same conclusion, it becomes apparent that it is DOJ, not those courts, misapplying the law.

Blue Cross neither wants nor needs DOJ's thought processes or opinions relating to the interviews, and it has not asked for DOJ's assessment of witnesses' credibility or of the importance of one fact over another. Thus, the cases that DOJ identifies as its "most appropriate authority" are irrelevant because they involve attempts to discover written memoranda prepared

[1] This focus on pre-complaint facts is important for at least two reasons. First, DOJ is attempting to take advantage of its ability to conduct unilateral pre-complaint discovery without disclosing what it learned after nearly a year of investigation. Dkt. 80, at 2. Second, Blue Cross has told plaintiffs that the parties should answer typical contention interrogatories, directed to information learned in post-complaint discovery, at a later agreed time. *See* Ex. 6 (letter to DOJ).

by counsel, not the underlying facts.[2] It cannot be the case that any time a party wishes to shield a fact from discovery, it can record that fact in a memorandum interspersed with work product. *See Dean Foods* at 7, 9 (Dkt. 80, Ex. 4). Finally, the interrogatories do not ask DOJ to identify which of the 75 interviewees it considers to be significant. Blue Cross is entitled to discover facts learned during DOJ's pre-filing investigation, as well as the identity of the persons with knowledge of these facts.[3]

B. By Refusing to Respond to Interrogatory Nos. 1 and 2, DOJ is Engaging in Selective Disclosure, Using the Work-Product Doctrine as Both Sword and Shield.

Interrogatory Nos. 1 and 2 seek factual information at plaintiffs' disposal at the time they saw fit to allege 34 separate and independent antitrust cases in a single complaint against Blue Cross, and DOJ admittedly did so by pleading by example rather than asserting a factual basis for each separate rule-of-reason violation. DOJ asserts that its "full" responses to Interrogatory

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[2] *Contra* Blue Cross Interrog. Nos. 1 & 2 (seeking "all facts"); *AMR Corp.*, at 4 (Dkt. 80, Ex. 2) ("Interrogatory No. 2 does not request the DOJ attorneys' notes, internal memoranda, or mental impressions; defendants request only the material or principal *facts*"); *and, Dean Foods* at 5 (Dkt. 80, Ex. 4) (antitrust defendant was "not requesting that the [DOJ] turn over their attorneys' memoranda or notes resulting form the third-party interviews"); *with Upjohn Co. v. U.S.*, 449 U.S. 383, 401 (1981) (refusing to compel production of memoranda); *Hickman v. Taylor*, 329 U.S. 495 (1947) (refusing to compel "the production of written statements and mental impressions"); *Norwood v. Federal Aviation Admin.*, 993 F.3d 570, 576 (6th Cir. 1993) (denying FOIA access to summaries that "contain the attorneys' characterization of facts . . . and determinations as to the credibility or weight of these defenses"); *Fed. Trade Comm'n v. Hope Now Modifications, LLC*, 2011 WL 2634029, at *3 (D.N.J. 2011) (refusing to compel production of memoranda "where the factual information they contain is so intertwined with the authors' thought process"); *Ross v. Abercrombie & Fitch*, 2008 WL 821059, at *2 (S.D. Ohio 2008) (refusing to compel response to interrogatory that asked "which information from those interviews was deemed worthy enough to support each specific allegation within that pleading").

[3] *See, e.g.*, *Dentsply* at 2, 6 (Dkt. 80, Ex. 3) (compelling DOJ to answer interrogatory seeking facts known to "the 184 individuals and entities who were interviewed by the DOJ pursuant to its CID investigation"); *AMR Corp.* at 2, 5 (Dkt. 80, Ex. 2) (compelling DOJ to answer interrogatory seeking facts known to 159 third-party witnesses). *Cf. Cason-Merenda*, 2008 WL 659647, at *4 (E.D. Mich. 2008) (observing that if plaintiffs had recounted facts gathered in pre-filing investigation, and defendant posed an interrogatory asking plaintiffs to identify persons with knowledge of those facts, identities would not be protected work product).

Nos. 3 and 7 include information obtained during its investigative interviews. Dkt. 88, at 5. But DOJ's argument makes no sense — if it has already disclosed all material facts it possessed, it could have just said so and avoided this motion. DOJ is withholding facts from Blue Cross. The examples below illustrate the point.

Interrogatory No. 3: Blue Cross asked DOJ to identify the factual basis for and methodology supporting its allegation that each of the 17 different geographic areas alleged in the Complaint constitutes a relevant geographic market under the antitrust laws. DOJ states:

> Patients generally prefer to obtain medical care near where they live and work. . . . Employers therefore prefer commercial group health insurance products that provide low-price network access to attractive hospitals and physicians in the area where substantial numbers of their employees live and work.

Resp. to No. 3 at 15-16, Dkt. 88 Ex. 2. DOJ then spends the next 17 pages of its response repeating essentially the same three paragraphs, citing Census data and information pulled from "Yahoo! Maps." *Id.* at 18-34. Nowhere does DOJ state which patients or employers, if any, told DOJ this is how they "prefer to obtain medical care" or "prefer" to select insurance products or — more to the point — whether any patients or employers told them something different.

There are other factors that dictate where patients choose to seek medical care. In a recent deposition, Three Rivers Medical Center's CFO testified that the hospital's main competitors include [redacted] and that he told DOJ this during the pre-complaint investigation. Andrews Dep. at 259-60, Ex. 7. Two of these hospitals ([redacted]) are located outside of St. Joseph County, the alleged relevant geographic market in which Three Rivers is located. Similarly, according to its CFO, Allegan General Hospital's competitors include [redacted] (Harning Dep. at 13-14, Ex. 8), all of which are located outside Allegan County, the alleged relevant geographic market. These are facts that

were known by DOJ before it filed the Complaint, are facts that contradict DOJ's geographic market allegations, and are facts DOJ ***did not*** disclose in responding to Interrogatory Nos. 3 and 7 (or any others) but would be required to disclose in responding to Interrogatory Nos. 1 and 2.

Interrogatory No. 7: Blue Cross asked DOJ to identify the factual basis for its allegation that Blue Cross's use of MFNs in its contracts with hospitals had anticompetitive effects. For each alleged geographic market, DOJ repeats essentially the same three conclusory paragraphs for over 37 pages regarding the presumed effects of the MFNs, without tying the conclusions to any real facts.

DOJ concludes, for example, that the Blue Cross MFN "[redacted]" Resp. to No. 7 at 83, Dkt. 88 Ex. 2. Yet, the CFO testified that [redacted]. Andrews Dep. at 269-70, Ex. 7. And DOJ makes the same conclusory statement regarding Allegan General — i.e., that the Blue Cross MFN "[redacted]." Resp. to No. 7 at 77, Dkt. 88 Ex. 2. But Allegan General's CFO testified that [redacted] Harning Dep. at 57, Ex. 8. Again, the bald conclusions in DOJ's Response to No. 7 beg the question: Did DOJ have access to the facts described by these hospital CFOs — facts that undermine DOJ's allegations — when it prepared the Complaint? This is appropriate discovery.

DOJ "cannot selectively assert facts learned in the third-party interviews to support their antitrust claims against [Blue Cross] while at the same time invoke the work-product doctrine to shield the same or additional facts obtained during the interviews." *Dean Foods*, at 8 (Dkt. 80,

Ex. 4). DOJ nevertheless "seeks to manipulate the timing of the revelation of facts it has gathered and upon which it intends to rely to suit its purposes. This was never the intent of the work product doctrine." *Dentsply*, at 5 (Dkt. 80, Ex. 3). This is exactly what DOJ is doing again here and, as the other courts have done, this Court should require DOJ to respond to Interrogatory Nos. 1 and 2, which simply seek to discover material facts known to DOJ.

C. Blue Cross Can Not "Conduct its Own Interviews" to Get the Same Information.

DOJ's argument that Blue Cross must demonstrate "substantial need" rests on the erroneous assumption that the interrogatories call for work product. As all three courts to consider this issue have concluded, they do not. They request ***facts*** and not mental impressions or strategy, thus a showing of "substantial need" is not required. Regardless, it is one thing for Blue Cross to request an interview with a hospital regarding negotiations in which it was on the other side of the table; it is quite another thing for the federal government to do so. It is apparent that when the United States Department of Justice contacts a person or entity to request an interview (often after having already served formal process for the production of documents under pre-complaint CID), it elicits a certain level of cooperation that Blue Cross cannot expect. Thus, it is no solution to suggest that Blue Cross may simply interview the persons listed in Plaintiffs' Initial Disclosures to learn the same information. And even if it could, those individuals' recollection may not be the same now as it was when DOJ interviewed them, some nearly two years ago. *Contra* Dkt. 88 at 14 n.11 (asserting every interview was "voluntary") *with* Ex. 9 (letter to DOJ). Nor is it legitimate to suggest that Blue Cross can get this information from depositions. Plaintiffs' Initial Disclosures list ***288*** people. Blue Cross would have to depose each of them. Yet, DOJ has taken the position that Blue Cross should be able to take only 170 depositions, at most. Thus DOJ is not only refusing to provide legitimate information, it is actively attempting to prevent Blue Cross from obtaining that information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury that he served a copy of the foregoing Reply in Support of Blue Cross Blue Shield of Michigan's Motion to Compel Responses to Interrogatories on November 17, 2011 on all counsel of record in accordance with this Court's policies and procedures for service of electronically filed documents.

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