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

JOINT STATEMENT OF RESOLVED AND UNRESOLVED ISSUES RELATING TO BLUE CROSS BLUE SHIELD OF MICHIGAN'S MOTION TO COMPEL A RESPONSE TO INTERROGATORIES

Plaintiff the United States of America and defendant Blue Cross Blue Shield of Michigan submit this Joint Statement of Resolved and Unresolved Issues Relating to Blue Cross's Motion to Compel Responses to Interrogatories (Dkt. 80), pursuant to the Court's November 8, 2011 Order for Submission and Determination of Motion Without Oral Hearing (Dkt. 90). The parties have conferred in good faith to resolve the issues presented in Blue Cross's Motion to Compel.

That motion concerns Blue Cross Interrogatory Nos. 1 and 2, which ask for facts known to the witnesses interviewed by DOJ in its pre-complaint 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.

See Dkt. 80, Ex. 1.

A. Resolved Issues

1. The United States no longer asserts that the law enforcement investigatory privilege is a basis for objecting to Blue Cross Interrogatory Nos. 1 and 2.

2. The United States no longer asserts that Blue Cross Interrogatory Nos. 1 and 2 are vague and ambiguous.

B. Unresolved Issues

1. Blue Cross maintains that the facts in the Department of Justice's possession at the time it filed the Complaint do not constitute work product and are therefore discoverable. Support for Blue Cross's position is found in three decisions in prior antitrust cases brought by the United States and ordering the Department to answer virtually identical interrogatories. *See* Memorandum and Order entered Feb. 7, 2000 in *United States v. AMR Corp.*, Civ. Action No.

99-1180-JTM (D. Kan.) (Dkt. 80, Ex. 2); Opinion entered June 11, 1999 in *United States v. Dentsply Int'l, Inc.*, Civ Action No. 99-5 MMS (D. Del.) (Dkt. 80, Ex. 3); Order entered Oct. 8, 2010 in *United States v. Dean Foods Co.*, Civ. Action No. 2:10-cv-00059-JPS (E.D. Wis.) (Dkt. 80, Ex. 4).

The United States maintains that Defendant's naked general demand for "facts" – the substance of non-parties' oral statements made during interviews Plaintiffs have conducted – seeks attorney work product. The United States' position is squarely supported by the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495, 508-13 (1947); *see also Norwood v. FAA*, 993 F.2d 570, 576 (6th Cir. 1993) ("statements of fact in an attorney's memoranda of interviews with witnesses" is protected work product); and other authority cited in the United States' brief.

2. Blue Cross maintains that it is entitled to learn not only the material facts in the United States' possession at the time it filed the Complaint, but also the source of those facts. Blue Cross does not seek to discover written memoranda prepared by counsel, just the underlying facts. *Compare Dentsply* at 2, 6 (Dkt. 8, Ex. 3) *and AMR Corp.*, at 2, 5 (Dkt. 80, Ex. 2) (compelling the United States to identify facts known to each of the third-party witnesses interviewed in the civil investigative process), *with In re Grand Jury Subpoena Dated November 8, 1979*, 622 F. 2d 933, 935-36 (6th Cir. 1980) (addressing grand jury's motion to compel an attorney representing a chemical company targeted by an FDA investigation and holding that the "grand jury's questions viewed as a whole delved into areas protected by the work product privilege," including questions seeking "information on drafts of submissions to the FDA and memoranda of interviews, which the courts have uniformly classified as work product").

The United States maintains, in accordance with Sixth Circuit precedent, that the *identity* of those individuals it has interviewed in preparing for litigation is also protected attorney work product because its disclosure would reveal the thought processes and strategic assessments of

Plaintiffs' counsel in deciding whom to interview. *In re Grand Jury Subpoena Dated November 8, 1979*, 622 F. 2d 933, 935-37 (6th Cir. 1980).

3. Blue Cross maintains that because Interrogatory Nos. 1 and 2 seek facts rather than mental impressions or strategy, they do not seek information protected by the attorney work product doctrine, and thus a showing of "substantial need" is not required. But, even if Blue Cross were required to show substantial need, it has made the requisite showing by demonstrating that, among other things, the alternative is requiring Blue Cross to conduct depositions of each of the more than 280 individuals listed on the Department's Initial Disclosures as having relevant and discoverable information. Blue Cross cannot simply interview those individuals that are associated with either hospitals on the other side of the table in negotiations or are competitors of Blue Cross, and certainly not with any expectation of eliciting the same level of cooperation that the U.S. Department of Justice would have received.

The United States maintains, consistent with the holdings of the Supreme Court and Sixth Circuit, that facts obtained in oral interviews are work product reflecting the mental impressions of counsel, and thus, as the Supreme Court has held, are discoverable only under extraordinary circumstances, if at all. *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981), which Blue Cross has failed to show. Moreover, even under the lesser "substantial need" standard that governs fact work product, Blue Cross' ability to depose or otherwise interview the individuals and entities in question obviates any claimed need, *Taylor v. Temple & Cutter*, 192 F.R.D. 552, 557-58 (E.D. Mich. 1999); *accord*, *Hickman*, 329 U.S. at 513, particularly when those individuals are likely to be far better known to Blue Cross than they are to the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury that on November 28, 2011 he served a copy of the foregoing Joint Statement of Resolved and Unresolved Issues Relating to Blue Cross Blue Shield of Michigan's Motion to Compel Responses to Interrogatories on all counsel of record in accordance with this Court's policies and procedures for service of electronically filed documents.

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