

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

**LISA REED and MARY McDOWELL,  
on behalf of themselves and all others  
similarly situated,**

**Plaintiffs.**

v.

**ADVOCATE HEALTH CARE, *et al.***

**Defendants.**

**No. 06 C 3337**

**Judge John F. Grady**

**JURY TRIAL REQUESTED**

**JANET SCHULTZ,  
on behalf of herself and all others  
similarly situated,**

**Plaintiffs.**

v.

**EVANSTON NORTHWESTERN, *et al.***

**Defendants.**

**No. 06 C 3569**

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE  
UNIVERSITY OF CHICAGO HOSPITAL'S MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Defendant University of Chicago Hospital (“UCH”) moves for summary judgment, arguing that even if it colluded with other hospitals to fix nurse wages in the Chicago market, and colluded to share detailed wage information with the other named defendants resulting in suppressed market wages, the mere fact of its collective bargaining agreement immunizes UCH from judicial scrutiny under the antitrust laws. (Def. UCH’s Mem. in Supp. of Mot. for Summ. J. (“Def’s. Mem.”) at 1). This argument is flatly wrong. Rather, as a leading commentator on antitrust law has explained, “the labor immunities do not extend to simple agreements among employers fixing the terms and conditions of employment or imposing other restraints on the labor market.” Phillip Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 257 (2005), LEXIS, Secondary Legal, Area of Law Treatises File.

Nevertheless, UCH strains unsuccessfully to invoke the judicially-created nonstatutory labor exemption, a limited antitrust exemption created solely to allow unions and employers to

make certain agreements that are necessary to facilitate meaningful collective bargaining. Agreeing with other hospitals to fix the wages of nurses in the Chicago area, however, hardly qualifies as an arrangement necessary to facilitate collective bargaining, and UCH never provides any argument to the contrary. Moreover, UCH does not even suggest how such collusive activities could be deemed necessary to facilitate collective bargaining with its own nurse employees. Instead, UCH mischaracterizes Plaintiff's claims as ones for "bad faith bargaining," or some other labor law violation, seeking somehow to bring its collusive activities within the primary jurisdiction of the National Labor Relations Board. As shown below, UCH attempts are entirely unavailing.

In addition, UCH occasionally suggests that, even if not necessary to the process of collective bargaining, its collusive activity was actually the result of some agreement it reached with its union. See, e.g., (Def's. Mem. at 12). To the extent that this is UCH's contention, the resolution of UCH's motion should be stayed by operation of Federal Rule of Civil Procedure 56(f) until Plaintiffs have had the opportunity to engage in discovery on (a) whether UCH's collusive activity was, in fact, pursuant to some "interest arbitration" provision in its collective bargaining agreement, (b) otherwise pursuant to some agreement with the union, and/or (c) was pursued outside collective bargaining to ensure that the starting point for each round of collective bargaining (*i.e.*, the prevailing wage in the market) would be artificially suppressed. See (Declaration of Thomas P. Dove in Support of Plaintiffs' Request for Discovery to Oppose Defendant University of Chicago Hospitals' Summary Judgment Motion (Fed. R. Civ. Proc. 56(f)), filed October 31, 2006 ("Dove Decl.")).

## II. STATEMENT OF FACTS

Plaintiffs filed suit on June 20, 2006 and filed a Consolidated Amended Complaint ("Complaint") on October 10, 2006. Counsel for UCH has conceded that for purposes of the instant motion every fact alleged in Plaintiffs' Complaint should be accepted as true.<sup>1</sup> The

---

<sup>1</sup> At a hearing before the Court on November 1, 2006, Mr. Marcus, counsel for UCH, stated:

He's [Mr. Dove, co-counsel to Plaintiffs] saying, well there was a conspiracy that affected whatever you were doing with them. We're saying we accept that as true. The allegation for the purposes of this motion we accept as true. And what we're saying . . . is that notwithstanding the alleged conspiracy, notwithstanding that alleged trade of information with nonunion entities, the

Complaint alleges that UCH and its co-defendants, various hospitals and health care systems in the Chicago area, entered into at least two agreements in violation of the Sherman Act. (Compl. ¶¶ 42-57). First, UCH and its co-defendants engaged in a continuing conspiracy in restraint of trade to depress the compensation of registered nurses (“RNs”) employed at hospitals in the Chicago area. (*Id.* ¶¶ 1, 42-45). Second, UCH and its co-defendants engaged in a continuing agreement to regularly exchange detailed and non-public information about compensation being paid or to be paid to their RN employees, which not only facilitated the enforcement of the wage-suppression conspiracy, but reduced competition and RN compensation in its own right. (*Id.* ¶¶ 2, 46-56). These overarching restraints were supplemented by a number of further restraints. For example, UCH and its co-defendants have agreed not to use the prospect of higher wages to entice nurses to leave each other’s employ, but to instead jointly recruit RNs to avoid competing for their services. (*Id.* ¶ 29).

The only additional fact offered in evidence by UCH is that it, alone among the defendants in this action, has had a series of collective bargaining agreements (“CBAs”) with a labor organization, the Illinois Nurses Association (“INA”), representing its RNs. (Def.’s Mem. at 7). The Complaint does not allege, however, that UCH’s CBAs with the INA, any provisions therein, or any agreements related to the collective bargaining relationship between UCH and the INA constitute an illegal restraint on trade. The Complaint does not request in its Prayer for Relief that any provision of UCH’s CBA with the INA be stricken, reformed or altered in any way. (Compl. at 16-17). Indeed, the Complaint makes no reference to the INA, CBAs, or any collective bargaining relationship.

### III. ARGUMENT

#### A. Legal Standards

Summary judgment may be granted “only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999); Fed. R. Civ. P. 56(c). The burden is on the party moving for summary

---

nonstatutory exemption still applies. . . . I would suggest to your honor that the facts are either in his complaint and we are admitting them, or they are facts he didn’t bother to allege.

(Transcript of Proceedings Before Hon. Judge Grady November 1, 2006 at 54, 10-22 (emphasis supplied)).

judgment to show “that there is an absence of evidence to support the nonmoving party’s case.” *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). In ruling on a motion for summary judgment, a court must “constr[ue] all facts and draw[] all reasonable inferences in favor of the non-moving party.” *Tourdot v. Rockford Health Plans, Inc.*, 439 F.3d 351, 353 (7th Cir. 2006).

UCH’s burden is particularly heavy in this case because its motion relies entirely on a judicially-created exemption to the antitrust laws that must be narrowly construed. *Abbott Labs. v. Portland Retail Druggists Ass’n., Inc.*, 425 U.S. 1, 12 (1976) (“Our cases have repeatedly established that there is a heavy presumption against implicit [antitrust] exemptions.”). Furthermore, summary judgment is generally disfavored where, as here, a plaintiff has not yet had the opportunity to pursue discovery. See *DUAP AG v. United Exposition Serv. Co.*, No. 87 C 3869, 1988 U.S. Dist. LEXIS 3869, at \*1 n.1 (N.D. Ill. April 16, 1988) (declining to entertain motion for summary judgment where “plaintiff has not yet had an opportunity to conduct any discovery”).

#### **B. UCH Is Not Shielded By The Nonstatutory Labor Exemption**

The nonstatutory labor exemption is an extension of the statutory labor exemption from antitrust liability, embodied in the Clayton and Norris-LaGuardia Acts, that expressly exempts employees and labor unions (and only employees and labor unions) from liability under the antitrust laws for certain of their activities. See, e.g., *Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100*, 412 U.S. 616, 621-22 (1975). Standing alone, the statutory exemption proved inadequate to protect core collective bargaining activities from antitrust scrutiny. See *Brown v. Pro Football*, 518 U.S. 231, 237 (1996). Accordingly, courts have implied an additional exemption, the so-called nonstatutory labor exemption (“exemption”) which exempts from antitrust scrutiny certain restraints of trade agreed to between and among unions and employers that have been “imposed through the bargaining process” and that are necessary to “allow meaningful collective bargaining to take place.” *Id.* at 238.<sup>2</sup>

In light of these principles, UCH’s arguments that the exemption justifies its dismissal from this case are misdirected. Because Plaintiffs challenge only UCH’s conspiracies with other, non-unionized hospitals and not any of its collective bargaining activities or agreements with INA, the exemption is entirely inapplicable to this action. Nor is UCH’s argument saved by its

---

<sup>2</sup> As UCH itself admits, an employer’s activities are shielded by the nonstatutory exemption only “where necessary to protect the national labor policy favoring free and private collective bargaining over wages, hours and working conditions[.]” (Def.’s Mem. at 4).

reliance on the Sixth Circuit's decision in *Detroit Auto Dealers Ass'n. v. FTC*, 955 F.2d 457 (6th Cir. 1992). Even if that case is treated as persuasive authority by this Court, it undermines rather than supports UCH's case.

**1. The exemption does not apply because Plaintiffs challenge only UCH's participation in conspiracies with non-union hospitals, not any collective bargaining activities.**

The Complaint makes clear that the nonstatutory labor exemption is irrelevant to this case. Plaintiffs do not claim that UCH violated the antitrust laws through: (1) any agreement with INA in its CBA, (2) any other agreement with INA, or (3) any conduct growing out of its collective bargaining relationship with INA. Rather, Plaintiffs claim only that UCH violated the antitrust laws by agreeing and conspiring with other hospitals to suppress wages and share wage data outside of any collective bargaining relationship.

Such an agreement cannot possibly fall within the exemption, and none of the authorities cited in UCH's brief stand for the proposition that an employer is immune from suit under the antitrust laws merely because it happens to be party to a CBA, particularly a CBA to which none of its co-conspirators is a participant. Nor has research by Plaintiffs' counsel uncovered such an authority. This is unsurprising since, as already noted, "the labor immunities do not extend to simple agreements among employers fixing the terms and conditions of employment or imposing other restraints on the labor market." Areeda, *supra*, ¶ 257.<sup>3</sup> *Accord Anderson*, 272 U.S. 359, *Radovich v. NFL*, 352 US 445 (1957) (employer agreement to "blacklist" employee violates Sherman Act); *Todd v. Exxon Corp.*, 275 F.3d 191, 195 (2d Cir. 2001) (employer agreement to suppress wages and share compensation information violates Sherman Act); *Nichols v. Spencer Int'l Press*, 371 F.2d 332 (7th Cir. 1967) (agreement among competitors not to hire each others' employees violates Sherman Act); *Union Circulation Co. v. FTC*, 241 F.2d 652 (2d Cir. 1957) (same); *Cordova v. Bache & Co.*, 321 F.Supp. 600 (S.D.N.Y. 1970) (agreement among

---

<sup>3</sup> Professor Areeda lists two exceptions to this rule, neither of which is relevant to this case. The first, "multi-employer restraints arising in the context of collective bargaining," cannot apply to this case because UCH, by its own admission, is not a member of any multi-employer bargaining unit – indeed, it is the only unionized defendant. Areeda, *supra*, ¶257; (Def.'s Mem. at 7). A "second and far more limited" exception may arise "when there is no formal collective bargaining relationship, but the employer combination at issue is no broader than the union against whom it is bargaining." Areeda, *supra*, ¶ 257. This second exception is inapplicable to the instant case because the wage-fixing and information-sharing agreements extend to UCH's non-union co-conspirators and target their employees as well. Thus, the conspiracies were not entered into "against" any common labor union.

employers to fix wages violates Sherman Act). Because Plaintiffs have alleged exactly that – simple agreements among competitors to suppress wages, both directly and via information-sharing – the exemption is inapplicable.

Not surprisingly, then, the first section of UCH’s brief is, by UCH’s own admission, devoted to a discussion of cases involving a “different factual context” than the instant case. (Def.’s Mem. at 7). These cases stand for the proposition that where a group of employers negotiates collectively with a common union representing all of the group’s employees, some employer-union and even employer-employer agreements in restraint of trade are entitled to the exemption because such agreements are necessary to facilitate collective bargaining. (Def.’s Mem. at 3-7); *Brown*, 518 U.S. at 250 (exemption applies to restraint of trade imposed by a multi-employer bargaining unit “during and immediately after a collective-bargaining negotiation” and which “grew out of, and was directly related to, the lawful operation of the bargaining process”); *Clarett v. N.F.L.*, 369 F.3d 124, 126 (2d Cir. 2004) (“NFL teams are permitted to engage in joint conduct with respect to terms and conditions of players’ employment as a multi-employer bargaining unit without risking antitrust liability”). In stark contrast, this case involves no such multi-employer bargaining. UCH and its co-conspirators entered into wage-fixing and information-sharing conspiracies entirely outside any common collective bargaining relationship. (Def.’s Mem. at 7).

UCH asserts that “this is a distinction without a difference.” *Id.* That assertion cannot be squared with controlling law. The Supreme Court applied the exemption in *Brown* based entirely on concerns unique to multi-employer collective bargaining. Such bargaining requires the consent of the collective bargaining representatives of the affected employee bargaining units. *See NLRB v. Great Atl. and Pac. Tea Co.*, 340 F.2d 690, 692-93 (2d Cir. 1965). The *Brown* Court first recognizes multi-employer bargaining as “a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor” that “constitutes an important part of the Nation’s industrial relations system.” *Brown*, 518 U.S. at 240.

The Court then applied the exemption to joint employer behavior directly after an impasse was reached in multi-employer collective bargaining because such bargaining would be unfeasible if the exemption did not apply:

If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior . . . [i]f any, or all, of them individually impose terms that differ significantly from that offer, they invite an unfair labor practice charge. Indeed, how can employers safely discuss their offers together even before a bargaining impasse occurs?

*Id.* at 241-42. In short, the exemption was necessary to facilitate meaningful collective bargaining in a multi-employer bargaining context. The Court proceeded to carefully limit its holding to employer conduct arising directly from that context:

[W]e hold that the implicit (“nonstatutory”) antitrust exemption applies to the [joint] employer conduct at issue here. That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collectively-bargained relationship.

*Brown*, 518 U.S. at 250. *Accord Cordova*, 321 F. Supp. at 607 (“an essential prerequisite to the legality of such multi-employer combinations with respect to industry-wide wages . . . is the existence or prospect of a joint collective bargaining agreement with the union[.]”).<sup>4</sup>

In contrast, UCH’s wage-suppression and information-sharing conspiracies with other Chicago hospitals did not grow out of any collective bargaining process, and they included hospitals that not only were not parties to UCH’s collective bargaining relationship with INA, but moreover had no collective bargaining relationships with any nurse union whatsoever. The exemption clearly does not apply where “the parties to the [CBA]” – *i.e.* UCH and INA – “are not the same as the parties to the conspiracy” – *i.e.* UCH and its co-defendant hospitals. *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 830 F. Supp. 1083 (N.D. Ill. 1993).

---

<sup>4</sup> Moreover, the *Brown* Court expressly declared that the holding should not be taken even as an endorsement of the claim that every restraint imposed by employers during the course of multi-employer bargaining is exempt. *Brown*, 518 U.S. at 250 (disclaiming the D.C. Circuit’s suggestion to that effect). Where a restraint is “sufficiently distant in time and circumstances from the collective bargaining process,” a multi-employer bargaining unit’s imposition of terms would fall beyond the “extreme outer boundar[y]” of the exemption. *Id.* UCH’s claim that the exemption applies even outside the multi-employer bargaining context lies far beyond even this “extreme outer boundar[y].”

Because no multi-employer bargaining is present in this case, UCH cannot plausibly argue that any of the policies or concerns underlying the application of the exemption justifies its application here.

2. **UCH's reliance on the Sixth Circuit's opinion in *Detroit Auto Dealers* is misplaced.**

Perhaps realizing it has little chance of prevailing under controlling authorities, UCH devotes a substantial portion of its brief to the Sixth Circuit's decision in *Detroit Auto Dealers* which, according to UCH, indicates that "the nonstatutory exemption fully applies in the circumstances of this case." (Def.'s Mem. at 7). Of course, if the *Detroit Auto Dealers* did so hold, it would be inconsistent with the reasoning of the Supreme Court's later *Brown* decision, and should be disregarded. A close examination of the *Detroit Auto Dealers* decision, however, reveals not only that it does not support the application of the exemption to this case, but that it actively undercuts UCH's arguments.

*Detroit Auto Dealers* concerned an agreement among a group of auto dealers to restrict their showroom hours. 955 F.2d at 458-59. The dealers had been the objects of intense and concerted organizing activities by a series of labor organizations seeking to represent their sales forces. *Id.* at 459-60. A focal point of the unions' campaign was the sales personnel's desire to shorten the dealers' hours of operation. *Id.* at 460. In a largely successful attempt to resist unionization, the dealers agreed among themselves to reduce hours of operation, thereby removing the most appealing plank of the unions' organizing platform. *Id.* Some dealers, however, were nevertheless successfully unionized and entered into CBAs with their salespeople; some of those CBAs contained provisions governing hours of operation. *Id.* The FTC nonetheless determined that the dealers' collective activity fixing hours of operation violated the Sherman Act. *Id.* at 458.

The dealers argued on appeal to the Sixth Circuit that they were all entitled to the labor exemption because, while they did not engage in multi-employer bargaining, their agreement was a joint response to union pressure. *Id.* at 467. The Sixth Circuit recognized that the agreement "came about, in part, upon the advice of labor counsel to petitioners as to the best way to avoid violent confrontation and threats of violence to dealers and to prevent unionization." *Id.* Despite this showing of at least a tangential relation to joint union activity and collective bargaining – a showing far beyond any UCH has or could make about the wage-fixing and

information-sharing conspiracies at issue here – the Sixth Circuit ruled the exemption did not apply to the employers’ joint fixing of hours because “the process was not, nevertheless, a direct product of employer collective bargaining, nor of arm’s length dealing with salespersons.” *Id.*

The *Detroit Auto Dealers* court did, however, treat unionized auto dealers who had entered into a CBA regulating their hours of operation somewhat differently. The court remanded their cases to the FTC for further fact-finding to determine whether the exemption “might” apply to their CBAs. *Id.* at 473. Contrary to UCH’s characterization of this second holding, the Sixth Circuit did not rule that the exemption applied to all CBA provisions regarding showroom hours. The court specified that the exemption might apply only in those cases where union-employer negotiations – not employer-employer collusion – “actually brought about additional or different limits on showroom hours[.]” *Id.* at 474 (emphasis added).<sup>5</sup> The court’s instruction to the FTC on remand was to “determine whether there was a restraint . . . imposed by a union rather than by the collective agreement with and among the other dealers[.]” *Id.* at 468 (emphasis in original). On remand, the FTC conducted additional factfinding and, after examining 13 dealers in detail, concluded that the exemption applied to only one. 119 F.T.C. 891, \*32.<sup>6</sup>

The rationale for this remand is easy to understand, and completely inconsistent with UCH’s position in this case. While the dealers had colluded among themselves to fix their hours of operation, it was possible that a labor union representing a particular dealer’s employees had collectively bargained for a CBA provision restricting that dealer’s hours of operation to the same (or greater) degree that the collusive agreement did. If the FTC’s remedy of forcing all dealers to stay open for longer periods were enforced against that dealer, the union in question, innocent of any antitrust violation, would be denied the benefit of its bargain by operation of antitrust law. Meanwhile the dealer, guilty of collusion, would receive an unjust windfall – whatever concessions on other matters its union made in the CBA in exchange for the now-

---

<sup>5</sup> On remand, the F.T.C. did just that, holding that the nonstatutory exemption did *not* apply to a CBA containing a restraint on hours bargained for by the union, when the terms (requiring early Saturday closing) were less restrictive than the restraint agreed upon by the dealers themselves (an agreement not to open on Saturday at all). *In the matter of Detroit Auto Dealers Ass’n., Inc.*, 119 F.T.C. 891, 1989 FTC LEXIS \*36-39.

<sup>6</sup> As a result the FTC, which previously had directed defendant dealers to keep their showrooms open for extra hours, amended its order to “not require” the one dealer upon which a union had successfully imposed a restraint on hours of operation through the collective bargaining process “to remain open beyond the provisions of the current labor contract.” *Id.* \*32.

obviated shortening of hours. This deprivation imposed on an innocent party would be inequitable and might legitimate the application of the nonstatutory labor exemption.

Here, however, those same equities are absent, or even reversed. Remedying UCH's collusion does not deprive INA of any bargained for benefit (unless, implausibly, INA actually bargained to suppress rather than maximize its members' wages<sup>7</sup>); rather if Plaintiffs prevail, the INA's members simply will receive compensation for the depressed wage that resulted from UCH's collusion on the market wage. Thus, if the exemption does not apply, no inequity is present – UCH's RNs, like all RNs damaged by the conspiracies, would be compensated, and UCH, like all its co-conspirators, would be liable for damages to its own nurses and to other nurses in the class harmed by the conspiracy. If UCH were protected by the exemption, however, an inequity arises similar to that which arguably legitimated the *Detroit Auto Dealers* application of the exemption. UCH's RNs, innocent of any antitrust violation, would be denied the compensation every other RN employed at conspiring hospitals receives, despite having been equivalently damaged. At the same time UCH, guilty of collusion, would receive a windfall – it, alone among the conspirators, would not pay money damages and would continue to enjoy the savings it achieved by conspiring to fix nurse wages in the Chicago market. The underlying rationale of *Detroit Auto Dealers* therefore directly undercuts UCH's position.<sup>8</sup>

---

<sup>7</sup> If UCH wants to argue that INA sought to impose CBA provisions depressing, rather than maximizing, nurse wages, it cannot do so on the present record. Both the Sixth Circuit and FTC decisions in *Detroit Auto Dealers* make clear that this question requires extensive factual inquiry. *Supra* at \_\_. If the instant motion turns on this issue, Plaintiffs are entitled to discovery on it pursuant to Federal Rule of Civil Procedure 56(f). See *infra* at p. \_

Yet UCH also appears to argue that any fact-finding about the bargaining process is improper because it would intrude upon the NLRB's jurisdiction to regulate collective bargaining. (Def.'s Mem. at 11, 14-15). Accepting this latter argument, however, compels the conclusion that *Detroit Auto Dealers* – the only case that even arguably supports UCH's position – was wrongly decided. UCH is thus left with absolutely no authority supporting the application of the exemption to employer-employer restraints on trade imposed outside the multi-employer bargaining process.

<sup>8</sup> This reading of the underlying rationale in *Detroit Auto Dealers* comports with the analysis of the Supreme Court that the labor exemption applies where a party that bargains for a restraint in a CBA is pursuing its independent labor relations interests, but not where it is simply seeking to use the collective bargaining process to further an anticompetitive conspiracy. *Compare Local 189, Amalgamated Meat Cutters and Butcher Workmen of No. Am. v. Jewel Tea Co.*, 381 U.S. 676, 688 (1965) (exemption shields “unions’ action forcing [employer] to accept the same restriction [as other employers], [when] the unions act[] not at the behest of any employer group but in pursuit of their own policies”) *with UMW v. Pennington*, 381 U.S. 657, 665-66 (1965) (“[A] union forfeits its exemption from the antitrust laws when

Even if *Detroit Auto Dealers* showed UCH could be covered by the nonstatutory labor exemption, UCH would be immunized from only some, not all, of the remedies Plaintiffs seek in this case. Under *Detroit Auto Dealers*, the FTC determined that, pursuant to the exemption, sanctions requiring an alteration or abrogation of the CBA did not apply to one employer, but all the conspiring employers still were subject to sanctions for their anticompetitive conduct, including, for example, an injunction to refrain from further collusion. *Detroit Auto Dealers*, 119 F.T.C. at 906-907 (application of the nonstatutory exemption means only that the “collective bargaining agreement [itself] is exempt from antitrust scrutiny”).<sup>9</sup> The Commission did not exempt the unionized defendant from other antitrust sanctions it had previously ordered that did not deprive the union of the benefit of its CBA. Compare *Id. with In re Detroit Auto Dealers Ass’n., Inc.*, 111 F.T.C. 417, 1989 FTC LEXIS 10, \*87-89, 91- 94 (imposing cease and desist orders on all defendant auto dealers). For all these reasons, *Detroit Auto Dealers* offers no support to UCH.

Moreover, regardless of whether the CBA somehow protects UCH from liability to its own nurses, UCH is still directly liable to its codefendants’ nurses for the harms inflicted by the conspiracy and jointly and severally liable with its co-conspirators for damages to the class. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 635 (1981) (Sherman Act liability is joint and several). These liabilities, not at issue in *Detroit Auto Dealers*, require no examination of the CBA or consideration of UCH’s bargaining relationship with INA. In *Paper Systems Inc. v. Nippon Paper Ind. Co., Ltd.*, 281 F.3d 629 (7th Cir. 2002), the court held that even where antitrust plaintiffs could not recover damages from a particular firm – because none were “direct purchasers” from defendant, *see Ill. Brick Co. v. Ill.*, 431 U.S. 720, 729 (1977) – joint and several liability “ma[de] it impossible to dismiss [the defendant] outright.” *Nippon Paper*, 281 F.3d at 632. The court ruled that, “[i]f [defendant] was among those conspirators [who fixed prices for

---

it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units.”). It is also reconcilable, unlike UCH’s interpretation, with the rationale of *Brown*.

<sup>9</sup> The FTC’s application of *Detroit Auto Dealers* likewise avoids conflict with the implicit assumption in *Pennington* that even if the exemption applies to a particular CBA, it does not confer immunity on labor or management for participating in other agreements in restraint of trade. 381 U.S. at 663 (“[I]f, as is alleged in this case, the union became a party to a collusive bidding arrangement designed to drive [plaintiffs] and others from the . . . market, we think any claim to exemption from antitrust liability would be frivolous at best.”).

fax machine paper], then it is responsible for the entire overcharge . . . and any direct purchaser from any conspirator can collect its own portion of damages from any conspirator.” *Id.* Thus, even if the nurses covered by the CBA cannot recover from UCH, plaintiffs employed by other defendants can still collect their “own portion of damages” from the hospital.

### **C. THIS ACTION IS NOT WITHIN THE NLRB’S PRIMARY JURISDICTION**

Apparently seeking to buttress its argument that UCH is shielded by the nonstatutory labor exemption, UCH also argues that Plaintiffs’ claims implicate matters “peculiarly within the competence of the [National Labor Relations] Board” (“NLRB”) and amount to little more than a claim that UCH has failed “to bargain in good faith over the compensation levels of its employees . . . a matter for the Board alone to remedy.” (Def.’s Mem. at 2-3, 9-14). Typically, such arguments are advanced to show that the NLRB has “primary jurisdiction” – a doctrine that applies when enforcement of a court claim “requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *Jewel Tea*, 381 U.S. at 684-5.

The NLRB primary jurisdiction doctrine does not apply, however, where “a Board determination would be of subsidiary importance at best.” *Id.* at 687. UCH cannot show why an NLRB determination would even be relevant, much less central, to a determination of the issues in this case. For example, in the argument above, UCH misconstrues the duty of good faith bargaining, which has a peculiar meaning under the NLRA. Even if UCH had insisted openly across the table that INA accept the same wage scale as other defendant hospitals’ and had refused to budge off that demand, this behavior alone would not constitute a failure to bargain in good faith. *See, e.g., Kankakee-Iroquois County Employers Ass’n. v. NLRB*, 825 F.2d 1091, 1094 (7th Cir. 1987) (negotiating position that collective bargaining agreement must include terms prevailing at other firms does not constitute failure to bargain in good faith where defendant makes other concessions); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953) (though an employer must make a “reasonable effort in some direction to compose his differences with the union,” the Board cannot compel a concession on a particular issue). Thus, UCH’s participation in the conspiracy to depress the market wage simply does not determine whether or not it bargained in good faith with INA. *Vice versa*, even should the NLRB make such a determination, its conclusion would be irrelevant to the question of whether UCH participated in this conspiracy.

In any event, Supreme Court precedent clearly indicates that an otherwise valid antitrust claim should not be dismissed on labor exemption grounds merely because it could also be characterized as an unfair labor practice under the NLRA. *Jewel Tea*, 381 U.S. at 685 (that plaintiffs “could have filed an unfair labor practice charge with the Board on the grounds that the unions had insisted on a nonmandatory subject” of collective bargaining does not exempt antitrust claim). *Accord Telecom Plus of Downstate N.Y., Inc. v. Local Union 3, IBEW*, 719 F.2d 613, 615 (2d Cir. 1983) (“[t]hat certain activities may arguably constitute an unfair labor practice under §8(e) [of the Act] does not oust a federal court of jurisdiction over a Sherman Act claim arising out of the same activities as part of a combination with employers to restrain competition against the [plaintiff]”) (citations omitted).

The opinions cited by UCH are not to the contrary.<sup>10</sup> Similarly, UCH’s discussion of “most favored employer” cases is irrelevant because, as UCH itself admits, those cases apply only to situations where “the union should negotiate lower compensation rates for the employees” of a competing employer. (Def.’s Mem. at 9 (emphasis added)). The instant Complaint – which UCH has assumed to be true for purposes of its motion – alleges that compensation rates for RNs in Chicago-area hospitals were suppressed only by collusive agreements among employers. (Compl. ¶¶ 1-2, 29, 39, 43, 47). The doctrine of primary jurisdiction simply does not support UCH’S Motion.

Finally, UCH argues that this court should not award back wages and benefits to UCH nurses because national labor policy prohibits changes to collectively bargained terms of employment absent bargaining to impasse, citing *NLRB v. Katz*, 369 U.S. 736, 747-48 (1962). *Katz*, however, stands only for the proposition that an *employer* cannot change a CBA’s terms. It says nothing about a court’s ability to hear claims based on entirely separate remedies and apply statutorily available relief. *See, e.g., Alexander v. Gardner-Denver*, 415 U.S. 36, 51 n.14 (1974)

---

<sup>10</sup> UCH’s citation of cases discussing the permissibility of “interest arbitration” and an employer’s duty under the NLRB to, in some circumstances, provide wage information in its possession to a union during collective bargaining are red herrings. The reason an employer’s refusal to provide a union with such information sometimes represents an unfair labor practice under the NLRA is that “[m]erely meeting and conferring without a prior exchange of requested data, where such is relevant, does not facilitate effective collective bargaining.” *Gen. Elec. Co., Inc. v. NLRB*, 466 F.2d 1177, 1183 (6th Cir. 1972). Although UCH seems to suggest that the NLRA also regulates the manner in which firms *procure* wage information from other employers (Def.’s Mem. at 13-14), it cites no case law to support this novel proposition. The Complaint does not, therefore, attack “INA’s right to obtain data” UCH has in its possession, but only UCH’s collection and use of that data as part of its conspiracy to suppress wages market-wide.

(plaintiff covered by CBA antidiscrimination clause is also entitled to independent relief under Title VII, since “judicial relief can be structured to avoid windfall gains”). The Supreme Court has held that such remedies are available to Title VII plaintiffs “even if the . . . [collective bargaining] agreement itself makes no provision for such relief.” *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 347 (1977) (court may award retroactive seniority to employees who are victims of discriminatory policies despite fact that “seniority system agreement” between employer and union does not sanction such measures). Similarly, claims under the Fair Labor Standards Act by union-represented employees are not barred even though federal remedies require compensation for work beyond that contemplated by a CBA or workplace custom. *See, e.g., Tennessee Coal, Iron & R.R. v. Muscoda Local 123*, 321 U.S. 590, 603-03 (1944) (“an agreement to pay less than the minimum wage requirements cannot be utilized to deprive employees of their statutory rights”); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740-41 (1981) (same).

**D. IF THE COURT CONSIDERS UCH’S SUGGESTION THAT ITS COLLUSION WAS THE RESULT OF, OR PURSUANT TO, ITS CBAs, RESOLUTION OF THAT CONTESTED MATTER OF FACT SHOULD BE POSTPONED PURSUANT TO FED. R. CIV. P. 56(f).**

UCH’s motion is insufficient as a matter of law. Plaintiffs have therefore filed this Opposition despite the fact that they have been denied any discovery. If, however, the Court considers UCH’s unproved suggestion that its collusion was pursuant to, or a result of, some agreement with the union (Def.’s Mem. at 12), Plaintiffs respectfully request the opportunity to engage in discovery on those issues pursuant to Federal Rule of Civil Procedure 56(f), as requested in their October 31, 2006 Request For Discovery To Oppose Defendant University of Chicago Hospital’s Summary Judgment Motion and the supporting Declaration of Thomas P. Dove.

Here, the nonstatutory labor exemption does not apply to the restraints of trade alleged in this case because they were not the result of any collective bargaining process, but rather the result of a price-fixing agreement among competitors. *See Detroit Auto Dealers*, 955 F.2d at 467 (nonstatutory labor exemption does not protect “pre-existing collusion”).<sup>11</sup> Plaintiffs contend

---

<sup>11</sup> Plaintiffs continue to maintain that even if UCH had procured INA’s agreement to the wage-fixing and information-sharing conspiracies and enshrined them in a CBA, UCH still would not be entitled to the labor exemption. It is beyond dispute that attempts to incorporate antitrust conspiracies

UCH's goal in participating in these conspiracies was to ensure that the starting point for each round of collective bargaining (*i.e.*, the prevailing wage in the market) would already be artificially suppressed.

Pursuant to at least one prior CBA between UCH and INA, any impasse that arises during negotiations may be presented to a Board of Arbitration. (Declaration of Maya Bordeaux in Support of Defendant University of Chicago Hospitals' Motion for Summary Judgment, filed October 20, 2006, ¶3 & Ex. 1 at 18). According to that CBA, the Board's guidelines for resolving the impasse "shall be like terms and conditions of employment which exist for other registered nurses in the Chicago area." *Id.* (emphasis added).

To the extent the Court considers UCH's suggestion that its collusion was pursuant to, or resulted from, this CBA provision or any other agreement with INA, Plaintiffs are entitled to discovery to determine, among other things: (a) when, how and from whom UCH obtained information about the "conditions of employment which exist for other registered nurses in the Chicago area;" (b) what that information consisted of, including whether it comprised current wage data (rather than former wage data), as the agreement's wording suggests; (c) whether UCH has ever stopped gathering information about the "conditions of employment which exist for other registered nurses in the Chicago area;" (d) if so, when and why; (e) what sources of information UCH has available to it to obtain this kind of data; (f) what UCH employees were involved in the information gathering and what methods they used to gather the information. See (Dove Decl. ¶¶4-5).

#### IV. CONCLUSION

For all the above reasons, UCH's motion should be rejected in its entirety or, in the alternative, stayed pending discovery pursuant to Federal Rule of Civil Procedure 56(f).

---

into CBAs are not entitled to the exemption's protection. *See, e.g., Pennington*, 381 U.S. at 665-66 ("One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes party to the conspiracy."); *Sun-Land Nurseries, Inc. v. So. Cal. Dist. Council of Laborers*, 793 F.2d 1110, 1117 (9th Cir. 1986) (en banc) (CBA subcontracting clauses are not "wholly exempt from scrutiny if they are shown to be instruments of an antitrust conspiracy already existing"). *Cf. Local 210*, 844 F.2d at 80 (observing that "agreements secured 'at the behest of or in [unlawful] combination with non labor groups' are not [entitled to the protection of the nonstatutory exemption]").

Dated: November 17, 2006

Respectfully,

Plaintiffs

By: s/ Marvin A. Miller

MARVIN A. MILLER  
MILLER FAUCHER AND CAFFERTY LLP  
30 North LaSalle Street, Suite 3200  
Chicago, IL 60602  
Telephone: (312) 782.4880  
Facsimile: (312) 782.4485

***Plaintiffs' Liaison Counsel***

DAVID P. DEAN  
MARY JOYCE CARLSON  
JAMES & HOFFMAN  
1101 17th Street NW, Suite 510  
Washington, D.C. 20036  
Telephone: (202) 496-0500  
Facsimile: (202) 496-0555

MICHAEL D. HAUSFELD  
DANIEL A. SMALL  
CHARLES P. TOMPKINS  
ALLYSON B. BAKER  
COHEN MILSTEIN HAUSFELD & TOLL,  
P.L.L.C.  
1100 New York Avenue NW  
Suite 500, West Tower  
Washington, D.C. 20005  
Telephone: (202) 408-4600  
Facsimile: (202) 408-4699

MICHAEL P. LEHMANN  
THOMAS P. DOVE  
KIMBERLY A. KRALOWEC  
FURTH LEHMANN & GRANT LLP  
225 Bush Street, 15th Floor  
San Francisco, CA 94104  
Telephone: (415) 433-2070  
Facsimile: (415) 982-2076

***Plaintiffs' Co-Lead Counsel***

DANIEL E. GUSTAFSON  
JASON S. KILENE  
GUSTAFSON GLUEK PLLC  
650 Northstar East  
608 Second Avenue South  
Minneapolis, MN 55402  
Telephone: (612) 333-8844  
Facsimile: (612) 339-6622

MARK A. GRIFFIN  
RAYMOND J. FARROW  
KELLER ROHRBACK L.L.P.  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101-3052  
Telephone: (206) 623-1900  
Facsimile: (206) 623-3384

JOSEPH M. VANEK  
SCOTT RUKSAKIATI  
DAVID P. GERMAINE  
VANEK, VICKERS & MASINI, P.C.  
225 W. Washington, 18th Floor  
Chicago, IL 60606  
Telephone: (312) 224-1500  
Facsimile: (312) 224-1510

LAWRENCE WALNER  
AARON WALNER  
LAWRENCE WALNER & ASSOCIATES  
150 N. Wacker Drive, Suite 2150  
Chicago, Illinois 60606  
Telephone: (312) 201-1616  
Facsimile: (312) 201-1538

*Plaintiffs' Counsel*

**CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

I, Marvin A. Miller, one of the attorneys for plaintiffs, hereby certify that on November 17, 2006, service of the *Plaintiffs' Memorandum Of Law In Opposition To The University Of Chicago Hospital's Motion For Summary Judgment* was accomplished pursuant to ECF as to Filing Users and I shall comply with LR 5.5 as to any party who is not a Filing User or represented by a Filing User .

/s/ Marvin A. Miller  
Marvin A. Miller