

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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SUZANNE C. CLARKE, et al.,            )  
  )  
      Plaintiffs,                            )  
  )  
vs.    )  
  )  
  )  
BAPTIST MEMORIAL HEALTHCARE        )  
CORP. and METHODIST HEALTHCARE,    )  
  )  
  )  
      Defendants.                            )

No. 2:06-cv-02377-MaV

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ORDER DENYING PLAINTIFFS' MOTION TO COMPEL

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Before the court is the December 27, 2007 motion of the plaintiffs, Suzanne C. Clark and Conise P. Dillard on behalf of themselves and all others similarly situated ("the Plaintiffs"), to compel the defendants, Baptist Memorial Healthcare Corp. and Methodist Healthcare ("the Defendant Hospitals"), to provide discovery in the form of certain inter-hospital communications. In particular, the Plaintiffs seek the disclosure of communications between and among the Defendant Hospitals, other Memphis-area hospitals, and/or third parties. The Defendant Hospitals have filed a response in opposition to this motion. The motion was referred to the United States Magistrate Judge for determination. For the reasons set forth below, the Plaintiffs' motion to compel is denied.

## PROCEDURAL AND FACTUAL BACKGROUND

The Plaintiffs filed the present complaint against the Defendant Hospitals on June 20, 2006, as a class action lawsuit on behalf of themselves and all others similarly situated. (Compl. ¶¶ 12-17.) In their complaint, the Plaintiffs allege that the Defendant Hospitals have conspired among themselves and with other hospitals in the Memphis area to depress registered nurses' ("RNs") compensation in the Memphis area in violation of the Sherman Act, 15 U.S.C. § 1. (Compl. ¶ 1.) The court issued a scheduling order on July 6, 2007, that bifurcated class certification from merits discovery. (See Scheduling Order, Doc. No. 127, July 6, 2007.) Since the issuance of the scheduling order, the parties have conducted discovery relating only to the class certification issues that are relevant to the requirements of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23").

During this discovery phase, the Plaintiffs issued requests for production of documents from the Defendant Hospitals, including requests for inter-hospital communications about nursing compensation or employment. (Defs.' Resp. Ex. 1 ¶¶ 12-13.) Specifically, the Plaintiffs sought communications made between the Defendant Hospitals themselves, other Memphis-area hospitals, and other third parties, including governmental entities and professional associations. (Pls.' Mem. 1, 12.) The Defendant Hospitals objected to producing such material because it pertained

only to the merits side of the case. (Defs.' Resp. 5.) Both parties discussed this issue at a meet-and-confer on August 16, 2007, but were unable to reach an agreement. (*Id.*) The class certification discovery phase ends January 31, 2008, and the Plaintiffs now move this court to compel the Defendant Hospitals to disclose the aforementioned inter-hospital communications.

The Plaintiffs assert that these inter-hospital communications are relevant to both the class certification and the merits phases of the case. (Pls.' Mem. 1.) They claim that just because the information pertains to the merits of the case does not mean that it is off-limits for discovery during the class certification phase. (*Id.* at 4.) Specifically, the Plaintiffs argue that the inter-hospital claims are relevant for establishing the existence and scope of the conspiracy, common impact and damages, and the scope of the class. (*Id.* at i.)

In opposition to the Plaintiffs' motion to compel, the Defendant Hospitals assert that they should not be required to disclose the requested material. Specifically, they contend that the Plaintiffs' motion is an attempt to circumvent the order bifurcating class certification and merits discovery. (Defs.' Resp. 6.) They also claim that the motion should be rejected as being untimely made. (*Id.* at 8.) Lastly, the Defendant Hospitals argue that the Plaintiffs are not entitled to the alleged inter-hospital communications in connection with class certification

because (1) the existence and scope of the conspiracy, which are merits issues, are already defined, (2) the alleged communications offer no additional insight into the common impact and damages issues, and (3) the rulings and proceedings in other similar nurse antitrust cases establish that inter-hospital communications are irrelevant to class certification. (*Id.* at I.)

#### ANALYSIS

In this discovery dispute, the court must determine whether the alleged inter-hospital communications are relevant material during the class certification stage of bifurcated discovery. Discovery on the merits of the case is not appropriate during the class certification stage of bifurcated discovery. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). At the present stage, discovery is only appropriate to determine if the Plaintiffs have met the prerequisites for class certification set forth in Rule 23. *Id.*

##### A. Timeliness of the Motion

The Defendant Hospitals argue that the Plaintiffs' motion should be denied as untimely because the motion could have been brought as early as the latter part of August 2007. They contend that by waiting until December 27, 2007, to file the motion, the Plaintiffs filed the motion too close to class certification discovery deadline, and that the Plaintiffs should not be allowed to dramatically expand discovery at this late date in the process.

Under Rule 37, there is no specific time limit within which a motion to compel must be filed. See FED. R. CIV. P. 37(a). It is within the discretion of the court to decide if a party has unreasonably delayed filing a motion to compel. See *Trimbur v. Ky. Lottery Corp.*, 64 F. App'x 970, 975 (6th Cir. 2003). Absent an abuse of that discretion, the court's determination of reasonableness will stand. See *id.*

In the present case, the Plaintiff's filed the motion to compel more than one month before the close of discovery. Just because they could have filed the motion at an earlier time does not make filing it at a later date unreasonable or untimely. In this district, the court routinely requires that motions to compel be filed prior to the discovery deadline. Plaintiffs properly filed their motion prior to the scheduling order's deadline. Accordingly, the motion to compel is not untimely.

B. Relevancy of the Alleged Inter-Hospital Communications

1. *The Existence and Scope of the Conspiracy*

The Plaintiffs argue that they can use the alleged inter-hospital communications to establish the existence and scope of the conspiracy. They contend that these communications, which are generalized proof common to all class members, would support their argument that common proof will be used to establish liability, and, as such, they should be produced during class certification discovery. The Plaintiffs cite multiple cases for the proposition

that courts looking to certify a class have found evidence of communications between defendants "to be relevant for determining whether the conspiracy can be established through common proof." (See Pls.' Mem. 6-8.)

The Defendant Hospitals argue that whether a conspiracy can be proven by the Plaintiffs is not relevant at the class certification stage. They contend that the only thing that matters at this stage is whether the requirements of Rule 23 are met and that there is no need to conduct discovery regarding the existence or scope of the conspiracy. The Defendant Hospitals maintain that because the discovery requests for the alleged inter-hospital communications relate to the merits of the litigation, they are not proper.

The existence and scope of the conspiracy are allegations made and defined in the complaint itself. (See Compl. ¶¶ 1-2, 11-13, Doc. No. 1, June 20, 2006.) Allowing discovery on these matters clearly goes towards the merits of the Plaintiffs' conspiracy claims. Other courts have found, and this court agrees, that investigating matters specifically involving the underlying alleged conspiracy relates to the merits of the litigation and is improper at the class certification stage. See *In re Urethane Antitrust Litig.*, 237 F.R.D. 454, 457 (D. Kan. 2006); see also Transcript of Status/Discovery Conference at 37, *Unger v. Albany Med. Ctr.*, No. 06-00765 (N.D.N.Y. Jan. 23, 2007) also available at (Defs.' Resp. Ex. 8). Accordingly, requesting the alleged inter-hospital

communications to establish the existence and scope of the conspiracy is not appropriate at the class certification stage.

## 2. *Establishing Common Impact and Damages*

The Plaintiffs also argue that the inter-hospital communications will allow them to "demonstrate that antitrust impact can be proven through class-wide evidence" and "illustrate how a methodology can be developed for proving damages on a class-wide basis." (Pls.' Mem. 8.) They contend that information such as the Defendant Hospitals' wage policies, wage structures, and actual wages paid to nurses would allow them to establish common impact by showing how the alleged conspiracy has affected all nurses. (*Id.* at 8-9.) The Plaintiffs specifically assert that this information would help their experts develop a formula to calculate class-wide damages. (*Id.* at 9.) They point out that the Defendant Hospitals have offered to produce this type of information in communications made *within* the various hospitals, but they have refused to offer any communications made *between* hospitals. The Plaintiffs proffer three hypothetical inter-hospital communications<sup>1</sup> in an attempt to show how the sought after

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<sup>1</sup> The Plaintiffs offer the following examples of possible inter-hospital communications:

[1] A communication agreeing that all hospitals will not give any nurses a raise next year.

[2] A communication in which a hospital considers giving some specific class of nurses a raise next year but decides not to do so because that would require raising

communications would be relevant to the issues of common impact and damages. (*Id.* at 9-10.)

The Defendant Hospitals argue that they have already produced the wage information sought by the Plaintiffs and that inter-hospital communications are not needed for the analysis that the Plaintiffs seek. Specifically, they contend that any inter-hospital communications could not contain any compensation information that is not available from the hospital internally, and thus, production of the alleged inter-hospital communications containing compensation information would be duplicative of the internal documents and communications that the Defendant Hospitals have already agreed to produce. (Defs.' Resp. 12-13.) They also assert that the hypotheticals suggested by the Plaintiffs are classic examples of merits evidence.

The court must limit discovery when the information sought is unreasonably cumulative or duplicative. See FED. R. CIV. P. 26(b)(2)(C)(i). In this case, the wage information contained in any inter-hospital communications would be unreasonably duplicative of the wage information that the Defendant Hospitals have already

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the wage of every nurse to maintain established parity relationships among nurses.

[3] An email attaching a spreadsheet showing that all nurse wages are determined based upon a formal grid combined with the application of formulaic adjustments.

(Pls.' Mem. 10.)

agreed to provide the Plaintiffs. The wage policies, wage structures, and actual wages paid to nurses would remain the same whether the Plaintiffs discover them through the internal documents and communications already produced or through inter-hospital communications. Because the Defendant Hospitals have already agreed to produce this type of information from their individual, internal documents, requiring them to produce alleged inter-hospital communications for the Plaintiffs' stated purpose of discovering the same information would be unreasonably duplicative.

The hypotheticals that the Plaintiffs proffer illustrate that the type of inter-hospital communications they hope to find are not relevant to the class certification process. The first two hypothetical communications involve hospitals communicating about changing nurses wages and are classic examples of merits evidence. They are not relevant to establishing common impact, but, rather, they are relevant to establishing the existence of the alleged conspiracy itself. As previously discussed, discovery on the merits is not appropriate at the class certification stage. The third hypothetical communication involves a spreadsheet showing a formula for calculating nurses compensation that was emailed to another hospital. If a formula for setting wages exists within the hospital, it would already be produced pursuant to the Defendant Hospitals' agreement to produce all wage information. The fact it may have been emailed to another hospital relates directly to the

existence of a conspiracy, a merits issue, and it is not relevant at the class certification stage.

The relevant wage information sought by the Plaintiffs has already been produced by the Defendant Hospitals. The Plaintiffs can compare the relevant wage information produced by each hospital to determine if there is a common impact and damages among the class without knowing if the individual hospitals communicated the information with each other. "Either there [is] typicality by virtue of the wages or there [is] not; whether there [is] a conspiracy or not is for another day." Transcript of Status/Discovery Conference at 37, *Unger v. Albany Med. Ctr.*, No. 06-00765 (N.D.N.Y. Jan. 23, 2007) also available at (Defs.' Resp. Ex. 8). Accordingly, the alleged inter-hospital communications sought by the Plaintiffs are not relevant for showing common impact or damages under Rule 23 at the class certification stage.

### 3. *Establishing the Scope of the Class*

The Plaintiffs argue that the inter-hospital communications could point to the involvement of other co-conspirators and thus impact the scope of the class. They cite to *Caldwell v. Rowland*, 932 F. Supp. 1018, 1022 (E.D. Tenn. 1996), for the proposition that courts have allowed discovery to determine the size of the alleged class. Specifically, the Plaintiffs contend that because they told the Defendant Hospitals the names of other possible co-conspirators, the Defendant Hospitals must now turn over any inter-

hospital communications so that the Plaintiffs may determine the possible scope of the class of affected nurses.

The Defendant Hospitals argue that the scope of the class has already been defined by the Plaintiffs' complaint. They further contend that in asking the Plaintiffs to name possible co-conspirators they simply sought clarification of "cryptic" allegations contained in the initial complaint and that does not justify expanding discovery to include any inter-hospital communications. (Defs.' Resp. 11 n.7.) Furthermore, the Defendant Hospitals point out that the plaintiffs in a similar nurses' wages case were allowed discovery of inter-hospital communications at the class certification stage and never even discussed how the communications related to class certification. (*Id.* at 15-16.)

In the Plaintiffs' cited case of *Caldwell*, the plaintiffs sought to conduct discovery relating to class certification by seeking out the names and numbers of potential class members from documents maintained by the defendants. *Caldwell*, 932 F. Supp. at 1022. Such is not the case here. The Plaintiffs have clearly defined the scope of the class as "[a]ll persons employed by any defendant or co-conspirator to work in a hospital in the Memphis MSA as an RN at any time from June 20, 2002[, ] until the present." (Compl. ¶ 12.) The Plaintiffs state that hospitals in the Memphis MSA currently employ more than 6,000 RNs and that approximately 68% of those RNs are employed by the Defendant Hospitals. (Compl. ¶¶

24-25.) They further state that St. Francis Hospital and the Regional Medical Center may have been involved in the alleged conspiracy. (Pls.' Mem. Ex. 13 at 2.) Based upon the Plaintiffs' stated definition of the class and the supporting facts, ascertaining the scope of the class is easily done by referring to the employment records of the Defendant Hospitals and any alleged co-conspirators. Any inter-hospital communications would only tend to prove the existence and extent of the alleged conspiracy, and accordingly, they are unnecessary for establishing the scope of the class and irrelevant at the class certification stage.

#### CONCLUSION

For the foregoing reasons, the Plaintiffs' motion to compel is DENIED.

IT IS SO ORDERED this 29th day of January, 2008.

/s/ Diane K. Vescovo  
DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE