UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Tampa Division

UNITED STATES OF AMERICA, Plaintiff, v. FEDERATION OF CERTIFIED SURGEONS AND SPECIALISTS, INC., and PERSHING YOAKLEY & ASSOCIATES, P.C., Defendants.	Case No. 99-167-CIV-T-17F Filed: January 26, 1999

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) ("APPA"), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On Jan. 26, 1999 the United States filed a civil antitrust Complaint alleging that defendants, the Federation of Certified Surgeons and Specialists, Inc. ("FCSSI") and Pershing Yoakley & Associates, P.C. ("PYA"), participated in an agreement to negotiate jointly with managed care plans ("MCPs") to obtain higher fees for FCSSI's otherwise competing general and vascular surgeons in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. The Complaint seeks injunctive relief to enjoin

continuance or resumption of the violation.

The United States filed with the Complaint a proposed Final Judgment intended to resolve this matter. The Court's entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction over the matter for any further proceedings that may be required to interpret, enforce, or modify the Final Judgment, or to punish violations of any of its provisions.

Plaintiff and defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the APPA unless, prior to entry, plaintiff withdraws its consent. In the Stipulations to the proposed Final Judgment, defendants have agreed to be bound by the provisions of the proposed Final Judgment pending its entry by the Court. The proposed Final Judgment provides that its entry does not constitute any evidence against, or admission by, any party concerning any issue of fact or law. The present proceeding is designed to ensure full compliance with the public notice and other requirements of the APPA.

II.

PRACTICES GIVING RISE TO THE ALLEGED VIOLATIONS

A. Defendants

Defendant FCSSI is a Florida corporation with its principal place of business in Tampa, Florida. FCSSI comprises 29 competing general and vascular surgeons in Tampa and is controlled by its member surgeons. In 1996, FCSSI's surgeons performed 87% of all general and vascular surgeries, and constituted over 83% of all general and vascular surgeons having operating privileges, at five of the seven hospitals in Tampa that provide general and vascular surgery services.

Defendant PYA, an accounting and consulting firm, is a Tennessee professional corporation with its principal place of business in Knoxville, Tennessee and with additional offices in Chattanooga

and Nashville, Tennessee; Atlanta, Georgia; Washington, D.C.; and Clearwater, Florida.

B. Defendants' Unlawful Activities

In May, 1997, FCSSI was formed to negotiate jointly on behalf of its member physicians with MCPs and to use their collective strength to improve "overall managed care reimbursement" to FCSSI surgeons, including "[o]btaining contract terms more favorable than if each physician contracted separately." FCSSI retained PYA to coordinate FCSSI surgeons' MCP contracting activities. For these services, each FCSSI surgeon paid PYA $75 per month as a retainer and a set amount per MCP contract negotiated by PYA, providing for higher payments to PYA for higher contractual fee levels.

In July, 1997, PYA contacted United HealthCare ("United") and made clear to United that it was representing FCSSI surgeons "as a group." United made an offer to FCSSI surgeons through PYA. PYA recommended to FCSSI's board that it not accept United's contract offer and either make a counteroffer or "have all members terminate their [United contracts]." FCSSI's board instructed PYA to make a counteroffer to United. PYA then informed United that unless United agreed to its demands, it would recommend that FCSSI surgeons terminate their United contracts. United agreed to PYA's contract demands, and FCSSI's board voted to accept the revised contract. The jointly negotiated contracts paid FCSSI surgeons 30% more than United's first offer and represented an average annual increase in revenue of $5,013 for each FCSSI physician.

In September, 1997, PYA attempted to renegotiate FCSSI surgeons' existing contracts with Aetna US Healthcare ("Aetna"). PYA advised Aetna that if Aetna met PYA's proposed financial and contractual terms, PYA would recommend that FCSSI surgeons accept the Aetna contract. Aetna subsequently offered FCSSI surgeons a contract that PYA viewed as "no improvement" and without

"concessions." PYA recommended that all FCSSI surgeons notify Aetna of their intent to terminate their contracts in order to allow PYA to negotiate higher fees. FCSSI's board of directors voted to accept PYA's recommendation and, on September 26, 1997, PYA notified each FCSSI surgeon of the board's decision and directed the surgeon to write a termination letter to Aetna. Twenty-eight of the twenty-nine FCSSI surgeons terminated their Aetna contracts. As a result of this group boycott, Aetna proposed increased payment levels for FCSSI surgeons.

By December 8, 1997, PYA had contacted four other MCPs on behalf of FCSSI surgeons. Upon learning of the Department of Justice's investigation of FCSSI's activities in December, 1997, however, FCSSI and PYA ceased negotiating contracts with those MCPs. Without the proposed relief, these negotiations would likely resume.

By contracting on behalf of all of its member surgeons or none at all, FCSSI forced some MCPs to pay FCSSI surgeons substantially higher fees and to contract with a greater number of general and vascular surgeons than the MCP had previously contracted with to service its members. According to the President of FCSSI, FCSSI's joint negotiating efforts "produced extraordinary results," amounting to an increase in revenues of $14,097 on average for each FCSSI surgeon. As a result of FCSSI's and PYA's concerted actions, MCPs, employees, and individual consumers faced significantly higher healthcare costs and were deprived of the benefits of free and open competition among Tampa general and vascular surgeons in the purchase of their services.

C. FCSSI's and PYA's Improper Use of the "Messenger Model"

While engaging in the unlawful conduct outlined above, FCSSI and PYA representatives attempted to cloak their illegal activities as those of a legitimate "third-party messenger," which are described in the Department of Justice and Federal Trade Commission Statements of Antitrust

Enforcement Policy in Healthcare, 4 Trade Reg. Rep. (CCH) ¶ 13,153 at 20,831 (August 28, 1996). However, defendants' illegal conduct is inconsonant with that of a legitimate messenger model. A legitimate messenger does not coordinate or engage in collective pricing activity for competing independent physicians, enhance their bargaining power, or facilitate the sharing of price and other competitively sensitive information among them.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is intended to prevent FCSSI and PYA from restraining competition in the future among general and vascular surgeons in Tampa.

A. Scope of the Proposed Final Judgment

Section III of the proposed Final Judgment provides that the Final Judgment shall apply to FCSSI, including its member physicians; to PYA, when providing, or supervising the provision of, services to any competing physicians in Hillsborough, Pinellas, or Pasco County, Florida; and to all other persons who receive actual notice of the proposed Final Judgment by personal service or otherwise and then act or participate in active concert with any of the above persons.

B. Prohibitions and Obligations

Section IV of the proposed Final Judgment sets forth the substantive injunctive provisions. Section IV(A) is designed to prevent FCSSI from collectively negotiating or acting as a messenger or agent with any payer on behalf of any FCSSI or other competing physicians or in any way

enhancing their bargaining power.[1] Thus, Sections IV(A)(1) and (5) prohibit FCSSI from facilitating an agreement between competing physicians about "competitively sensitive information" (as that term is defined in the Final Judgment) or communicating or facilitating the communication of "competitively sensitive information" to, or in the presence of, competing physicians. Sections IV(A)(2) and (3) prohibit FCSSI from acting as or using a messenger or agent to represent FCSSI surgeons in negotiations or communications with payers or from facilitating an agreement among competing physicians about the use of a messenger or about dealing only through a messenger. In addition, Section IV(A)(4) enjoins FCSSI from negotiating with any payer on behalf of any FCSSI physicians. Finally, Section IV(A)(6) prohibits FCSSI from facilitating any agreement among competing physicians that FCSSI physicians will deal with a payer only through a particular agent.

Section IV(B) is designed to ensure that PYA does not engage in joint negotiations on behalf of competing physicians in the three counties around Tampa, Hillsborough, Pinellas, or Pasco Counties (the "Tampa area"), where PYA has been active in seeking physician clients, and does not act as a messenger or agent for more than twenty percent of FCSSI's surgeons. Accordingly, Sections IV(B)(1) and (2) prohibit PYA from facilitating any agreement between competing physicians in the Tampa area about any competitively sensitive information or exclusively using a messenger. Sections IV(B)(3) and (4) prohibit PYA, in the Tampa area, from negotiating payer contracts on behalf of competing physicians and from making any recommendations to competing physicians about any payer contract or contract term. Moreover, pursuant to Sections IV(B)(5) - (7), PYA may not

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[1] Section II(F) defines a messenger to mean a person that communicates to a payer any competitively sensitive information it obtains, individually, from a participating physician or communicates, individually, to a participating physician any competitively sensitive information it obtains from a payer.

communicate competitively sensitive information in the presence of competing physicians in the Tampa area or communicate to competing Tampa area physicians any subjective opinion or analysis about competitively sensitive information or discourage any competing physician in the Tampa area from exercising his or her own business judgment in determining whether to negotiate, contract, or deal directly with any payer.

Section IV(B)(8) enjoins PYA from acting as or using a messenger on behalf of FCSSI or any group of competing physicians in the Tampa area if past or present members of FCSSI constitute more than twenty percent of any individual group's membership or all groups' total membership. Further, PYA may act as a messenger only if it complies with the provisions of Section IV(B)(9). Pursuant to Sections IV(B)(9)(a) - (c), PYA must (a) notify all payers with which it communicates as a messenger that the payer may communicate directly with the physicians; (b) inform all physicians for whom it acts as a messenger that he or she may communicate with any payer (without PYA) at any time; and (c) inform each physician and payer involved that it cannot negotiate collectively or individually for any physician who uses PYA as a messenger. Section IV(B)(9)(d) requires PYA to inform physicians of a payer's decision not to communicate through PYA. Under Sections IV(B)(9)(e) and (f), PYA must communicate all competitively sensitive information from a payer separately to each individual physician, and if a physician discloses competitively sensitive information to PYA, then PYA may disclose that information to payers only. Finally, Section IV(B)(9)(g) requires PYA to memorialize in writing all oral communications between it and any payer and physician, preserve such records for two years, address all physician correspondence individually, and not send any correspondence that contains a physician's competitively sensitive information to any other physician.

Sections V(A) - (C) require FCSSI to notify each payer with which FCSSI negotiated or is negotiating a contract, that FCSSI approached on behalf of any FCSSI physician, or that inquires about contracting through FCSSI, that FCSSI will no longer represent any FCSSI physician in any manner relating to MCP contracts or contract terms. FCSSI shall also notify, in writing, each MCP with which FCSSI has negotiated a contract that any contract between FCSSI and that MCP may be terminated by the MCP upon written notice to FCSSI. Section V(D) obligates FCSSI to notify plaintiff at least 30 days before any dissolution of FCSSI, sale or assignment of its claims or assets, or change in corporate structure that may affect its compliance obligations under the proposed Final Judgment.

Section VI makes clear that PYA may, at a physician's request, communicate to the physician accurate, factual, and objective information about a proposed payer contract offer or terms and engage in activities reasonably necessary to facilitate lawful activities by physician network joint ventures and multiprovider networks.

Section VII of the Final Judgment sets forth various compliance measures. Sections VII(A)(1) and (2) and (C) require FCSSI to distribute a copy of the Final Judgment and Competitive Impact Statement to all current and future FCSSI physicians and to obtain and maintain records of written certifications that they have read, will abide by, and understand the consequences of their failure to comply with the terms of the Final Judgment.

Sections VII(B)(1), (2), and (5) and (C) require PYA to distribute a copy of the Final Judgment and Competitive Impact Statement to all of its shareholders, agents, representatives, employees, officers, and directors who provide, or supervise the provision of, services to competing physicians, and to any of their successors, and to obtain and maintain records of written certifications

that they have read, will abide by, and understand the consequences of their failure to comply with the terms of the Final Judgment.

Section VII(B)(3) requires PYA to hold an annual seminar for all of its shareholders, agents, representatives, employees, officers, and directors who provide, or supervise the provision of, services to competing physicians, explaining the antitrust principles applicable to their work, the Final Judgment's restrictions, and the implications of violating the Final Judgment. Section VII(B)(4) ensures that PYA maintains an internal mechanism for addressing questions from its personnel regarding the application of antitrust laws to the representation of competing physicians.

Section VIII obligates FCSSI and PYA to certify that they have distributed the Final Judgment and Competitive Impact Statement as required by the Judgment and annually to certify their compliance with the Judgment's provisions. FCSSI is also required to certify that it has made the notifications required by Section V of the Judgment.

Finally, Section IX sets forth a series of measures by which Plaintiff may have access to information needed to determine or secure FCSSI's and PYA's compliance with the Final Judgment or to determine whether the Final Judgment should be modified or terminated. Section XI limits the term of the Final Judgment to ten years.

IV.

EFFECT OF THE PROPOSED FINAL JUDGMENT ON COMPETITION

The relief in the proposed Final Judgment is designed to remedy the violation alleged in the Complaint and prevent its recurrence. The Complaint alleges that FCSSI and PYA violated Section 1 of the Sherman Act by negotiating with MCPs jointly on behalf of otherwise competing FCSSI

surgeons to obtain higher fees for their services and by boycotting MCPs that did not provide payments for FCSSI surgeons at a level substantially higher than those provided in individually negotiated contracts.

The proposed Final Judgment eliminates the restraint on competition among general and vascular surgeons in Tampa by enjoining (1) FCSSI from acting for FCSSI physicians as a negotiator, messenger, or agent or using PYA or any other agent as a negotiator; and (2) PYA from acting as a negotiator for FCSSI or any other competing physicians in the Tampa area. Moreover, PYA is not permitted to act as a messenger for more than twenty percent of FCSSI's physicians or for any competing physicians in the Tampa area if it does not comply with certain provisions designed to ensure that it does not facilitate any agreement between competing physicians about competitively sensitive information or in any way enhance their bargaining power.

The proposed Final Judgment contains provisions adequate to prevent further violations of the type upon which the Complaint is based and to remedy the effects of the alleged conspiracy. The proposed Final Judgment's injunctions should restore the benefits of free and open competition among general and vascular surgeons in the sale of their services in Tampa.

V.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment would be a full trial on the merits of the case. In the view of the Department of Justice, such a trial would involve substantial costs to the United States and defendants and is not warranted because the proposed Final Judgment provides all of the relief necessary to remedy the violation of the Sherman Act alleged in the Complaint.

VI.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and a reasonable attorney's fee. Entry of the proposed Final Judgment will neither impair nor assist in the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent lawsuit that may be brought against defendants in this matter.

VII.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by Sections 2(b) and (d) of the APPA, 15 U.S.C. § 16(b) and (d), any person believing that the proposed Final Judgment should be modified may submit written comments to Gail Kursh, Chief; Health Care Task Force; United States Department of Justice; Antitrust Division; 325 Seventh Street, N.W.; Room 400; Washington, D.C. 20530, within the 60-day period provided by the Act. All comments received, and the Government's responses to them, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free, pursuant to Paragraph 2 of the Stipulation with each defendant, to withdraw its consent to the proposed Final Judgment at any time before its entry, if the Department should determine that some modification of the Final Judgment is necessary to protect the public interest. Moreover, Section X of the proposed Final Judgment provides that the Court will retain jurisdiction over this action, and that the parties may apply to the Court for such orders as may

be necessary or appropriate for the modification, interpretation, or enforcement of the proposed Final Judgment.

VIII.

DETERMINATIVE DOCUMENTS

No materials and documents of the type described in Section 2(b) of the APPA, 15 U.S.C. § 16(b), were considered in formulating the proposed Final Judgment. Consequently, none are filed herewith.

Dated: January 26, 1999

Respectfully submitted,

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