UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and
STATE OF MICHIGAN

Plaintiffs,

v.

Case No. 15-cv-12311-JEL-DRG
Honorable Judith E. Levy
Magistrate

HILLSDALE COMMUNITY HEALTH CENTER, W.A. FOOTE COMMUNITY HEALTH CENTER D/B/A ALLEGIANCE CLEMENS REGIONAL MEDICAL HEALTH, COMMUNITY HEALTH CENTER OF BRANCH COUNTY, and PROMEDICA HEALTH SYSTEM, INC.,

Defendants.

SETTLING DEFENDANTS HILLSDALE COMMUNITY HEALTH CENTER AND COMMUNITY HEALTH CENTER OF BRANCH COUNTY'S BRIEF IN OPPOSITION TO 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

I. INTRODUCTION

Defendant Allegiance Health ("Allegiance"), the only non-settling Defendant in this action, requests this Court to place an unequivocal and inequitable hardship on all other Defendants ("Settling Defendants")[1] in order to remedy a *perceived* inequity between it and Plaintiffs resulting from its own decision to litigate rather than settle Plaintiffs' claims. Specifically, Allegiance asks this Court to treat Settling Defendants as full-party litigants for the full duration of the discovery period despite each having resolved and settled all allegations made in Plaintiffs' Complaint by fully executing a Stipulation and Order agreeing to entry of the Proposed Final Judgment. The Proposed Final Judgment binds the Settling Defendants and, if and when entered by the Court, would be dispositive with respect to the Settling Defendants.

Settling Defendants should not be treated as parties and required to participate in <u>any</u> party related discovery because (1) each will be a non-party as soon as this Court, in its discretion, enters the Final Judgment; and (2) the costs and time to participate in discovery as a party would be overly burdensome, oppressive and contrary to public policy and judicial administrative efficiency considering the Final Judgment will terminate this action with respect to the

[1] "Settling Defendants" include Hillsdale Community Health Center and Community Health Center of Branch County. Promedica Health System, Inc., also a Settling Defendant but represented by separate counsel, has filed a separate brief.

Settling Defendants as soon as it is entered by the Court. Avoiding such discovery expense was a primary reason Settling Defendants agreed to the terms of the proposed Final Judgment, and accordingly, they are entitled to the benefit of their bargain.

For these reasons, Settling Defendants request that this Court enter the Proposed Final Judgment without any conditions, including requiring each to remain parties for discovery or any other purpose throughout the course of this continuing litigation.

II. PROCEDURAL HISTORY AND APPLICABLE FACTS

In 2014, Plaintiffs issued Civil Investigative Demands (CIDs) to all Defendants and each responded to these requests for information and documents. As part of Plaintiffs' investigation into alleged anticompetitive conduct, several depositions also occurred. Allegiance's claims here regarding the perceived inequity regarding the balance of discovery is overstated.

In 2015, Plaintiffs formally filed this action against all Defendants alleging violations of federal and state antitrust provisions. (ECF No. 1) The same day, and as part of the same filing, Settling Defendants agreed to resolve all claims pursuant to a Stipulation and Order that included a Proposed Final Judgment. ("Final Judgment") (ECF No. 2) Under the Stipulation and Order, entered by the Court on July 1, 2015 (ECF No. 11), Settling Defendants are already bound by the

terms of the Final Judgment. Pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(e), the sixty (60) day public comment period expired on September 20, 2015 and no public comments were submitted. Thus, Plaintiff United States filed a Motion for Entry of the Proposed Final Judgment on September 24, 2015. (ECF No. 29) Accordingly, all procedural requirements under the APPA have been satisfied, and Settling Defendants remain parties to this lawsuit only until such time as this Court, in its discretion, enters the Final Judgment.

Prior to Plaintiff United States filing its Motion for Entry of the Proposed Final Judgment, and also prior to a Case Management Order being entered, all parties *except* Allegiance, agreed to consider Settling Defendants as non-parties. However, as a result of Allegiance's refusal, Settling Defendants have been compelled to participate, and have in fact participated (subject to their collective objection that each should be treated as non-parties) in initial case management matters such as the Fed. R. Civ. P. 26 conference, numerous drafts of the parties' proposed Joint Discovery Plan and proposed Case Management Order. Even more oppressive, Allegiance served Settling Defendant Hillsdale, pursuant to Fed. R. Civ. P. 34, with its First Request for Production (Ex. 1). Finally, Allegiance has refused to restrict depositions of Settling Defendants' employees in this case to comply with the limitations (*i.e.*, "1 day of 7 hours") plainly imposed by Fed. R.

Civ. P. 30(d)(1). Plaintiffs and Allegiance have both indicated they intend to depose Settling Defendants' employees in this matter.

On September 25, 2015, the Court held a telephonic status conference. During that call, Allegiance asserted that Settling Defendants should be treated as parties even after entry of the Final Judgment. The Court stayed discovery related to the Settling Defendants until such time as it renders a decision on Plaintiffs' Motion for Entry of the Proposed Final Judgment.

On October 9, 2015, Allegiance submitted its Memorandum on this issue, requesting this Court order Settling Defendants to continue as parties "for discovery purposes . . . throughout the entire discovery period" even if Settling Defendants are dismissed by this Court's entry of the Final Judgment. (ECF No. 31, p. 13)

Because Settling Defendants will be non-parties to this litigation as soon as this Court, in its discretion, enters the Final Judgment, each should not be required (for any period of time) to participate in full discovery *as a party*. Settling Defendants will remain subject to non-party discovery pursuant to Fed. R. Civ. P. 45. Requiring Settling Defendants to spend time and resources participating and defending its actions in a lawsuit to which it will <u>not</u> be a party, is unjust, burdensome, oppressive and contrary to public policy and judicial administrative efficiency considerations.

III. STATEMENT OF LAW

A. Entry Of The Proposed Final Judgment Without Imposing Additional Conditions On Settling Defendants Or Further Delay Is In the Public Interest

Defendant Allegiance is seeking to convert a straightforward procedural ruling into a very complicated administrative process for the Court, in order to "game" the APPA statutory process by serving discovery on Settling Defendants *before* the Court has an opportunity to rule on the Motion for Entry of the Final Judgment. Further, Defendant Allegiance is *now* seeking to, in effect, modify the Final Judgment as currently proposed in order to subject Settling Defendants to ongoing discovery requests *as parties*, despite its failure to submit any public comment or object to the proposed Final Judgment, and is continuing to disingenuously claim that it "does not oppose Plaintiffs' motion" for entry of the Proposed Final Judgment. *See United States v. Apple, Inc.*, 889 F.Supp.2d 623, 633 (S.D.N.Y. 2012) (Court rejected litigating defendant's late and inadequate opposition to entry of proposed final judgment). In so doing, Allegiance seeks to impose an undue and inequitable burden on Settling Defendants and, in turn, complicate and impede judicial administrative efficiency.

The Proposed Final Judgment, if and when entered by the Court at its discretion, will be dispositive and will terminate this action with respect to the Settling Defendants, as the Plaintiff United States makes clear in its Motion and

Memorandum for Entry of the Proposed Final Judgment ("United States Memorandum"). (ECF No. 29, pp. 1, 4) At that time, Settling Defendants will be non-parties here, and any discovery seeking information from them must be served pursuant to Fed. R. Civ. P. 45. Settling Defendants are already bound to comply, and have complied, with the terms of the Proposed Final Judgment pursuant to the Stipulation and Order entered by the Court. (ECF No. 2) As a result, Settling Defendants are already conducting themselves as non-parties, other than to the extent they have been compelled to participate in initial case management matters by Allegiance's intransigence. No public comments were received, the statutory procedure under the APPA is complete, and this matter is ready for the Court's consideration. As Plaintiff United States explained in its Competitive Impact Statement and Memorandum, entry of the Proposed Final Judgment is in the public interest and appropriate at this time under 15 U.S.C. Section 16(e). (ECF No. 29, pp. 4-6)

B. Entry Of The Final Judgment As Proposed by Plaintiffs and Settling Defendants Without Imposing Additional Conditions Will Promote Judicial Administrative Efficiency And Equitable Interests

"The interests of judicial administration and the equities involved weigh heavily in favor of immediate entry of judgment" with no additional conditions on Settling Defendants. *Apple*, 889 F.Supp.2d at 643. Entry of the proposed Final Judgment without the additional discovery conditions that Allegiance seeks will

resolve the claims against Settling Defendants and there will be nothing further for the Court to adjudicate with respect to them. The Court and the remaining parties then can focus on Plaintiffs' claims against Allegiance, the remaining litigating Defendant. *See United States v. Am. Express Co.*, No. 10 CV-4496, 2011 WL 2974094, at *4 (E.D.N.Y. July 20, 2011). Allegiance, however, is attempting to force the Court to deal with issues it would not need to address otherwise.

In addition, entering the Final Judgment as proposed and rejecting Allegiance's request for discovery here will provide Settling Defendants with the expected benefits of their choice to settle. *See Apple*, 889 F.Supp.2d at 643; *United States v. Bristol-Myers Co.*, 82 F.R.D. 655, 662 (D.D.C. 1979). Settling Defendants elected to settle primarily to avoid the "expense of engaging in discovery," but Allegiance nonetheless seeks to retroactively impose that burden and expense. *See id.* In addition, Settling Defendants are entitled to the certainty of a final judgment containing the terms they agreed to with no additional un-bargained for conditions. *See id.; Bristol-Myers*, 82 F.R.D. at 662. Permitting Settling Defendants to be treated as parties under these circumstances will chill future settlements, contrary to public policy.

Moreover, immediate entry of the Final Judgment without further delay caused by Allegiance's current or any future procedural maneuvering, will allow the public to benefit from full and immediate implementation of the proposed

relief, such as Hillsdale and Branch implementing an antitrust compliance plan. *Apple*, 889 F.Supp.2d at 644; *Bristol-Myers*, 82 F.R.D. at 660.

In short, "the orderly, efficient management of discovery requires that the Settling Defendants have a defined role in the ongoing litigation," but Allegiance's proposal here forcing them to participate in discovery would leave Settling Defendants in a "state of legal limbo." *Apple*, 889 F.Supp.2d at 644. Approval of "anything less than the final judgment" or dismissing Settling Defendants conditionally "would be tantamount to disapproval of the settlement." *Bristol-Myers*, 82 F.R.D. at 662. "The objections raised by [Allegiance] *on its own behalf* certainly do not warrant depriving the people (or [Settling Defendants]) of the benefit of this bargain." *Id.*

C. Treating Settling Defendants As Parties Would Impose An Undue Burden on Settling Defendants

Allegiance's proposed additional conditions here would result in a significant, additional, burden on Settling Defendants that they did not contemplate or bargain for when they agreed to settle Plaintiffs' claims; indeed, Allegiance concedes the very purpose of its request is to impose additional and more extensive discovery than it could otherwise properly obtain. As a result of Allegiance's refusal to stipulate to treating Settling Defendants as non-parties prior to the Court entertaining Plaintiffs' motion for entry of the Proposed Final Judgment, Settling Defendants have already been compelled to participate, and have in fact

participated as parties (subject to their objection that they should be treated as non-parties) in initial case management matters such as the Fed. R. Civ. P. 26 conference, numerous drafts and debates of the parties' proposed Joint Discovery Plan and Proposed Case Management Order.

In addition, even before the Court was able to consider the Motion for Entry of the Proposed Final Judgment and without raising this issue with the Court, Allegiance subsequently served Settling Defendant Hillsdale with party document requests pursuant to Fed. R. Civ. P. 34 containing 30 separate requests (Ex. 1). Allegiance's Rule 34 requests are extensive, burdensome, and tellingly, duplicative of information Allegiance also requests from Plaintiffs – information that Plaintiffs have already stated in their responses to Allegiance's discovery requests to them that they will produce.

Significantly, Allegiance concedes its purpose is to obtain additional and more lenient (from its perspective) discovery than it would otherwise be entitled to under Rule 45 – essentially admitting that the present request is a strategy to game the APPA process. (ECF No. 31, pp. 6-7) In its brief, Allegiance states that the Federal Rules "treat non-parties quite differently than parties for discovery purposes." (*Id.*). Allegiance's argument clearly demonstrates that its request here will clearly impose significant burdens on Settling Defendants, and deprive them of the protections afforded by the Federal Rules to non-parties.

Allegiance justifies its imposition of this burden on Settling Defendants by claiming it "needs" additional, full party discovery from Settling Defendants because a provision in the proposed Final Judgment requiring Settling Defendants to "cooperate" with Plaintiffs will provide them with an advantage over Allegiance. (ECF No. 31, p. 3) Even if Allegiance's claims in this regard were accurate, these objections to the terms of the Final Judgment raised for its own benefit would be outweighed by the public interest and Settling Defendants' interest in receiving the benefit of its bargain and avoiding this burden. *Bristol-Myers*, 82 F.R.D. at 662. In fact, however, Allegiance overstates the scope and impact of the cooperation provision. The access to information provided by the cooperation provision (*e.g.*, document production, depositions, testifying at trial) could be obtained or compelled by Plaintiffs, and also by Allegiance, by utilizing the non-party discovery mechanisms provided by Fed. R. Civ. P. 45. And to the extent, which is by no means clear, that this provision provides Plaintiffs with any additional discovery rights (*e.g.*, witness interviews), Allegiance has the ability to serve full *party* discovery on Plaintiffs requesting any information Plaintiffs obtained pursuant to the cooperation clause; there is no need to impose the burden of party discovery on Settling Defendants. An identical argument that a "cooperation clause" in a Final Judgment would give the government an "unfair procedural advantage" was rejected by the court in *Bristol-Myers*, which stated that

not only was the litigating defendant's claimed interest trumped by those of the settling defendants' and the public, but noting that the litigating defendant would benefit by having access to any discovery information the government obtained. *Bristol-Myers*, 82 F.R.D. at 662.

D. The Proper Procedures For Obtaining The Discovery Sought By Allegiance Is Through Fed. R. Civ. P. 45

Settling Defendants do not oppose fulfilling their discovery obligations in this action, however, it should be conducted pursuant to Fed. R. Civ. P. 45, given their currently *de facto* and prospectively actual status as non-parties. Entry of the Final Judgment will be dispositive and terminate this action with respect to the Settling Defendants. Settling Defendants also recognize that the Court, in its discretion, may not grant Plaintiff United States' Motion for Entry of the Proposed Final Judgment, in which case they may be required to respond to party discovery in this matter. Settling Defendants object, however, to Allegiance's blatant attempt thus far to improperly "game" Hillsdale and Branch's interim status under the APPA and unfairly seek party discovery from Settling Defendants simply by serving discovery before the Court has an opportunity to rule on the Motion for Entry of the Final Judgment. Similarly, going forward, Allegiance should not be allowed to continue "gaming" the process by seeking an improper modification of the Final Judgment terms agreed upon by Settling Defendants and Plaintiffs, outside of the APPA process and after the period for public comments, in order to

impose burdensome full-party discovery obligations on Settling Defendants simply for its own perceived benefit.

IV. CONCLUSION

WHEREFORE, Settling Defendants request that this Honorable Court deny Allegiance's request to treat Settling Defendants as parties for purposes of discovery because the Proposed Final Judgment, if and when entered by the Court, would be dispositive with respect to the Settling Defendants.

Respectfully submitted,

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Dated: October 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2015, a copy of the foregoing instrument was filed electronically with the Clerk of the Court using the ECF system, which will send notice of such filing to all attorneys of record at their registered email addresses.

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