

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA and
STATE OF MICHIGAN,

Plaintiffs,

v.

W.A. FOOTE MEMORIAL HOSPITAL,
D/B/A ALLEGIANCE HEALTH,

Defendant.

Case No.: 5:15-cv-12311-JEL-DRG
Judge Judith E. Levy
Magistrate Judge David R. Grand

**PLAINTIFF UNITED STATES OF AMERICA'S
NOTIFICATION OF SETTLEMENT AND
EXPLANATION OF CONSENT DECREE PROCEDURES**

Pursuant to Local Rule 16.4(e)(7), Plaintiff United States of America hereby notifies the Court that the United States, Plaintiff State of Michigan, and Defendant W.A. Foote Memorial Hospital, d/b/a Allegiance Health (“Defendant”) have reached a settlement of this case in the form of a proposed Final Judgment, attached hereto as Exhibit A.

The Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)-(h) (the “APPA” or “Tunney Act”), which applies in civil antitrust cases brought by the United States, provides that certain events must occur prior to the Court signing

and entering the proposed Final Judgment to resolve this case. Below the United States summarizes the Tunney Act process.

1. In the proposed Final Judgment, Defendant agrees to be bound by the provisions of the Final Judgment, *see* Exhibit A at 2, pending its approval by the Court, which may occur after the proceedings required by the Tunney Act are completed.

2. The Final Judgment may be filed with and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the APPA, and without further notice to any party or other proceedings.

3. In addition to the proposed Final Judgment filed today, the United States will separately file with this Court a Competitive Impact Statement, pursuant to the APPA (*see* 15 U.S.C. § 16(b)).

4. The APPA requires that the United States publish the proposed Final Judgment and the Competitive Impact Statement in the *Federal Register* and cause to be published a summary of the terms of the proposed Final Judgment and the Competitive Impact Statement in certain newspapers at least sixty days prior to entry of the proposed Final Judgment. The notices will inform members of the public that they may submit comments about the proposed Final Judgment to the

United States Department of Justice, Antitrust Division (*see* 15 U.S.C. §§ 16(b)-(c)).

5. During the sixty-day period, the United States will consider, and at the close of that period respond to, any comments that it has received, and it will publish the comments and the United States' responses in the *Federal Register* or through an alternative publication method authorized by the Court.

6. After the expiration of the sixty-day period, the United States will file with the Court the comments and its responses, and it may ask the Court to enter the proposed Final Judgment.

7. If the United States requests that the Court enter the proposed Final Judgment after compliance with the APPA, 15 U.S.C. §§ 16(e)-(f), then the Court may enter the Final Judgment without a hearing, provided that the Court concludes that the Final Judgment is in the public interest.

Dated: February 9, 2018

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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/s/ Garrett Liskey
Garrett Liskey (D.C. Bar No. 1000937)
Katrina Rouse
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Jill C. Maguire
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U.S. Department of Justice
450 Fifth St., NW
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Certificate of Service

I hereby certify that on February 9, 2018, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 5:15-cv-12311-JEL-DRG, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants.

/s/ Garrett Liskey
Garrett Liskey (D.C. Bar No. 1000937)
Antitrust Division, Healthcare and
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U.S. Department of Justice
450 Fifth St., NW
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Exhibit A

**UNITED STATES DISTRICT COURT
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Case No.: 5:15-cv-12311-JEL-DRG
Hon. Judith E. Levy
Mag. Judge David R. Grand

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiffs, the United States of America and the State of Michigan, filed their joint Complaint on June 25, 2015, alleging that W.A. Foote Memorial Hospital, d/b/a/ Allegiance Health; Hillsdale Community Health Center; Community Health Center of Branch County; and ProMedica Health System, Inc. violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Michigan Antitrust Reform Act, MCL 445.772;

AND WHEREAS, Plaintiffs and W.A. Foote Memorial Hospital, d/b/a Henry Ford Allegiance Health, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS, Plaintiffs require Allegiance to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects alleged in the Complaint;

AND WHEREAS, Plaintiffs require Allegiance to agree to be bound by the provisions of the Final Judgment pending its approval by the Court;

NOW THEREFORE, before any testimony is taken, without this Final Judgment constituting any evidence against or admission by Allegiance regarding any issue of fact or law, and upon consent of the parties to this action, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to this action. 28 U.S.C. §§ 1331, 1337(a), 1345, 1367(a). The Complaint states a claim upon which relief may be granted against Allegiance under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Michigan Antitrust Reform Act, MCL 445.772.

II. DEFINITIONS

As used in this Final Judgment:

A. “Allegiance” means Defendant W.A. Foote Memorial Hospital, d/b/a Henry Ford Allegiance Health, a corporation organized and existing under the laws of the State of Michigan and affiliated with the Henry Ford Health System with

headquarters in Detroit, Michigan, (i) its successors and assigns, (ii) all subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures that are controlled by Henry Ford Allegiance Health, and (iii) their directors, officers, managers, agents, and employees.

B. “Agreement” means any contract, arrangement, or understanding, formal or informal, oral or written, between two or more persons.

C. “Communicate” means to discuss, disclose, transfer, disseminate, or exchange information or opinion, formally or informally, directly or indirectly, in any manner.

D. “Communication” means any discussion, disclosure, transfer, dissemination, or exchange of information or opinion.

E. “Joint Provision of Services” means any past, present, or future coordinated delivery of any healthcare services by two or more healthcare providers, including a clinical affiliation, joint venture, management agreement, accountable care organization, clinically integrated network, group purchasing organization, management services organization, or physician hospital organization.

F. “Marketing” means any past, present, or future activities that are involved in making persons aware of the services or products of the hospital or of physicians employed or with privileges at the hospital, including advertising,

communications, public relations, provider network development, outreach to employers or physicians, and promotions, such as free health screenings and education.

G. “Marketing Manager” means any company officer or employee at the level of director, or above, with responsibility for or oversight of Marketing.

H. “Person” means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institute, governmental unit, or other legal entity.

I. “Provider” means any physician or physician group and any inpatient or outpatient medical facility including hospitals, ambulatory surgical centers, urgent care facilities, and nursing facilities.

III. APPLICABILITY

This Final Judgment applies to Allegiance and all other persons in active concert or participation with Allegiance who receive actual notice of this Final Judgment by personal service or otherwise.

IV. PROHIBITED CONDUCT

A. Allegiance shall not enter into, attempt to enter into, maintain, or enforce any Agreement with any other Provider that:

- (1) prohibits or limits Marketing; or
- (2) allocates any service, customer, or geographic market or

territory between or among Allegiance and any other Provider, unless such Agreement is reasonably necessary for and ancillary to a bona fide Agreement providing for the Joint Provision of Services.

B. Allegiance shall not Communicate with any other Provider about Allegiance's Marketing in its or the Provider's county, except Allegiance may:

- (1) Communicate with any Provider about joint Marketing if the Communication is related to the Joint Provision of Services;
- (2) Communicate with any Provider about Marketing if the Communication is part of customary due diligence relating to a merger, acquisition, joint venture, investment, or divestiture; or
- (3) Market to Providers, including through its physician liaison program.

C. Allegiance shall not exclude or eliminate Hillsdale County from its Marketing or business development opportunities.

V. REQUIRED CONDUCT

A. Within thirty days of entry of this Final Judgment, Allegiance shall hire and appoint an Antitrust Compliance Officer. The Antitrust Compliance Officer may be a current employee of Henry Ford and must be approved by Plaintiffs.

B. Antitrust Compliance Officer shall:

- (1) within sixty days of entry of the Final Judgment, furnish a copy of this Final Judgment, the Competitive Impact Statement, and a cover letter that is identical in content to Exhibit 1 to (a) all of Allegiance's Marketing Managers and other employees engaged, in whole or in part, in activities relating to Allegiance's Marketing or business development activities; (b) all direct reports of Allegiance's CEO; and (c) Allegiance's officers and directors (including their Boards of Directors);
- (2) within thirty days of any person's succession to any position described in Section V.B.(1) above, furnish a copy of this Final Judgment, the Competitive Impact Statement, and a cover letter that is identical in content to Exhibit 1;

- (3) annually brief each person designated in Section V.B.(1) and (2) on the meaning and requirements of this Final Judgment and the antitrust laws;
- (4) obtain from each person designated in Section V.B.(1) and (2), within sixty days of that person's receipt of the Final Judgment, a certification that he or she (i) has read and, to the best of his or her ability, understands and agrees to abide by the terms of this Final Judgment; (ii) is not aware of any violation of the Final Judgment that has not already been reported to Allegiance; and (iii) understands that any person's failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against Allegiance and/or any person who violates this Final Judgment;
- (5) maintain a record of certifications received pursuant to Section V.B.(4);
- (6) annually communicate to Allegiance's employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws;
- (7) ensure that each person identified in Section V.B.(1) and (2) of this Final Judgment receives at least four hours of training annually on

the meaning and requirements of this Final Judgment and the antitrust laws, such training to be delivered by the Antitrust Compliance Officer or an attorney with relevant experience in the field of antitrust law; and

(8) maintain a log of telephonic, electronic, in-person, and other communications regarding Marketing with any Officers or Directors of any healthcare system Provider and make it available to Plaintiffs for inspection upon either Plaintiff's request.

(9) provide to Plaintiffs annually, on or before the anniversary of the effective date of this order, a written statement affirming Allegiance's compliance with Section V of this order, and including the training or instructional materials used or supplied by Allegiance or Henry Ford in connection with the training as required by Section V.B.(7).

C. Allegiance shall:

(1) upon learning of any violation or potential violation of any of the terms and conditions contained in this Final Judgment, promptly take appropriate action to terminate or modify the activity so as to comply with this Final Judgment and maintain all documents related to any violation or potential violation of this Final Judgment;

- (2) upon learning of any violation or potential violation of any of the terms and conditions contained in this Final Judgment, within thirty days of its becoming known, file with each Plaintiff a statement describing any violation or potential violation, and any steps taken in response to the violation, which statement shall include a description of any communication constituting the violation or potential violation, including the date and place of the communication, the persons involved, and the subject matter of the communication; and
- (3) certify to each Plaintiff annually on the anniversary date of the entry of this Final Judgment that Allegiance has complied with the provisions of this Final Judgment.

VI. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice or the Office of the Michigan Attorney General, including consultants and other retained persons, shall, upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or of the Office of

the Michigan Attorney General, and on reasonable notice to Allegiance, be permitted:

- (1) access during Allegiance's office hours to inspect and copy, or at the option of the United States or the State of Michigan, to require Allegiance to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Allegiance, relating to any matters contained in this Final Judgment; and
- (2) to interview, either informally or on the record, Allegiance's officers, directors, employees, or agents, who may have individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Allegiance.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or of the Office of the Michigan Attorney General, Allegiance shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States or the State of Michigan to any

person other than an authorized representative of the executive branch of the United States or the State of Michigan, except in the course of legal proceedings to which the United States or the State of Michigan is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Allegiance to the United States or the State of Michigan, Allegiance represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Allegiance marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States and the State of Michigan shall give Allegiance ten calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VII. INVESTIGATION FEES AND COSTS

Allegiance shall pay to the United States the sum of \$5,000.00 for pre-trial litigation costs and the State of Michigan the sum of \$35,000.00 to partially cover transcripts and related litigation costs.

VIII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time prior to the expiration of this Final Judgment for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. ENFORCEMENT OF FINAL JUDGMENT

A. Plaintiffs retain and reserve all rights to enforce the provisions of this Final Judgment, including their right to seek an order of contempt from this Court. Allegiance agrees that in any civil contempt action, any motion to show cause, or any similar action brought by Plaintiffs regarding an alleged violation of this Final Judgment, Plaintiffs may establish a violation of the Final Judgment and the appropriateness of any remedy therefor by a preponderance of the evidence, and Allegiance waives any argument that a different standard of proof should apply.

B. In any enforcement proceeding in which the Court finds that Allegiance has violated this Final Judgment, Plaintiffs may apply for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. Allegiance agrees to reimburse the Plaintiffs for any attorneys' fees, experts' fees, and costs incurred in connection with any effort to enforce this Final Judgment.

X. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire five years from the date of its entry.

XI. NOTICE

For purposes of this Final Judgment, any notice or other communication required to be filed with or provided to the United States or the State of Michigan shall be sent to the persons at the addresses set forth below (or such other address as the United States or the State of Michigan may specify in writing to Allegiance):

Chief
Healthcare & Consumer Products Section
U.S. Department of Justice
Antitrust Division
450 Fifth Street, Suite 4100
Washington, DC 20530

Division Chief
Corporate Oversight Division
Michigan Department of Attorney General
525 West Ottawa Street
P.O. Box 30755
Lansing, MI 48909

XII. PUBLIC INTEREST DETERMINATION

The parties, as required, have complied with the procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon, and the United States' responses to comments. Based upon the

record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

United States District Judge

2/6/18 (SVP) General Counsel HFTIS
Andrew Cardinal

February 6, 2018
U.S. Dept of Justice
Antitrust Division.

J. M. E. [Signature]
2/6/18
ASSISTANT ATTORNEY GENERAL
STATE OF MICHIGAN

Exhibit 1

[Letterhead of Allegiance]

[Name and Address of Antitrust Compliance Officer]

Dear [XX]:

I am providing you this notice to make sure you are aware of a court order recently entered by the Honorable Judith E. Levy, a federal judge in Ann Arbor, Michigan. This court order applies to our institution and all of its employees, including you, so it is important that you understand the obligations it imposes on us. Ms. Georgia Fojtasek has asked me to let each of you know that they expect you to take these obligations seriously and abide by them.

In a nutshell, the order prohibits us from agreeing with other healthcare providers, including hospitals and physicians, to limit marketing or to divide any geographic market, territory, customers, or services between healthcare providers. This means you cannot give any assurance to another healthcare provider that Henry Ford Allegiance Health will refrain from marketing our services, and you cannot ask for any assurance from them that they will refrain from marketing. The court order also prohibits communicating with any health care system provider, or their employees about our marketing plans or about their marketing plans. There are limited exceptions to this restriction on communications, such as discussing joint projects, but you should check with me before relying on those exceptions.

A copy of the court order is attached. Please read it carefully and familiarize yourself with its terms. The order, rather than the above description, is controlling. If you have any questions about the order or how it affects your activities, please contact me. Thank you for your cooperation.

Sincerely,

[Allegiance's Antitrust Compliance Officer]