UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and STATE OF MICHIGAN,

Plaintiffs,

v.

HILLSDALE COMMUNITY HEALTH CENTER, W.A. FOOTE MEMORIAL HOSPITAL d/b/a ALLEGIANCE HEALTH, COMMUNITY HEALTH CENTER OF BRANCH COUNTY, and PROMEDICA HEALTH SYSTEM, INC.,

Defendants.

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

ORAL ARGUMENT REQUESTED

DEFENDANT ALLEGIANCE HEALTH'S BRIEF IN RESPONSE TO THE COURT'S REQUEST FOR SUPPLEMENTAL BRIEFING [107]

Defendant Henry Ford Allegiance Health, formerly W.A. Foote Memorial Hospital ("Allegiance"), appreciates the opportunity to respond to this Court's Order dated July 20, 2017 [DE 107] (the "Order"). As demonstrated herein, to the extent that the alleged unlawful conduct by Allegiance set forth in Plaintiffs' Complaint ever occurred (which Allegiance denies), it has long since ceased, and is unlikely to occur in the future. For this reason, there is no longer a live case or controversy for this Court to adjudicate, thus making the case ripe for dismissal. *See United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199,

203-04 (1968) ("A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.") At the very least, this Court should make clear that because any unlawful, anticompetitive conduct is unlikely to occur in the future, injunctive relief is no longer necessary nor appropriate, and that such relief will not be granted even if the case proceeds to trial. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (instructing that a plaintiff seeking an injunction must show "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive"). Guidance from this Court on this issue would be particularly beneficial at this time, as it could potentially lead to the resolution of this case pretrial.

A. Even If the Alleged Unlawful Conduct Occurred at Some Time in the Past, It Is Clearly Not Ongoing, and There Is No Reasonable Expectation It Will Occur in the Future.

1. The challenged conduct has ceased.

In questioning whether there remains a live case or controversy for this Court to adjudicate, the Court correctly begins by asking the parties to "address, among other issues, whether the *conduct at issue is ongoing*." (Order at 3 (emphasis added).) This is unquestionably the proper starting point for the analysis, because even if the allegations of Plaintiffs' Complaint as to Allegiance were true (and, as Allegiance demonstrated in its summary judgment papers, they

are not), the conduct described in the Complaint—that is, an alleged *agreement* between Allegiance and Hillsdale Community Health Center ("HCHC") not to market competing services—has unquestionably ceased. (*See* Complaint [DE 1], at 1, ¶¶ 17, 18, 35.)[1]

Whether the alleged unlawful conduct is ongoing is of critical importance because, as the Supreme Court and Sixth Circuit have repeatedly recognized, "'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Remus Joint Venture v. McAnally*, 116 F.3d 180, 184 (6th Cir. 1997) (quoting *Arizonans For Official English v. Arizona*, 520 U.S. 43, 67 (1997)); *accord United States v. City of Detroit*, 401 F.3d 448, 451 (6th Cir. 2005). Indeed, it is well-settled that "[a] federal court has no authority to render a decision upon moot questions or to declare rules of law that cannot affect the matter at issue." *City of Detroit*, 401 F.3d at 450 (quoting *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001)) (dismissing appeal of district court's injunction as moot upon changed circumstances). Moreover, a case may *become*

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[1] It is fundamentally true that an antitrust violation under Section 1 requires an ***agreement*** to engage in unlawful conduct. *E.g.*, *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768 (1984) ("Section 1 of the Sherman Act . . . does not reach conduct that is 'wholly unilateral.'"). Not only has every single witness denied the existence of any agreement between Allegiance and HCHC, but more importantly, as even Plaintiffs have acknowledged, so long as Allegiance ***independently*** determines what kind of marketing it does—including whether or not to market ***at all*** in Hillsdale County—it has acted completely lawfully.

moot where the defendant has voluntarily ceased the allegedly objectionable activity. *West Mich. Envtl. Action Council, Inc. v. Nuclear Regulatory Comm'n*, 570 F. Supp. 1052, 1054 (W.D. Mich. 1983) (quoting *Concentrated Phosphate*, 393 U.S. at 203) (accepting defendant's averments that it would not, and could not reasonably be expected to, repeat the alleged harms and finding case moot). For this reason, the Court's inquiry at this time is both necessary and appropriate.

As noted above, Plaintiffs brought this suit premised on the contention that, at the time of filing, HCHC and Allegiance had an ongoing, unlawful agreement, dating back to at least 2009, pursuant to which Allegiance refrained from marketing competing services in Hillsdale County. (Compl., at ¶¶ 17-18.) However, as discovery has confirmed, since at least *2012,* Allegiance has engaged in *significant* marketing in Hillsdale County, even with respect to its oncology, cardiovascular, and orthopedic services, (*see* Allegiance's Reply to Motion for Partial Summary Judgment, Exhibit Q ("Transcript of Dep. of Kevin Minnelli") [DE 83-2], at 225:4-20, 234:9-237:21, 260:3-21), which are the very service lines that Plaintiffs expressly identify as those that were the subject of the alleged agreement not to market in Hillsdale County (*see* Compl., at ¶¶ 17-18).[2] There can be only one conclusion from these facts: any such agreement, if it ever existed, has

[2] To minimize the burden on the Court, Allegiance cites to materials already on the record wherever possible; the only discovery material cited herein that was not previously filed with the Court is attached as an exhibit to this Supplemental Brief *infra*.

long since ceased.

Moreover, quite significantly, Allegiance's expert on hospital marketing, Mr. Lawrence Margolis, has opined that Allegiance's digital advertising in Hillsdale County has been "*substantial*, and [that] the data-validated results met or exceeded benchmarks used by the industry and in [his] consulting practice." (Allegiance's Motion for Partial Summary Judgment ("MPSJ"), Exhibit H ("Margolis Am. Expert Report") [DE 68-8], at ¶ 76 (emphasis added).[3]) Mr. Margolis further opined that the marketing strategy being employed by Allegiance is the proper one in the circumstances, and thus there is no reasonable basis to conclude that Allegiance is likely to alter its strategy going forward to commence, or return to, any impermissible or unlawful conduct. *See* Transcript of Deposition of Lawrence Margolis, 12/8/2016, excerpted and attached hereto as Exhibit "1," at 8:19-9:3.

In short, the allegedly unlawful conduct—if it ever occurred in the first place—has unquestionably and definitively ceased, and did so *many* years ago.

2. There is no reasonable expectation that an unlawful agreement will occur in the future.

Equally important, indisputable evidence confirms that there is no

[3] As Allegiance also demonstrated in its summary judgment brief, digital marketing has certainly not been Allegiance's *only* form of marketing in Hillsdale County; both before and after 2012, Allegiance has also consistently advertised in Hillsdale County via television, radio, print, and the use of "physician liaisons."

reasonable likelihood that an agreement between Allegiance and HCHC, pursuant to which Allegiance agrees not to engage in marketing in Hillsdale County, is likely to exist in the future.

Several reasons *strongly* support this conclusion. First, and perhaps most importantly, as this Court alluded to in the July 20 Order, the Final Judgment that this Court has previously entered as to HCHC effectively precludes it from engaging in anticompetitive conduct agreement in the future. (*See* Order Granting Plaintiff's [sic] Motion for Entry of Proposed Final Judgment [DE 36], at 6-7.) Indeed, the Final Judgment largely prevents HCHC from even discussing with Allegiance their respective marketing strategies, much less agreeing on them, (*id.*), and, given that the *only* entity with which Allegiance is alleged to have engaged in unlawful conduct is HCHC, the Final Judgment that has already been entered against HCHC *ensures,* to a high degree of certainty, that the unlawful conduct alleged in the Complaint against Allegiance cannot, and will not, occur in the future.

Moreover, it is telling that the *Plaintiffs* expressed this very view when requesting that the Court endorse the Final Judgment and terminate HCHC as a party-defendant, stating that "[t]he United States is satisfied . . . that the relief proposed in the Final Judgment will ***prevent the recurrence of the violations alleged in the Complaint and ensure that patients, physicians, and employers***

benefit from competition between Defendants." (Pls. Motion for Entry of Proposed Final Judgment [DE 29], at 12 (emphasis added).) In fact, Plaintiffs even assured the Court that "the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation . . .," (*id.* at 12-13), and Plaintiffs later reiterated that "[e]ntering the Final Judgment would ***fully implement*** relief that would benefit patients, physicians, and employers in the hospitals' service areas [and] . . . will ensure that the Settling Defendants do not re-enter illegal agreements," (Pls. Reply Brief in support of Motion for Entry of Proposed Final Judgment [DE 34], at 4 (emphasis added)). For all of these reasons, there is no justification for believing that HCHC and Allegiance will enter any unlawful agreement in the future, and thus no reason for any further relief in this case.

While the terms of the Final Judgment, standing alone, should provide this Court with all of the assurance it may require that unlawful conduct will not occur in the future, changes at Allegiance provide further confirmation that no further relief in this case is necessary or appropriate.

Significantly, Allegiance is no longer an independent entity. In 2016, Allegiance became part of the Henry Ford Health System ("HFHS"). As such, Allegiance is now subject to HFHS' policies, procedures, and oversight, and HFHS ultimately has authority over all decisions at Allegiance, including its marketing

strategy and legal compliance. This change in circumstance is highly relevant to the Court's inquiry, because there is absolutely *no* allegation whatsoever that HFHS was *in any way* involved in the alleged conduct, nor is there any basis to presume that HFHS would engage in unlawful conduct in the future. Accordingly, any suggestion that, absent action by this Court, unlawful conduct is likely to occur in the future is wholly unfounded.[4]

B. <u>Given the Change in Circumstances, and the Unlikelihood of Unlawful Conduct in the Future, This Court Should Declare the Case Moot.</u>

The determination that a case is moot and that the requested relief is outside the jurisdiction of the Court is left to the sound discretion of the Court, *see Concentrated Phosphate*, 393 U.S. at 203-04; *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 334 (1952), and Allegiance acknowledges that the courts have typically imposed a heavy burden of persuasion to show mootness, *see Concentrated Phosphate*, 393 U.S. at 203-04; *Youngtown Pub'g Co.*, 189 F. App'x 402, 405, 2006 WL 1792215, *4 (6th Cir. 2006) (quoting *Mosley v. Hairston,* 920 F.2d 409, 415 (6th Cir. 1990); *United States v. Mercy Health Servs.,* 107 F.3d 632, 635 (8th Cir. 1997) (dismissing Government antitrust case against hospitals as

[4] Allegiance further notes that, as demonstrated in its summary judgment brief, Allegiance's marketing strategy in Hillsdale County has been quite *successful,* resulting in an increase year to year in patients seen from Hillsdale County, even with respect to competing service lines. In addition to providing compelling evidence *against* the Plaintiffs' claim that an unlawful agreement ever existed, the success of the current strategy makes it highly unlikely that Allegiance would depart from it in the future.

moot where merger was abandoned mid-suit). However, Allegiance submits that the circumstances of this case unquestionably support such a ruling.

The Sixth Circuit has explained that "[t]he reasoning behind this 'heavy burden' is simple: courts want to 'protect a party from an opponent who seeks to defeat judicial review by temporarily altering its behavior." *Youngtown Pub'g Co.*, 189 F. App'x at 405, 2006 WL 1792215, at *4 (quoting *City of Detroit*, 401 F.3d at 451 n.1). Of course, this potential concern simply does not apply here. It is clear that Allegiance ceased any allegedly unlawful conduct several *years* before this lawsuit was even commenced—well before there was even a threat of judicial review—and over the subsequent years Allegiance has demonstrated its continued commitment to conducting digital and other marketing on both competing and non-competing service lines in Hillsdale County. Plaintiffs cannot dispute this fact, and this conduct clearly satisfies the standard for dismissal on mootness grounds. *See Concentrated Phosphate*, 393 U.S. at 203 ("Mootness may be demonstrated where the likelihood of further violations is 'sufficiently remote' to make injunctive relief unnecessary."); *see also Brooks v. Celeste*, No. 98-4027, 1999 WL 1204879,*1 (6th Cir. 1999) (unpub.) (dismissing case as moot based on allegedly inadequate medical care provided to inmates by a prison doctor who retired from the prison four years prior, and whose retirement made it unreasonable to expect that doctor would ever return to resume unlawful conduct).

In short, this Court can be highly confident that the possibility of unlawful conduct in the future by Allegiance is so remote and unjustifiably speculative as to compel a finding of mootness, and the case should be dismissed at this time on that basis.

C. Even If the Court Chooses to Retain Jurisdiction Over the Case at this Time, the Prospective Relief Requested by Plaintiffs Is Unnecessary and Unwarranted.

Finally, because the same conditions that demonstrate the mootness of this case likewise illustrate that injunctive relief cannot properly be awarded, Allegiance respectfully submits that, should the Court choose not to dismiss the action at this time, this Court should at the very least make clear that the injunctive relief sought by Plaintiffs is no longer necessary nor appropriate, and that it will *not* be awarded if the case were to proceed to trial. *See W.T. Grant Co.*, 345 U.S. at 633 (recognizing that a defendant's voluntary cessation of the alleged wrongs, even if it does not suffice to moot a case, is "one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts."); *TRW, Inc. v. F.T.C.*, 647 F.2d 942, 953-54 (9th Cir. 1981) (explaining the difference between the standard governing mootness and that of the need for prospective relief . . . is one between a 'mere possibility' and a 'cognizable danger' of recurrent violation," and reversing an award of injunctive relief because complainant failed to carry burden to show a "cognizable danger" of

future antitrust violation); *Brooks*, 1999 WL 1204879, at *1 ("[W]e cannot consider granting an injunction on this issue, since no prospective relief is possible.").[5]

The absence of any need for injunctive relief in this case is further confirmed by the simple fact that, as Allegiance has already demonstrated in its summary judgment papers, *there has been no competitive harm caused by Allegiance's conduct,* and thus there is nothing this Court would need to "remedy" prospectively even *if* the Plaintiffs were to succeed at trial in showing that *any* unlawful conduct ever occurred in the past (and they will not). Indeed, the absence of any harm to consumers or competition is confirmed by Allegiance's expert, Mr. Margolis, who explained that there is "no evidence that Allegiance's marketing strategy for Hillsdale County negatively impeded its brand awareness in Hillsdale County or that it resulted in any material reduction in the benefits marketing can typically provide to Hillsdale County residents." (Margolis Am. Expert Rpt. [DE 68-8], at ¶ 22.) Similarly, Allegiance's other expert witness, Dr. Susan Manning, has opined that, even assuming the alleged agreement ever existed, Allegiance's conduct created ***no harm to competition in the market as a whole,*** an opinion that

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[5] Notably, Allegiance's conduct is *very different* than that of the defendant in cases where the defendant only promises to discontinue the offensive conduct after a lawsuit is threatened, *e.g.*, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 48 (1960), or where there is no change in circumstances that would prevent the conduct from recurring, *e.g.*, *United States v. Packorp, Inc.*, 246 F. Supp. 963, 967-68 (W.D. Mich. 1965).

Plaintiffs' economist has failed to refute in any meaningful way. (*See* Allegiance's MPSJ, Exhibit F ("Manning Expert Report") [DE 68-6], at ¶¶ 19-20; *id.* at Exhibit B ("Chipty Rebuttal Report") [DE 68-2], at ¶ 8.) Thus, the Court should have a high degree of confidence, even now, that there has been no adverse effect on competition in South-central Michigan to "remedy" through an injunction, and that the requested relief would serve no purpose but to punish Allegiance for past alleged conduct, which would be improper. *See Oregon State Med. Soc'y,* 343 U.S. at 333 (affirming that an injunction is solely intended "to forestall further violations," not for "punishment or reparations for those in the past"); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects.").

The Supreme Court's decision in *Oregon State Medical Society* is instructive on this issue. There, the Court expressly rejected the United States' request to enjoin an alleged Section 1 antitrust violation, finding that the defendant healthcare providers had ceased the allegedly anticompetitive behavior several years before the lawsuit was foreseen or filed. 343 U.S. at 334. Because the defendants' abandonment of the conduct at issue "did not consist merely of pretensions or promises," but was instead affirmatively "carried out by extensive operations which have every appearance of being permanent," the Court held that "[t]he

record discloses no threat or probability of resumption of the abandoned [anticompetitive conduct]." *Id.* For this reason, the Court properly rejected the United States' request for an injunction. *Id.*[6]

Here, the facts are no less compelling than they were in *Oregon State Medical Society,* and thus it should be clear to the Court that, even should the case proceed to trial, injunctive relief will not be appropriate. Accordingly, Allegiance submits that the Court should make clear that Plaintiffs cannot satisfy their burden to show that the injunctive relief they seek is necessary or appropriate, and such a ruling would be particularly beneficial at this time as it may permit the case to be resolved without the necessity of a trial.

D. <u>Request for Oral Argument</u>

Given the significant issues presented by this Court's July 20 Order, Allegiance believes that oral argument would assist the Court in reaching a decision, and therefore requests that oral argument be held by the Court at its earliest opportunity.

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[6] Allegiance anticipates that Plaintiffs may contend that relief remains necessary in this case simply because Allegiance has not admitted that its past conduct was unlawful; however, Allegiance submits that its past conduct is irrelevant here because the alleged conduct cannot occur in the future in light of the existing Final Judgment. Where the alleged unlawful conduct has ceased and will not recur, the dismissal of the action on grounds of mootness or, at a minimum, the denial of injunctive relief, is unquestionably the proper result.

Dated August 7, 2017.

Respectfully submitted,

/s/ ____________________________

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a Notice of Electronic Filing to all counsel or parties of record on the Service List below.

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