IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 1:05-cv-431
	)	
vs.	)	Hon. Sandra S. Beckwith, C.J.
	)	
FEDERATION OF PHYSICIANS AND DENTISTS, *et al.*,	)	Hon. Timothy S. Hogan, M.J.
	)	
	)	
Defendants.	)	

PLAINTIFF UNITED STATES' RESPONSE TO PUBLIC COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), the United States submits this response to five public comments relating to the proposed Final Judgment that has been lodged with the Court for eventual entry in this case. After review of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. Following publication of the comments and this response to them in the *Federal Register*, pursuant to 15 U.S.C. § 16(d), the United States will request that the Court enter the proposed Final Judgment.

I. PROCEDURAL HISTORY

On June 24, 2005, the United States filed this civil antitrust action, alleging that the Federation of Physicians and Dentists ("Federation") and Federation employee Lynda Odenkirk, along with physician co-defendants Drs. Warren Metherd, Michael

Karram, and James Wendel, coordinated a conspiracy among about 120 obstetrician-gynecologist physicians ("OB-GYNs") practicing in greater Cincinnati, Ohio, that unreasonably restrained interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The physician defendants agreed to a judgment that was filed concurrently with the Complaint and entered by this Court on November 14, 2005, as being in the public interest. (Dkt. Entry # 36). The Federation and Ms. Odenkirk (the "Federation defendants"), however, contested the charges.

On January 26, 2006, the United States filed with the Court a motion seeking entry of partial summary judgment on liability against the Federation defendants. (Dkt. Entry ## 40, 47). After briefing on this motion was completed, the Federation defendants filed an unopposed motion requesting the Court to order that the case be referred to mediation. (Dkt. Entry # 63). On April 14, 2006, the Court ordered that the case be referred to mediation.

Following two mediation conferences and protracted settlement negotiations, on June 19, 2007, the United States filed with the Court a settlement stipulation (Dkt. Entry # 81) with the Federation defendants, consenting to entry of the proposed Final Judgment (Dkt. Entry # 81-2), which was lodged with the Court pending the parties' compliance with the APPA. On July 18, 2007, the United States published the Stipulation, proposed Final Judgment, and Competitive Impact Statement ("CIS") (Dkt. Entry # 84) in the *Federal Register* at 72 Fed. Reg. 39450 (2007), as required by the APPA to facilitate public comments on the proposed Final Judgment. A summary of the terms

of the proposed Final Judgment and CIS was published for seven consecutive days in the Cincinnati Enquirer from July 20 through July 26, 2007, and in the *Washington Post* from July 18 through July 24, 2007, also pursuant to the APPA. The 60-day period for public comments on the proposed Final Judgment began on July 27, 2007, and expired on September 24, 2007. During that period, five comments were submitted.

II. SUMMARY OF THE COMPLAINT'S ALLEGATIONS

The Federation is a membership organization of physicians and dentists, headquartered in Tallahassee, Florida. The Federation's membership includes economically independent physician groups in private practice in many states, including Ohio. The Federation has offered member physicians assistance in negotiating fees and other terms in their contracts with health care insurers.

In spring 2002, several Cincinnati OB-GYNs became interested in joining the Federation to negotiate higher fees from health care insurers. The physician defendants assisted the Federation in recruiting other Cincinnati-area OB-GYNs as members. By June 2002, the membership of the Federation had grown to include a large majority of competing OB-GYN physicians in the Cincinnati area.

With substantial assistance from the physician defendants and Ms. Odenkirk, the Federation coordinated and helped implement its members' concerted demands to insurers for higher fees and related terms, accompanied by threats of contract terminations. From September 2002 through the fall of 2003, Ms. Odenkirk communicated with the physician defendants and other Cincinnati-area OB-GYN

Federation members to coordinate their contract negotiations with health care insurers. Along with the physician defendants, Ms. Odenkirk developed a strategy to intensify Federation member physicians' pressure on health care insurers to renegotiate their contracts, including informing member physicians about the status of competing member groups' negotiations and taking steps to coordinate their negotiations.

The agreement coordinated by the Federation defendants forced Cincinnati-area health care insurers to raise fees paid to Federation member OB-GYNs above the levels that would likely have resulted if Federation members had negotiated competitively with those insurers. As a result of the conspirators' conduct, the three largest Cincinnati-area health care insurers each were forced to increase fees paid to most Federation member OB-GYNs by approximately 15-20% starting July 1, 2003, followed by cumulative increases of approximately 20-25% starting January 1, 2004, and approximately 25-30% effective January 1, 2005. This conduct by Federation member OB-GYNs, coordinated by the Federation defendants, also caused other insurers to raise the fees that they paid to Federation OB-GYN members. The increased fees paid by health care insurers to Federation OB-GYN members in the Cincinnati area are ultimately borne by employers and their employees.

III. SUMMARY OF RELIEF TO BE OBTAINED UNDER THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to enjoin the Federation defendants from taking future actions that could facilitate private-practice physicians in

coordinating their dealings with payers for health care services. It accordingly prohibits the Federation defendants from being involved in its private-practice members' negotiations or contracting with health insurers or other payers for health care services anywhere in the United States.

The proposed Final Judgment prohibits the Federation defendants from providing any services to any physician in private practice (defined as an "independent physician") regarding such physician's negotiation, contracting, or other dealings with any payer. The proposed Final Judgment also prohibits the Federation defendants from (1) representing any independent physician with any payer (including as a messenger); (2) reviewing or analyzing, for any such physician, any proposed or actual contract or contract term between the physician and any payer; and (3) communicating with any independent physician about the status of that physician's, or any other physician's, negotiations, contracting, or participation with any payer. The Federation defendants are also generally prohibited from communicating about any proposed or actual contract or contract term between any independent physician and any payer. In addition, the proposed Final Judgment enjoins the Federation defendants from responding to any question or request initiated by any payer, except to state that the Final Judgment prohibits such a response. Finally, the proposed Final Judgment generally prohibits the Federation defendants from training or educating, or attempting to train or educate, any independent physician in any aspect of contracting or negotiating with any payer.

The proposed decree includes exceptions to these prohibitions covering conduct that neither threatens competitive harm nor undermines the clarity of the prohibitions. For example, the proposed decree limits its prohibition on training or educating independent physicians in any aspect of contracting or negotiating with payers by allowing the Federation defendants to

(1) speak on general topics (including contracting), when (a) invited to do so as part of a regularly scheduled medical educational seminar offering continuing medical education credit, (b) advance written notice has been given to Plaintiff, and (c) documents relating to what was said by the Federation defendants are retained by them for possible inspection by the United States;

(2) publish articles on general topics (including contracting) in a regularly disseminated newsletter; and

(3) provide education to independent physicians regarding the regulatory structure (including legislative developments) of workers compensation, Medicaid, and Medicare, except Medicare Advantage,

provided that such conduct does not violate any other injunctive provision of the proposed Final Judgment.

In a section titled "permitted conduct," the proposed decree permits certain other conduct as well:

(1) Federation defendants may engage in activities involving physician participation in written fee surveys that are covered by the "safety zone" under Statement 6 of the 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153, which addresses provider participation in exchanges of price and cost information;

(2) Federation defendants and Federation members may engage in lawful union organizational efforts and activities;

(3) Federation defendants may petition governmental entities in accordance with doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny; and

(4) Federation physician members may choose independently, or with other members or employees of such member's bona fide solo practice or practice groups, the health insurers with which to contract, and/or to refuse to enter into discussions or negotiations with any health care payer.

The proposed Final Judgment clarifies that it does not alter the Federation's obligations under the decree entered by the district court in Delaware in a prior, similar case against the Federation, *United States v. Federation of Physicians and Dentists, Inc.*, CA 98-475 JJF (D. Del., consent judgment entered Nov. 6, 2002) (the "*Delaware* decree"). If there is any conflict between the injunctive provisions of the proposed Final Judgment and the injunctive provisions or conduct permitted by the *Delaware* decree, the proposed Final Judgment controls. The proposed Final Judgment embodies more stringent relief than that provided by the *Delaware* decree because it prohibits the Federation, for example, from representing physicians in their dealings with payers as a messenger and reviewing and analyzing physician contracts with any payer. The *Delaware* decree had permitted such conduct in limited circumstances.

IV. SUMMARY OF PUBLIC COMMENTS AND THE UNITED STATES' RESPONSES TO THEM

During the 60-day public comment period, the United States received comments from one individual and four medical societies. Upon review, the United States believes that nothing in the comments warrants a change in the proposed Final Judgment or

suggests that the proposed Final Judgment is not in the public interest. None of the comments contend that the proposed decree fails adequately to redress the violations and competitive harm alleged in the Complaint. Rather, two of the comments contend that the proposed Final Judgment is too stringent, and another implies the same point. Two other comments contend that this case resulted from an unfair application of the antitrust laws to physicians in their dealings with insurers. The remaining comment generally criticizes what is characterized as an unreasonably aggressive antitrust enforcement policy by the Department of Justice and Federal Trade Commission with respect to physicians. The United States addresses these concerns below and explains why the proposed Final Judgment is appropriate.

A. Comments Questioning the Charges Brought Against the Federation Defendants

1. Summary of Comments Submitted by Dr. Michael Connair and the American Academy of Orthopaedic Surgeons

Dr. Michael Connair, an orthopedic surgeon in Connecticut and a Vice President of the defendant Federation of Physicians and Dentists, has submitted a comment (Attachment 1) that criticizes the United States' Competitive Impact Statement ("CIS") (Dkt. Entry # 84) as "reflect[ing] a misguided DOJ enforcement policy that ignores antitrust principles and that encourages anticompetitive behavior by insurers." According to Dr. Connair, the CIS ignores that Cincinnati "physicians were forced to react to anti-competitive behaviors by Cincinnati insurers because the Department of Justice did not enforce antitrust principles against those insurers."

Similarly, the American Academy of Orthopaedic Surgeons' comment (Attachment 2) expresses the Academy's belief that this case "is the result of the antitrust laws not being applied equally to the insurance industry as they are to physicians or other professions," which "would reduce competition in the insurance industry and, ultimately, harm consumers." The Academy's comment also asserts that "[i]n this case, the physicians appeared to be reacting to anticompetitive behaviors by Cincinnati insurers which artificially lowered prices below Medicare levels."

2. United States' Response to Comments Submitted by Dr. Michael Connair and the American Academy of Orthopaedic Surgeons

Dr. Connair's and the Academy's comments challenge the United States' decision to prosecute the defendants' alleged anticompetitive conduct, rather than alleged anticompetitive actions by health insurers. Such an argument is outside the scope of this APPA proceeding because the APPA does not permit the Court to review the efficacy or "correctness" of the United States' enforcement policy or its determination to pursue -- or not pursue -- a particular claim in the first instance. As explained by the District Court for the District of Columbia, in a Tunney Act "public interest" proceeding, the district court should not second-guess the prosecutorial decisions of the Antitrust Division regarding the nature of the claims brought in the first instance; "rather, the court is to compare the complaint filed by the United States with the proposed consent decree and determine whether the proposed decree clearly and effectively addresses the anticompetitive harms initially identified." *United States v. The Thomson Corp*, 949 F.

Supp. 907, 913 (D.D.C. 1996); *accord*, *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995) (in APPA proceeding, "district court is not empowered to review the actions or behavior of the Department of Justice; the court is only authorized to review the decree itself").

Although the comments of Dr. Connair and the Academy are beyond the scope of an APPA proceeding, the United States nevertheless observes that their comments are incorrect as a matter of fact and law. The United States believes that the uncontested evidence and law presented in support of its motion for summary judgment, which the Court was not called on to decide in view of the parties' proposed settlement, strongly supports the Complaint's allegations that the Federation defendants violated the antitrust laws. (Dkt. Entry ## 1, 47). Further, even if the Federation defendants believed that Cincinnati insurers had colluded on payments made to OB-GYNs, as the comments imply, such circumstances would provide no defense for the Federation defendants' coordination of Cincinnati OB-GYNs price fixing. Controlling law is clear "[t]hat a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 465 (1986).

B. Comments Arguing that the Proposed Final Judgment is Overly Restrictive

1. Summary of Comments Submitted by the Connecticut State Medical Society, Connecticut Orthopedic Society, and Utah State Orthopaedic Society

The Connecticut State Medical Society (CSMS) comments (Attachment 3) that the proposed Final Judgment is "unnecessarily restrictive and more onerous than final decrees typically proposed by both the [Department of Justice] and the Federal Trade Commission (FTC) under similar circumstances in that it precludes the Federation from engaging in *lawful* conduct including representing physicians in their dealing with payers as messengers and from reviewing and analyzing physician contracts with any third-party payer." The CSMS asks the United States to modify the proposed Final Judgment to allow the defendant Federation to participate in (1) qualified risk-sharing and qualified clinically integrated joint arrangements, (2) messenger-model arrangements, and (3) communications with physicians about insurer contracts. The Connecticut Orthopedic Society comments (Attachment 4) in support of the letter submitted by the CSMS.

The Utah State Orthopaedic Society's ("USOS's") comment (Attachment 5) states that the defendant Federation has served as a messenger for orthopedists in Utah with productive results. Based on the Utah experience, the comment "presume[s] that the activities in Cincinnati have been handled in a similar fashion by the Federation." The USOS's comment further expresses the "hope . . . [that] the 'messenger model' throughout the country is managed legally by those that employ it."

2. United States' Response to Comments Submitted by the Connecticut State Medical Society, Connecticut Orthopedic Society, and Utah State Orthopaedic Society

These comments seek entry of a decree that essentially tracks the *Delaware* decree. The United States had agreed to resolve its earlier case against the Federation, in part, to give the Federation an opportunity to conduct some of its activities in a lawful manner that should not have led to anticompetitive results. The Federation defendants' actions in Cincinnati, as alleged in the United States' Complaint (Dkt. Entry # 1) and demonstrated in its summary judgment brief (Dkt. Entry # 47), however, have shown that such a decree is insufficient to prevent the Federation defendants from engaging in substantial anticompetitive conduct and, therefore, that a more restrictive decree is appropriate. The Federation defendants' alleged conduct in Cincinnati demonstrates that the USOS's expressed "hope" that the Federation defendants have employed the "messenger model" appropriately elsewhere has not been realized.

Had the Federation defendants' complied with the *Delaware* decree, it plainly would have prevented them from coordinating Cincinnati OB-GYNs' fee negotiations with health insurers. The Federation defendants nonetheless have steadfastly maintained that their conduct challenged in this matter complied with the *Delaware* decree, which –- like the proposed Final Judgment –- is nationwide in scope. Accordingly, the United States decided in this matter to negotiate a more restrictive proposed Final Judgment with the Federation defendants that assures that the Federation will not again engage in conduct that has the anticompetitive effects alleged in the complaint. The proposed Final Judgment thus provides appropriate additional

assurance that the type of conduct that occurred in Cincinnati, despite the *Delaware* decree, will not recur.

In short, the orthopedic groups' comments fail to recognize that the Federation defendants' conduct in Cincinnati has shown that the *Delaware* decree is insufficient to prevent their recurrent anticompetitive conduct and, therefore, that a more stringent decree is required. "While the resulting [proposed Final Judgment] may curtail the exercise of liberties that the [Federation defendants] might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the [recurrent] violation." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978). Although the proposed Final Judgment "goes beyond a simple proscription against the precise conduct previously pursued[,] that is entirely appropriate" under the circumstances. *Id.* at 698.

V. CONCLUSION

After considering the five comments received, the United States continues to believe that the proposed Final Judgment reasonably and appropriately addresses the harm alleged in the Complaint. Therefore, following publication of this response to comments in the *Federal Register* and submission of the United States' certification of

compliance with the APPA, the United States intends to request entry of the proposed Final Judgment once the Court determines that entry is in the public interest.

Dated: December 17, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff United States' Response to Public Comments was served this 17th day of December, 2007, electronically on:

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