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

ALLEGIANCE HEALTH'S MEMORANDUM IN SUPPORT OF ITS REQUEST THAT THE COURT IMPOSE DISCOVERY CONDITIONS ON THE SETTLING DEFENDANTS SHOULD IT ENTER PLAINTIFFS' PROPOSED FINAL JUDGMENT

As directed by the Court during the status conference on September 25, 2015, Defendant, W.A. Foote Memorial Hospital d/b/a Allegiance Health ("Allegiance"), respectfully submits this memorandum in support of its request that the Court impose conditions on its co-defendants -- Hillsdale Community Health Center ("HCHC"), Community Health Center of Branch County ("Branch"), and ProMedica Health System, Inc. ("ProMedica") (collectively, the "Settling

Defendants") -- should the Court decide to dismiss them from the action by granting Plaintiffs' pending Motion for the Entry of Proposed Final Judgment (ECF Doc. 29.) Specifically, as a condition to permitting the Settling Defendants to be dismissed from the action before the case is fully resolved, Allegiance requests that the Court order that, post-dismissal, the Settling Defendants will continue to be treated as *parties* for discovery purposes for the remainder of the discovery period. As demonstrated herein, this Court clearly has the authority to grant this relief, and doing so would be fair, equitable and just in the circumstances.

PRELIMINARY STATEMENT

As the Court is aware, Plaintiffs, the United States of America and the State of Michigan, commenced this action against Allegiance, and its co-defendants, after conducting a year-long, pre-complaint investigation. During this investigation, Plaintiffs collected thousands (if not tens of thousands) of pages of documents from the Defendants, and conducted many days of depositions of the Defendants' representatives. Plaintiffs did not share the documents they obtained from the Settling Defendants with Allegiance, nor was Allegiance permitted to attend the depositions of the Settling Defendants' witnesses. Consequently, Allegiance commenced this litigation at a significant *disadvantage* to Plaintiffs in terms of knowledge of the evidence, particularly the evidence as it relates to

Allegiance's co-defendants.

As the Court is also aware, Plaintiffs coupled the filing of their Complaint with the filing of a Proposed Final Judgment as to the Settling Defendants (ECF Doc. 2), which would resolve the litigation as to those Defendants. Allegiance does not object to its co-defendants settling Plaintiffs' claims against them at this time, and therefore did not oppose Plaintiffs' motion. However, because entry of Plaintiffs' Proposed Final Judgment will *greatly* tip the balance of discovery in this case *even further* in favor of Plaintiffs, in ways that are plainly inequitable to Allegiance, Allegiance *does* request that the Court take action to limit the prejudice that Allegiance will suffer should the Court chose to approve Plaintiffs' proposed settlement with Allegiance's co-defendants.[1]

Significantly, the terms of Plaintiffs' Proposed Final Judgment would require that the Settling Defendants continue to "cooperate" with Plaintiffs in the litigation, post-dismissal, including by the production of documents, making officers, directors, employees available for interviews, and testifying at trial. (ECF No. 2-1 at 10-11). By virtue of this requirement, Plaintiffs will likely have no need to seek any discovery from the Settling Defendants as provided for under the Federal Rules. Instead, Plaintiffs can presumably require the Settling Defendants

[1] Allegiance chose not to settle this matter along with its co-defendants, confident that it could demonstrate to this Court that the Plaintiffs have misinterpreted Allegiance's *procompetitive* actions as anticompetitive conduct. However, significant discovery from Allegiance's co-defendant, HCHC, with whom Plaintiffs allege Allegiance conspired, is critical to Allegiance's ability to do so.

to comply with any request for information -- anytime, anywhere, and for any purpose -- that they choose, without regard to the limits and restrictions regarding discovery in the Federal Rules. More importantly, the rights the Federal Rules grants to *Allegiance* with respect to Plaintiffs' collection of evidence will disappear as Plaintiffs obtain their evidence through means outside of the Federal Rules. For example, Allegiance will undoubtedly not be invited to any witness interviews that Plaintiffs may conduct of these co-defendants pursuant to the "cooperation clause" Plaintiffs have included in their Proposed Final Judgment.[2]

In addition, when Allegiance is seeking discovery from its co-defendants, it will be afforded none of the benefits that Plaintiffs enjoy under Plaintiffs' Proposed Final Judgment, notwithstanding that *Allegiance's* need for discovery from its co-defendants is significantly *greater* than that of the Plaintiffs (given that Plaintiffs have already had a year of pre-complaint discovery). Nevertheless, the Proposed Final Judgment does not direct the Settling Defendants to "cooperate" with Allegiance in the manner that Plaintiffs have insisted upon for themselves. Allegiance will possess only the rights to discovery provided to it by the Federal Rules.

Moreover, if the Final Judgment is entered by the Court at this time, without

[2] While Allegiance acknowledges that it would not have an absolute right to be present at a *voluntary* witness interview conducted by Plaintiffs, Allegiance submits that the circumstances are altogether different, or should be, when the interviewed party is *required* to submit to such an interview, as will be the case if the Proposed Final Judgment is entered without the Court taking some action to protect Allegiance's interests.

further action by this Court, the inequity with respect to discovery that Allegiance potentially faces will increase even further. This is clear, given that the Settling Defendants have asserted that they should be treated as *non-parties,* rather than parties, for discovery purposes after the Court approves any settlement.

While the most equitable resolution of this situation would be to require Plaintiffs to broaden the "cooperation clause" in the proposed settlement agreement to require the Settling Defendants to "cooperate" with Allegiance in precisely the same manner, and to the same degree, that they are compelled to "cooperate" with Plaintiffs, Allegiance seeks only a much more modest form of relief at this time. Specifically, Allegiance seeks only that the Court order that the Settling Defendants be required to continue to respond to discovery in this matter as *parties*, and not non-parties, for the duration of the litigation, even after any approval of their settlement with Plaintiffs.

As explained below, Allegiance's request is well within this Court's inherent power and authority to manage its docket, is consistent with the Tunney Act, 15 U.S.C. §16(b)-(h) and the provisions of Rule 54(b), and accords with the most basic principles of justice and fairness. Accordingly, Allegiance respectfully asks that this Court "level the playing field" -- or more accurately, avoid permitting it to be even *further* tilted in Plaintiffs favor -- by granting Allegiance the relief it seeks.

ARGUMENT

I. The Court Has Inherent Power To Enter the Relief Allegiance Seeks

This Court's inherent power to manage its docket to aid in the administration of justice is indisputable. *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962) (A district court has broad discretion "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.") This authority has been held to include the issuance of case management orders, imposing stays, levying sanctions, and, in general, "control[ling] the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

This authority unquestionably includes the power to protect Allegiance from the inequity in the discovery process that approval of Plaintiffs' Proposed Final Judgment, as it currently stands, will inflict upon Allegiance. *See Sister Michael Marie v. American Red Cross,* 771 F.3d 344, 366 (6th Cir. 2014) ("District Courts have broad discretion under the rules of civil procedure to manage the discovery process and control their dockets").

As this Court undoubtedly recognizes, the order that Allegiance seeks regarding discovery is necessitated by the fact that the Federal Rules of Civil Procedure treat non-parties quite differently than parties for discovery purposes. *See U. S. v. American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1331-32 (1978)

(rejecting government's claim that antitrust defendants' discovery interests were adequately protected under Rule 45 because, *inter alia*, "Rule 34 is a more manageable discovery mechanism than Rule 45 in a number of different respects"); *Harco Nat'l Ins. Co. v. Sleegers Eng'g, Inc.*, No. 06-cv-11314, 2014 WL 5421237 (E.D. Mich. Oct. 22, 2014) ("The discovery rules distinguish between parties to litigation and non-parties. Some rules permit discovery only from parties. Others permit discovery from nonparties, but impose additional burdens for obtaining such discovery . . . .").

Moreover, Allegiance's concerns about how discovery will proceed in this action absent Court intervention are neither abstract nor hypothetical; HCHC has already made clear its intention to claim "non-party status" with respect to discovery, perhaps even as to the discovery that Allegiance has *already* served.[3] Indeed, HCHC expressed this view clearly during the parties' call with the Court on September 25, which precipitated the Court's request for briefing on this issue.

II. The Relief Sought By Allegiance Is Appropriately Within the Scope of this Court's Review of the Proposed Final Judgment

A. The Court's obligations and authority under the APPA

Section 16(e) of the APPA, 15 U.S.C. § 16(e), (the "Tunney Act"), expressly directs that this Court should play a significant role in the approval of a proposed

[3] If the Court had not ordered during the September 25 call that discovery as to HCHC be stayed pending this briefing, HCHC's responses to Allegiance's Rule 34 Request for Documents would have been due October 7, 2015.

consent decrees in government antitrust cases:

> . . . [T]he Court can and *should* inquire . . . into the purpose, meaning, and efficacy of the decree. If the decree is ambiguous, or the District Judge can foresee difficulties in implementation, we would expect the Court to insist that these matters be attended to. *And, certainly, if third parties contend that they would be positively injured by the decree, a District Judge might well hesitate before assuming that the decree is appropriate*.

U.S. v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam) (emphasis added).

Indeed, based upon this statutory language, other federal courts have expressly recognized that "it is plain from the statute and its legislative history that a Court, rather than being a 'rubber stamp' for the Department of Justice, is required to act as an independent check on the terms of such decrees." *U.S. v. Western Elec. Co., Inc.*, 767 F. Supp. 308, 328 (D.D.C. 1991) (citations omitted); *see also U.S. v. Microsoft Corp.*, 56 F.3d at 1458 (quoting S. REP. NO. 298, 93d Cong., 1st Sess. at 5 (1973)) ("Congress intended the court to 'make an independent determination as to whether or not entry of a proposed consent decree [was] in the public interest.'"); *U.S. v. Bleznak*, 153 F.3d 16, 19 (2d Cir. 1998) ("[P]arties may not use a consent decree to limit non-party rights that would otherwise prevail").

In fact, if this Court is not satisfied with the DOJ's proposed Consent Decree, it clearly has the authority to *require* the DOJ to modify it as a prerequisite

to the Court's approval. *See*, *e.g.*, *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1206 (D.C. Cir. 2004); *U.S. v. GTE Corp.*, 603 F. Supp. 730, 743, 753 (D.D.C. 1984). As previously noted, however, Allegiance does *not* seek that result, even though such relief would not be inappropriate in the circumstances. Instead, Allegiance seeks only a much more modest form of relief, designed solely to protect its right to obtain discovery from its co-defendants in a fair, thorough and efficient manner -- the imposition of provision in the Case Management Order requiring that the Settling Defendants continue to provide discovery to Allegiance as *parties,* rather than non-parties, post settlement. And, while modest in scope, this relief is *critical* to Allegiance's ability to present its case to this Court.

B. The Relief Sought By Allegiance is Also Supported By Rule 54(b)

Moreover, the relief Allegiance seeks is also consistent with Rule 54, which directs that where a settlement involves "fewer than all parties," as is the case here, the Court should expressly consider whether there is any "just reason for delay." Fed. R. Civ. P. 54(b).

Again, while Allegiance does not seek to "delay" the ability of its co-defendants to obtain a final judgment in this case, Allegiance *does* believe that a "delay" in a change of status for the Settling Defendants, with respect to their discovery obligations, is appropriate in the circumstances.

C. The Cases Cited by Plaintiffs in Support of their Motion for the Entry of the Proposed Final Judgment Do Not Argue Against the Relief Allegiance Seeks

In moving for entry of the Proposed Final Judgment, the DOJ acknowledges that where, as here, a consent decree is entered as to some but not all defendants, additional considerations can come into play for the Court's consideration. (ECF No. 29 at 9.) However, DOJ's suggestion that Allegiance's concerns should be minimized (or worse yet, ignored) by the Court are off-base, and certainly not supported by the cases Plaintiffs cite in their moving papers in support of their request for entry of the Proposed Final Judgment.

In *United States v. Bristol-Myers Co.*, 82 F.R.D. 655, 661 (D.D.C. 1979), for example, the non-settling defendant argued, like Allegiance, that a provision in a DOJ proposed decree requiring the settling defendants to continue to cooperate in discovery with the DOJ, but not with the objecting defendant, gave the government "unfair procedural advantages" that warranted Court intervention. However, in that case, the Court observed that the objecting party's concerns were somewhat overstated because (1) discovery was almost already completed; (2) the decree provided that certain of the settling defendants' witnesses, who may not otherwise have been able to be compelled to testify at trial, would be made available for the objecting defendant; (3) there was a court-ordered deadline for the government to complete its informal interviews of the settling defendants' witnesses, which had

already passed; and (4) the informal interviews that had already occurred were followed by formal depositions that the non-settling defendant had attended. *Id.* at 661-662. In stark contrast to the facts in *Bristol Myers*, here, discovery has just begun (at least the discovery to which Allegiance is permitted to participate in has just begun), and no provisions to lessen the inequity of the situation as to Allegiance appear to have even been considered by Plaintiffs, much less offered to Allegiance.

Plaintiffs' reliance on *United States v. Apple, Inc.,* 889 F.Supp.2d 623 (S.D.N.Y. 2012) is similarly off the mark. Unlike Apple, Allegiance is *not* seeking to postpone entry of a final judgment as to its co-defendants *until after trial.* Allegiance simply requests that the Court include a modest provision in the upcoming Case Management Order that would protect Allegiance's discovery rights from now *through the discovery period*. In short, if the Court find the Consent Decree is otherwise in the public interest, Allegiance seeks only that the Court redress the unusual but significant hardship that Allegiance will uniquely suffer by ordering that the Settling Defendants be treated as parties for the purpose of discovery throughout the discovery period. Neither Plaintiffs nor the Settling Defendants can raise any legitimate objection to so modest a request.

III. The Court's Authority to Require Discovery Responses As A Prerequisite To Dismissal Of A Party Is Well Recognized in Similar Circumstances

Finally, the relief Allegiance seeks is further supported by the fact that, even notwithstanding the requirements of the APPA, Rule 41 of the Federal Rules of Civil Procedure direct the Court to consider whether the early dismissal of one party to the proceeding will prejudice another party, and permit the Court to make approval of a dismissal contingent on the performance of certain conditions. *See* F.R.C.P. 41(a).

For example, the courts have required that a party seeking dismissal in a manner that will not terminate the litigation fully and finally respond to outstanding discovery requests under Rules 33 and 34 to obtain their dismissal - a result quite like what Allegiance seeks here. *See, e.g., Eaddy v. Little*, 234 F. Supp. 377, 379-80 (D.S.C. 1964); *Hudson Eng'g Co. v. Bingham Pump Co.*, 298 F.Supp. 387 (S.D.N.Y. 1969) (granting voluntary dismissal under Rule 41(a) between a plaintiff and defendant over objection of second plaintiff, on condition that they give second plaintiff copies of pretrial transcripts, all documents produced by either of them, and any other information or witnesses reasonably requested by second plaintiff).

CONCLUSION

For the foregoing reasons, Allegiance respectfully requests that, should the Court decide that entering Plaintiffs' Proposed Final Judgment is in the public interest, that the Court protect *Allegiance's* unique interests by directing that, for discovery purposes, the Settling Defendants will remain "parties" throughout the entire discovery period.

Dated: October 9, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 9, 2015, 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.

/s/ Doron Yitzchaki
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