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

DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

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Defendant Blue Cross Blue Shield of Michigan ("Blue Cross"), by its undersigned counsel of record, submits this motion to compel responses to its Interrogatory Nos. 1 and 2.

In support of this motion, Defendant relies upon the statement of facts, authorities, and argument set forth in the accompanying brief and its attachments.

As required by Local Rule, Defendant's counsel held conferences with attorneys for Plaintiffs entitled to be heard on the motion in which Defendants explained the nature of the motion and its legal basis and requested but did not obtain concurrence in the relief sought.

Dated: October 21, 2011

Respectfully submitted,

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

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STATEMENT OF ISSUES PRESENTED

1. Plaintiff the United States of America has objected to Blue Cross Blue Shield of Michigan's Interrogatory Nos. 1 and 2, although other federal district courts considering substantially similar interrogatories posed by antitrust defendants have compelled Plaintiff to provide a complete response. Moreover, Plaintiff's objections asserting the work-product doctrine and the law enforcement investigatory privilege are without merit. Should Plaintiff be compelled to respond fully to Interrogatory Nos. 1 and 2?

CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

Federal Cases

Cason-Merenda v. Detroit Medical Center, No. 06-15601, 2008 WL 659647 (E.D. Mich. Mar. 7, 2008)

Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303 (E.D. Mich. 2000)

In re Packaged Ice Antitrust Litigation, No. 08-md-01952, 2011 WL 1790189 (E.D. Mich. May 10, 2011)

United States v. AMR Corp., No. 99-1180-JTM (D. Kan. Feb. 7, 2000)

United States v. Dean Foods Co., No. 10-CV-59 (E.D. Wis. Oct. 8, 2010)

United States v. Dentsply International, Inc., No. 99-5 MMS (D. Del. June 11, 1999)

United States v. Four Hundred Sixty-Three Thousand . . . Dollars in U.S. Currency, 779 F. Supp. 2d 696 (E.D. Mich. 2011)

Federal Statutes

Fed. R. Civ. P. 26(b)

Defendant Blue Cross Blue Shield of Michigan ("Blue Cross") hereby moves to compel Plaintiff the United States of America to respond to Blue Cross Interrogatory Nos. 1 and 2. As required by the Local Rules, Blue Cross and the United States Department of Justice ("DOJ") have engaged in a good faith meet and confer, but DOJ will not respond to these interrogatories. Blue Cross therefore files this motion to compel.[1]

I. INTRODUCTION

In three previous civil antitrust cases brought by DOJ, defendants served interrogatories seeking the identity of, and information provided by, individuals whom DOJ interviewed during its pre-complaint investigations. In all three cases DOJ objected, citing, among other things, the work-product doctrine. And in all three cases, federal district court judges overruled DOJ's objections and required it to answer the interrogatories.

Blue Cross assumed that DOJ would answer interrogatories that courts have on three occasions ordered DOJ to answer. So Blue Cross asked, as its first and second interrogatories, the very same questions that were asked in those previous cases. Surprisingly, though, DOJ responded with substantially the same objections that the other courts rejected. During the meet-and-confer process, DOJ chose to ignore those courts' decisions.

Because Blue Cross is entitled to learn what facts exist to support Plaintiffs' allegations, DOJ should be compelled to respond fully to Interrogatory Nos. 1 and 2.

[1] Blue Cross's First Interrogatories to Plaintiff the United States of America consisted of 11 interrogatories. Blue Cross will discuss with DOJ its objections to the remaining interrogatories and Blue Cross believes the parties can reach agreement on most, if not all, of the objections. But the parties have reached an impasse with respect to the first two interrogatories. Given the importance to Blue Cross of obtaining an early response to these first two interrogatories, and the fact that they present distinct legal issues, Blue Cross believes it is necessary and appropriate to file this motion before determining whether a motion to compel is required with respect to any other interrogatories.

II. BACKGROUND

Before filing the Complaint, DOJ engaged in two investigations. First, it investigated Blue Cross's proposed acquisition of Physicians Health Plan of Mid-Michigan. Second, it conducted a truncated investigation of Blue Cross's contracting practices with hospitals. As part of those investigations, DOJ served Civil Investigative Demands ("CIDs") on Blue Cross customers and competitors, Michigan hospitals, and various other associations and entities. DOJ interviewed many individuals and entities. And DOJ relied on facts obtained from these interviews in bringing this action. Because DOJ conducted the interviews using its civil investigative authority, Blue Cross was not present.

Blue Cross naturally sought to learn the facts gathered during those investigations. Therefore, Blue Cross served Interrogatory Nos. 1 and 2, which ask for facts known to the witnesses interviewed by DOJ in its CID investigations of Blue Cross.

> Interrogatory No. 1: For each individual or entity interviewed by the DOJ pursuant to its CID investigation of Blue Cross related to this matter, identify in detail all facts known to these individuals and entities that are relevant to Plaintiffs' claims against Blue Cross.
>
> Interrogatory No. 2: For each individual or entity that provided information in any investigation of Blue Cross' proposed acquisition of Physicians Health Plan of Michigan, identify in detail all facts known to these individuals and entities that are relevant to Plaintiffs' claims against Blue Cross.

In response, DOJ offered several objections: that "identify in detail" and "entity" are vague and ambiguous; that the interrogatories are unduly burdensome to the extent the requested information "is already in Blue Cross's possession"; that DOJ could not know all facts known to the witnesses; and that the materials requested fell within the protections of the work-product

doctrine and/or the law enforcement investigatory privilege.[2] (DOJ does not assert the attorney-client privilege—nor could it—so that privilege is not at issue here.)

Blue Cross sent a letter asking DOJ to withdraw its objections to Interrogatory Nos. 1 and 2 and provide complete answers. Blue Cross explained that, as DOJ well knew, those interrogatories are substantially the same as interrogatories posed by defendants in three previous civil antitrust actions brought by the United States. And as DOJ further knew, the courts in those cases rejected the same objections offered here and required DOJ to respond fully to the interrogatories. *See* Memorandum and Order entered Feb. 7, 2000 in *United States v. AMR Corp.*, Civ. Action No. 99-1180-JTM (D. Kan.), attached as Ex. 2; Opinion entered June 11, 1999 in *United States v. Dentsply Int'l, Inc.*, Civ. Action No. 99-5 MMS (D. Del.), attached as Ex. 3; Order entered October 8, 2010 in *United States v. Dean Foods Co.*, Civ. Action No. 2:10-cv-00059-JPS (E.D. Wis.), attached as Ex. 4.

DOJ refused to withdraw its objections, making clear that it will continue to fight this issue in every district and circuit court in the country.[3] But the federal judges in Kansas, Delaware, and Wisconsin were correct. Moreover, controlling law in the Eastern District of Michigan holds that DOJ cannot use the work-product doctrine to shield facts from discovery.

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[2] In accordance with Local Rule 37.2, a verbatim recitation of each interrogatory and each response is set forth in Exhibit 1. Under Local Rule 7.1(a), Blue Cross states that it has explained to DOJ the nature of its motion and its legal basis, but has not obtained concurrence in the relief sought.

[3] Though DOJ intimated, after multiple exchanges, that it might be able to identify some subset of the information requested by Interrogatory Nos. 1 and 2 that it could agree to provide, it offered no concrete explanation of what that limited response might encompass or the time-frame that it would take DOJ to determine whether it could even reach such a compromise. Moreover, it is Blue Cross's position that it is entitled under the law to the information requested, without limitation. The parties are, therefore, at an impasse.

Accordingly, DOJ's objection should be overruled and it should be required to provide full and complete responses to these interrogatories.

III. ARGUMENT

A. Three Federal Courts Have Compelled the United States to Respond to Nearly Identical Interrogatories.

On at least three occasions, DOJ has refused to answer interrogatories that are nearly identical to Blue Cross Interrogatory Nos. 1 and 2, asserting that the information sought is protected work product. In all three instances, courts have rejected that argument and compelled DOJ to respond.

In *AMR Corp.*, the court compelled DOJ to answer the following interrogatory:

> With respect to the [witnesses who provided information during the pre-complaint investigation] identified in response to Interrogatory No. 1, identify in detail all material or principal facts supplied to you by these persons that are relevant to your claims that American monopolized or attempted to monopolize any relevant market for air service.

Order, *United States v. AMR Corp.*, No. 99-1180-JTM, at 2 (D. Kan. Feb. 7, 2000), Ex. 2. The court rejected DOJ's argument that the information sought was protected work product because the interrogatory "requests facts and not counsel's mental impressions or conclusions." *Id.* at 5.

DOJ argued, as it presumably will argue here, that under *Hickman v. Taylor*, the work-product doctrine protects an attorney from being forced "to repeat or write out all that witnesses have told him." *AMR Corp.* Order at 4 (quoting *Hickman v. Taylor*, 329 U.S. 495, 512 (1947)). The court disagreed, reasoning that "[t]he interrogatory does not require a complete recitation of statements a witness may have provided to counsel; plaintiff is only required to provide the substance of the 'material or principal facts' which the witness possesses concerning this case." *AMR Corp.* Order at 5-6. The court also rejected DOJ's argument that linking the names of witnesses to facts would violate the work-product doctrine. Instead, the court concluded that

"[i]nterrogatories asking for witness names and the facts they possess are standard discovery questions and routinely employed to assist a party in determining which witnesses to depose." *Id.* at 5.

Likewise, in *Dentsply*, the court compelled DOJ to answer this interrogatory:

> With regard to the 184 individuals and entities who were interviewed by the DOJ pursuant to its CID investigation of Dentsply and subsequently identified in Plaintiff's Rule 26(a)(I) Initial Disclosures, please identify in detail all facts known to these individuals and entities that are relevant to the DOJ's claims against Dentsply in this matter.

Order, *United States v. Dentsply Int'l, Inc.*, No. 99-5 MMS, at 2 (D. Del. June 11, 1999), Ex. 3. The court explained that "Dentsply seeks only the facts that form the basis of the lawsuit – the interrogatory does not require the Government to supply its counsel's view of the case, identify the facts which counsel considered significant or reveal the specific questions asked by the Government Attorneys." *Id.* at 3.

Again, in *Dean Foods*, the court required DOJ to answer the following interrogatory:

> Identify each of the individuals and entities interviewed by each of the Plaintiffs (either together or independently) pursuant to the Investigation of the challenged Transaction and provide all factual information obtained from these individuals and entities through such interviews that is relevant to Plaintiffs' claims in this case.

Order, *United States v. Dean Foods Co.*, No. 10-CV-59, at 2 (E.D. Wis. Oct. 8, 2010), Ex. 4. The court concluded that "[t]he work-product doctrine does not protect plaintiffs' [sic] from Dean's discovery request because the First Interrogatory asks for facts and not the attorneys' mental impressions or conclusions." *Id.* at 11.

Importantly, the *Dentsply* court noted that the work-product doctrine must not be used to manipulate the timing of fact disclosures for strategic purposes.

> The weakness of the Government's position is perhaps best exposed by its necessary concession . . . at some point before trial it would have to reveal the facts upon which it would rely to prove its case against Dentsply. But,

> if facts developed during the three-year investigation were truly work product, the facts sought by Dentsply would never have to be disclosed. ***The Government, therefore, under the guise of the work product doctrine, 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 Order at 5 (emphasis added).

The same is true here. DOJ clearly is trying to avoid providing the facts in its possession for strategic reasons, such as preventing Blue Cross from learning which of the potentially hundreds of third-party witnesses in this case it needs to depose. These tactics should not be countenanced, especially where the discovery sought by Blue Cross is no different from the information DOJ has been ordered to produce to defendants in previous civil antitrust cases. Accordingly, DOJ should be compelled to provide, for each person interviewed during the CID investigations of Blue Cross, the facts obtained from those witnesses before Plaintiffs filed their Complaint.

B. The Principles Relied on by the *AMR, Dentsply* and *Dean Foods* Courts Have Been Applied by this Court as Well.

While this Court obviously has not had the opportunity to rule on the precise interrogatories at issue here, it has applied the same principles in addressing work product issues. As this Court has stated, "[T]he work-product doctrine, like the attorney/client privilege, does not protect underlying facts from disclosure." *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000). *See also William Beaumont Hosp. v. Medtronic, Inc.*, No. 09-CV-11941, 2010 WL 2534207, at *7 (E.D. Mich. June 18, 2010) (refusing to apply work-product doctrine to shield facts from discovery). Indeed, it is widely recognized that the work-product doctrine does not shield facts from discovery. *See, e.g., Cason-Merenda v. Detroit Med. Center*, No. 06-15601, 2008 WL 659647, at *3-*4 (E.D. Mich. Mar. 7, 2008) (holding that an interrogatory that seeks the facts uncovered in pre-filing investigation interviews is not subject to

objection based on the work product doctrine); *Infosystems, Inc.*, 197 F.R.D. at 306 ("[T]he work-product doctrine, like the attorney/client privilege, does not protect underlying facts from disclosure."); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) ("Because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product."); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984) ("Of course, where the same document contains both facts and legal theories of the attorney, the adversary party is entitled to discovery of the facts. It would represent a retreat from the philosophy underlying the Federal Rules of Civil Procedure if a party could shield facts from disclosure by the expedient of combining them or interlacing them with core work product.").

This is not surprising as, in its seminal *Hickman* decision, the Supreme Court reasoned: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Hickman*, 329 U.S. at 507. Moreover, "[a] party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney." *Id.* at 504. In other words, DOJ cannot use the work-product doctrine to avoid telling Blue Cross the ***facts*** it has gathered (other than the self-selected and incomplete "facts" it decided to include in the Complaint).

Moreover, Interrogatory Nos. 1 and 2 do not focus on post-complaint interviews. Instead, they are specifically directed to DOJ's pre-Complaint investigation. An interrogatory that seeks the facts uncovered in pre-filing investigation interviews is not subject to objection based on the work-product doctrine. *See*, *e.g.*, *Cason-Merenda*, 2008 WL 659647, at *3-*4.

As these cases indicate, Blue Cross is entitled to discover facts gathered by DOJ during its CID investigations. The interrogatories at issue do not ask for any privileged information that may be contained in memoranda or notes prepared by DOJ attorneys, or for the specific questions asked by counsel of the witnesses during the CID investigations. Nor do these interrogatories ask for DOJ attorneys' theories, analyses, mental impressions or beliefs. Rather, Blue Cross seeks only ***facts*** obtained from the many third-party witnesses who were subject to DOJ's pre-Complaint investigations. Moreover, the facts gleaned from the CID interviews will not reveal "the topics of interest to the United States"—certainly, no more so than already evidenced by the allegations in Plaintiffs' Complaint.

Equally unavailing is DOJ's assertion that if it were required to identify who "it selected to interview during the course of its investigation," it would violate the work-product doctrine. Here, "the list of interviewees is just that, a list. It does not directly or indirectly reveal the [DOJ's] mental processes." *United States v. Amerada Hess Corp.*, 619 F.2d 980, 987-88 (3d Cir. 1980) (affirming district court order requiring production of list of persons interviewed).

C. The Law Enforcement Investigatory Privilege Does Not Apply.

DOJ's assertion of the law enforcement investigatory privilege also must fail. This is "'a qualified privilege designed to prevent disclosure of information that would be contrary to the public interest in the effective functioning of law enforcement.'" *In re Packaged Ice Antitrust Litig.*, No. 08-md-01952, 2011 WL 1790189, at *6 (E.D. Mich. May 10, 2011) (Borman, J.) (quoting *In re Micron Tech., Inc. Secs. Litig.*, 264 F.R.D. 7, 10 (D.D.C. 2010)). The investigatory privilege is designed to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise prevent interference in an investigation. *Tuite v. Henry*, 181 F.R.D. 175, 176-77 (D.D.C. 1998).

This privilege "'protects only suggestions, advice, recommendations and opinions, rather than factual and investigatory reports, data and surveys in government files.'" *See In re Packaged Ice Antitrust Litig.*, 2011 WL 1790189, at *7 (quoting *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 659 (6th Cir. 1976)). A litigant's need for to obtain discovery is balanced against "the government's interests in ensuring the secrecy of the [information] in question." *Tuite*, 181 F.R.D. at 177. And this balancing test is applied "with an eye towards disclosure." *Id.*

The privilege has been used, for example, "to prohibit disclosure of FBI agents' names and FBI's internal operating protocols," and it "applies with greater force to a request by a party in a civil suit to obtain materials from the government's criminal investigation." *United States v. Four Hundred Sixty-Three Thousand . . . Dollars in U.S. Currency*, 779 F. Supp. 2d 696, 713 (E.D. Mich. 2011) (Lawson, J.). Here, by contrast, Interrogatory Nos. 1 and 2 do not ask DOJ to disclose law enforcement techniques or internal operating procedures. Nor is there any legitimate concern about preserving the confidentiality of sources, as there are no safety or privacy concerns for the witnesses whom DOJ interviewed concerning business issues. *See In re Packaged Ice Antitrust Litig.*, 2011 WL 1790189, at *6 (noting that one consideration is "the impact upon persons who have given information of having their identities disclosed"). Interrogatory Nos. 1 and 2 simply seek factual information gathered in a civil, not criminal, investigation, and that investigation has concluded. *See In re Packaged Ice Antitrust Litig.*, 2011 WL 1790189, at *6 (noting that factors weighed include "whether the information sought is

factual data or evaluative summary" and "whether the investigation has been completed"). [4]

In short, DOJ cannot use the law enforcement investigatory privilege to shield from discovery facts identified in a civil investigation. This is consistent with the scope of permissible discovery under Rule 26(b). Indeed, "'[m]utual knowledge of all the relevant facts . . . is essential to proper litigation.'" *In re Four Hundred Sixty-Three Thousand . . . Dollars*, 779 F. Supp. 2d at 713 (quoting *Hickman*, 329 U.S. at 507-08).

D. Plaintiff's Other Objections are Improper and Should be Rejected.

DOJ also objects to Interrogatory Nos. 1 and 2 "as unduly burdensome to the extent that it requests information that is already in Blue Cross' possession, custody, or control." But that is exactly the point: by the very nature of CID interviews, Blue Cross could not participate. Thus, DOJ had an opportunity to discover third-party information outside of Blue Cross's presence. Once DOJ brought this civil action, however, the information learned during the CID interviews became discoverable.

DOJ's remaining objections are mere equivocation. DOJ objects because it does not have in its possession, custody or control "all" facts known to persons they interviewed. But DOJ certainly can provide those facts at its disposal. Moreover, asking a party to "identify" facts is

[4] There is authority that suggests that this privilege only applies to criminal investigations. *In re U.S. Dep't Homeland Sec.*, 459 F.3d 565, 571 (5th Cir. 2006) ("Petitioner expands the privilege's scope too broadly. Several types of information probably would not be protected, including documents pertaining to: (1) people who have been investigated in the past but are no longer under investigation, (2) people who merely are suspected of a violation without being part of an ongoing criminal investigation, and (3) people who may have violated only civil provisions."); see also *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1126 (7th Cir. 1997) ("The victim of a crime cannot force the government to prosecute the criminal; equally he cannot say to the government, 'Speed up your investigation, or get out of the way, because I want to seek a civil remedy.' . . . The heart of our concern is with the principle that the control of criminal investigations is the prerogative of the executive branch, subject to judicial intervention only to protect rights-and no rights of the plaintiffs were invaded by the government's assertion of its law enforcement investigatory privilege."); *United States ex. rel. Becker v. Tools & Metals, Inc.*, Nos. 3:05-CV-627-L, 3:05-2301-L, 2011 WL 856928 (N.D. Tex. Mar. 11, 2011).

neither vague nor ambiguous. Equally pedantic is DOJ's objection to the request for facts provided by "each individual or entity interviewed" as "vague and ambiguous because the United States typically interviews natural persons affiliated with entities, not entities." Of course they interviewed "natural persons" when attempting to learn what information is known to a business, association or other entity. That is no basis to withhold the information sought by Interrogatory Nos. 1 and 2. DOJ should simply be ordered to disclose the facts it knows.

Finally, the fact that DOJ has produced to Blue Cross documents previously produced to it by various persons or entities during the CID investigations is not a sufficient response to Interrogatory Nos. 1 and 2. While Rule 33(d) affords a party the option to produce business records when those records contain the information sought, the third-party business records produced by DOJ will not necessarily—or comprehensively—contain the same factual information discovered by DOJ during the CID interviews. In that regard, DOJ has told counsel for Blue Cross that they did not procure pre-complaint declarations or take pre-complaint depositions of these parties, so the pending interrogatories are the only method of learning such information now.

IV. CONCLUSION

Blue Cross respectfully requests that this Court grant its motion to compel Plaintiff to produce full and complete responses to its First Set of Interrogatories Nos. 1 and 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury that he served a copy of the foregoing Motion and Memorandum in Support on October 21, 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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