UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. FEDERATION OF PHYSICIANS AND DENTISTS, et al., Defendants.	Civil Action No. 1:05CV431 Chief Judge Beckwith United States Magistrate Judge Hogan

PLAINTIFF UNITED STATES' REPLY MEMORANDUM SUPPORTING ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AGAINST THE FEDERATION OF PHYSICIANS AND DENTISTS AND LYNDA ODENKIRK

In opposing a summary-judgment motion, a "party may not rest upon . . . mere allegations or denials" in its pleadings. Fed. R. Civ. P. 56(e). Defendants' opposition, however, offers no evidence and has failed to raise a genuine issue of material fact for trial. On the undisputed record, the United States is entitled to judgment as a matter of law. The Court should therefore grant the United States' motion for partial summary judgment.

Defendants' arguments, limited to two paragraphs in their brief (Dkt. Entry 54), address two elements of plaintiff's claim under § 1 of the Sherman Act, 15 U.S.C. § 1: that defendants must have (1) had an agreement or conscious commitment to a common scheme that (2) imposed an unreasonable restraint of trade. *See, e.g., Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005). The flaws in defendants' arguments

are explained below, but all share a common thread: They try to escape *per se* illegality not by pointing to evidence that contests the evidence cited by plaintiff, but merely by making arguments that are either legally irrelevant or based on mischaracterizations of the nature of the defendants' and their conspirators' concerted action.

1. Defendants acted pursuant to a common scheme

Contesting the first element of a Section 1 claim, concerted action, defendants argue that they merely provided physicians with information that would increase the doctors' effectiveness in "individual" negotiations with payers. In other words, despite overwhelming undisputed evidence that the Federation coordinated its members' contract negotiations, defendants claim that all member negotiations were "individual" and that Federation members did not act in concert.

The United States will not repeat here all of that evidence, which must be viewed as a whole. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004). To summarize, however, the record amply demonstrates that the conspirators' joint and collaborative action was pervasive in the initiation, execution, and fulfillment of their plan to increase fees for the OB-GYNs. *United States v. General Motors Corp.,* 384 U.S. 127, 142-43 (1966). For example, Federation activity in the Cincinnati OB-GYN community was initiated with the goal of improving the doctors' negotiating position against insurers through collective action by a substantial majority of area OB-GYNs. *See, e.g.*, PX 16; PX 22 at FPD-111719. The conspirators executed and fulfilled their goal, in part, by having Ms. Odenkirk manage the sequence, timing, and specific language of, and communications about, members' negotiations with insurers. *See, e.g.*, PX 26 (reflecting coordination of the sequence of negotiations); PX 28, 32, 46 (newsletters coordinating letter campaigns to Anthem, Humana, and United, respectively);

PX 78 (Federation will use its "collective knowledge" to coordinate members' negotiations); PX 83, 84, 103 (reflecting coordination of a second wave of letters to Anthem and Humana); PX 127 (showing Ms. Odenkirk's coordination of Federation members' negotiations with Anthem and Humana through the Critical Federation Alert system).

Defendants' conclusory claim that its members engaged in "individual" negotiations with insurers is insufficient under Rule 56(e) to withstand summary judgment. *Cf. United States v. One Harrington and Richardson Rifle*, 378 F.3d 533, 534 (6th Cir. 2004) ("conclusory opinions" are insufficient to defeat summary judgment); *Maki v. Laakko*, 88 F.3d 361, 364 (6th Cir. 1996) ("To preclude summary judgment, the nonmoving party must present evidence, beyond his pleadings and his own conclusory statements, to establish the existence of specific triable facts."). There are no disputed facts that this Court needs to resolve sitting as finder of fact at trial.

2. Defendants' restraint of trade was unreasonable

The restraint proven by the United States is clearly unreasonable as a matter of law. As the government explained in its opening brief (Dkt. Entry 47), when competing OB-GYNs act in concert and collectively threaten to terminate their contracts with insurers if the doctors' fees are not increased, that concerted action is *per se* illegal and conclusively presumed an unreasonable restraint. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422-23 (1990).

Defendants respond with straw arguments: First, they suggest that any agreement among Federation members was not an agreement on prices. But whether or not they agreed on specific fees is irrelevant, as *Trial Lawyers* illustrates. In that case about 100 CJA lawyers signed a petition stating that they would not accept any new cases "unless we are granted a substantial

increase in our hourly rate." 493 U.S. at 416. Just as in this case, in *Trial Lawyers* there was no need for the conspirators to specify a single price to succeed in raising their fees. But the lawyers' collective actions were nevertheless *per se* illegal. 493 U.S. at 422-23. Defendants also deny that they jointly negotiated prices (and hence presumably deny that they acted in concert) to increase their bargaining leverage and extract higher fees. But that claim, along with defendants' other arguments contesting concerted action, is refuted by the evidence.

Defendants' next argument is that the United States "has not shown an agreement among competitors not to contract unless their collective demands as to price were met." Defendants' response brief at 1 (Dkt. Entry 54). Defendants argument that a concerted refusal to contract is lacking ignores the import of undisputed evidence that the Federation members threatened *en masse*, with identical language, to terminate their contracts with insurers that did not increase the members' fees. Plaintiff's brief at 10-26 (Dkt. Entry 47). As the insurers explained, in unrebutted testimony, they capitulated to the Federation members' demands for higher fees because they realized the harm that they would suffer if the OB-GYNs carried out their concerted threats to terminate their contracts. Snyder Dec. ¶ 7, 16 (PX 5); Newman Dec. ¶ 12 (PX 7). Moreover, the evidence shows that leading Federation members were prepared to act on their threats. Dr. Karram observed in an e-mail to Dr. Metherd: "I agree that we probably will have to terminate someone to show everyone we are serious and that we do have the numbers. However I think we should persue [sic] their avenue a little longer so thaey [sic] can't accuse us of colluding." PX 9.

If defendants' legal point is that most Federation members did not carry out their termination threats, then that defense also fails. The Federation cannot escape antitrust liability

under *Trial Lawyers* by pointing to the fact that its members' concerted threats to terminate their contracts succeeded without the need to carry out the boycott. *Cf. United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992) (competing dentists that negotiated in concert with insurers were criminally liable under § 1 of the Sherman Act where the dentists "agreed to persuade the plans to raise co-payment fees and then took steps to carry out that agreement" short of boycotting). The insurers, which capitulated to Federation members' termination threats, were not required to put their heads into the lion's mouth to see if it would bite.

Defendants also complain that the government has not made "even an attempt to show that unlawful conduct, rather than informed individual negotiation and other market factors, led to the increases in reimbursement alleged in the complaint." Defendant's response brief at 1-2. This argument rests on both defendants' conclusory denial of the overwhelming evidence that they acted in concert and faulty legal reasoning. Defendants' claim that "individual negotiation" led to increased reimbursements is refuted by the very words of the Federation, which itself touted its role in its members' obtaining increased fees. In a Federation Alert on April 2, 2003, Ms. Odenkirk wrote to the members: "It appears there would be no discussions taking place if it were not for the Federation. Insurance companies generally do not desire major interruptions to their provider panels because of patient access, choice and continuity of care." PX 10. *See also* Snyder Dec. ¶ 22 (PX 5); Buckingham Dec. ¶ 15 (PX 6); Newman Dec. ¶ 13 (PX 7).

In any event, as a matter of law, the United States need not show that defendants' illegal conspiracy actually caused higher prices. As courts have stressed many times, *per se* restraints are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused. . . ." *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995,

1012 (6th Cir. 1999) (quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289 (1985)). Economic effects need not be shown for *per se* violations. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991) ("the essence of any violation of § 1 is the illegal agreement itself"); *United States v. Hayter Oil Co., Inc. of Greenville, Tenn.*, 51 F.3d 1265, 1270 (6th Cir. 1995) ("the price-fixing agreement itself constitutes the crime").

Similarly, defendants' conclusory claim that the information they provided doctors merely reduced the "asymmetry" between the doctors and insurers and was "pro-competitive, not anti-competitive," mischaracterizes the undisputed facts and, at any rate, is irrelevant as a matter of law. *Per se* restraints are presumed anticompetitive "without elaborate inquiry as to . . . the business excuse for their use." *Re/Max Int'l, Inc.*, 173 F.3d at 1012. As *Trial Lawyers* and *Alston* make clear, there is nothing "pro-competitive" about competing OB-GYNs collectively threatening to terminate their contracts with insurers to increase their fees. The Federation's coordination of its members' conspiracy constitutes participation in garden-variety *per se* illegal conduct.

On the undisputed factual record before the Court, the United States is entitled to summary judgment as a matter of law. The Court should grant the United States' motion for partial summary judgment.

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Defendants' remarks on settlement bear mention as one last point. Well before the United States filed its complaint on June 24, 2005, the government made an oral settlement offer to counsel then representing the Federation, but in contrast to the doctors who negotiated a pre-complaint settlement (Dkt. Entry 4), the Federation and Ms. Odenkirk offered no response.

Again, in August 2005, the United States outlined to defense counsel the government's principles on settlement. Dkt. Entry 26 ¶ 5. And in the parties' Rule 26(f) report, filed on September 1, 2005, defense counsel stated that within two weeks after receiving testimony and documents from the United States in response to defendants' forthcoming Rule 34 request, defendants would present a settlement proposal to the government. *Id*. Given the timing of the United States' production of the materials sought in the Rule 34 request, defendants should have submitted a settlement proposal comfortably by the end of November 2005. The United States also outlined again its settlement principles to defense counsel on December 2005, and January 12, 2005.

Defendants did not submit a settlement proposal to the United States until February 17, 2006, three weeks after the government's summary-judgment motion was filed. It does not appear that the parties are presently near a settlement.

DATE: March 28, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: Donald Mooney (Trial Attorney for Defendant Federation of Physicians and Dentists and Trial Attorney for Defendant Lynda Odenkirk), and I hereby certify that I have sent the document via electronic mail to the following non CM/ECF participant:

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