

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

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

PROPOSED FINAL JUDGMENT

Plaintiff, the United States of America, having filed its Complaint on January 26, 1999, and plaintiff and defendant Federation of Certified Surgeons and Specialists, Inc., (“FCSSI”) and defendant Pershing Yoakley & Associates, P.C. (“PYA”), by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of fact or law;

AND WHEREAS defendants have agreed to be bound by the provisions of this Final Judgment;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law, and upon consent of the plaintiff and defendants, it is hereby ORDERED, ADJUDGED, AND DECREED:

I.

JURISDICTION

This Court has jurisdiction over the subject matter of and over the plaintiff and defendants to this action. The Complaint states a claim upon which relief may be granted against defendants under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II.

DEFINITIONS

As used in this Final Judgment:

(A) “Communicate” means to discuss, disclose, transfer, disseminate, or exchange information or opinion, formally or informally, in any manner;

(B) “Competing physicians” means two or more physicians in separate medical practices in the same county in the same specialty;

(C) "Competitively sensitive information" means

(1) Any participating physician's actual or possible view, intention, or position concerning the negotiation or acceptability of any proposed or existing payer contract or contract term, including the physician's negotiating or contracting status with any payer or the physician's response to a payer contract or contract term; or

(2) Any proposed or existing term of a payer contract that affects:

(a) the amount of fees or payment, however determined, that a participating physician charges, contracts for, or accepts from or considers charging, contracting for, or accepting from any payer for providing physician services;

(b) the duration, amendment, or termination of the payer contract;

(c) utilization review; or

(d) the manner of resolving fee disputes between the participating physician and the payer;

(D) "FCSSI" means the Federation of Certified Surgeons and Specialists, Inc., located in Tampa, Florida; each of its present and former members, shareholders, directors, officers, agents, representatives, and employees (all such persons only in such capacities with FCSSI or with any successors or assigns of FCSSI); its successors and assigns, including any group

organized directly or indirectly by two or more competing physicians (who serve or have served as a director or officer of FCSSI) for the purpose of negotiating with payers; and each entity over which it has control;

(E) “FCSSI physician” means all present and former physician shareholders and physician members of FCSSI;

(F) “Messenger” means 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;

(G) “Objective information” or “objective comparison” means empirical data that are capable of being verified or a comparison of such data;

(H) “Participating physician” means a physician who is either in solo practice or a group practice, and who participates in a messenger arrangement, and any employee of such physician or group practice acting on the physician’s or group practice’s behalf in connection with a messenger arrangement;

(I) “Payer” means any person that purchases or pays for all or part of a physician’s services for itself or any other person and includes but is not limited to independent practice associations, individuals, health insurance companies, health maintenance organizations, preferred provider organizations, and employers;

(J) “Payer contract” means a contract between a payer and a physician by which that physician agrees to provide physician services to persons designated by the payer;

(K) “Person” means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institute, governmental unit, or other legal entity; and

(L) “PYA” means Pershing Yoakley & Associates, P.C. with offices in Clearwater Florida; each of its shareholders, its agents, representatives, employees, officers, and directors (in such capacities only); its successors and assigns; and each entity it controls.

III.
APPLICABILITY

Except where expressly limited to one defendant, this Final Judgment applies to:

- (A) FCSSI;

- (B) PYA, when providing, or supervising the provision of, services to any competing physicians in Hillsborough, Pinellas, or Pasco County, Florida; and

- (C) All other persons who receive actual notice of this Final Judgment by personal service or otherwise and then act or participate in active concert with any of the above persons.

IV.
INJUNCTIVE RELIEF

- (A) FCSSI is enjoined, directly or indirectly, from:
 - (1) Participating in, encouraging, or facilitating any agreement or understanding between competing physicians about any competitively sensitive information;

(2) Acting as, or facilitating the use of, a messenger or any other agent or representative for any FCSSI physician for the purpose of negotiating or communicating with any payer on behalf of such FCSSI physician;

(3) Participating in, encouraging, or facilitating any agreement or understanding among competing physicians about using a messenger;

(4) Negotiating with any payer on behalf of any FCSSI physician;

(5) Communicating or facilitating the communication of any competitively sensitive information to, or in the presence of, competing physicians; and

(6) Participating in, encouraging, or facilitating any agreement or understanding among any competing physicians that FCSSI physicians will deal with a payer only through a messenger or other agent or representative.

(B) PYA is enjoined, directly or indirectly, from:

(1) Participating in, encouraging, or facilitating any agreement or understanding between competing physicians with offices in Hillsborough, Pinellas, or Pasco County, Florida, about any competitively sensitive information;

(2) Participating in, encouraging, or facilitating any agreement or understanding between competing physicians with offices in Hillsborough, Pinellas, or Pasco County, Florida, to deal with any payer exclusively through a messenger rather than individually or through other channels;

(3) Negotiating, collectively or individually, on behalf of competing physicians with offices in Hillsborough, Pinellas, or Pasco County, Florida, any actual or proposed payer contract or contract term with any payer;

(4) Making any recommendation to competing physicians with offices in Hillsborough, Pinellas, or Pasco County, Florida, about any actual or proposed payer contract or contract term or whether to accept or reject any such payer contract or contract term;

(5) Communicating competitively sensitive information in the presence of competing physicians with offices in Hillsborough, Pinellas, or Pasco County, Florida;

(6) Communicating to competing physicians with offices in Hillsborough, Pinellas, or Pasco County, Florida, any subjective opinion or subjective analysis, evaluation, or assessment about competitively sensitive information;

(7) Precluding or discouraging any competing physicians with offices in Hillsborough, Pinellas, or Pasco County, Florida, from exercising his, her, or their own independent business judgment in determining whether to negotiate, contract, or deal directly with any payer;

(8) Acting as, or using, a messenger on behalf of defendant FCSSI or any other group or groups of competing physicians with offices in Hillsborough, Pinellas, or Pasco County, Florida if present or former members of FCSSI constitute more than twenty percent of any individual group's membership or of all groups' total membership; and

(9) Acting as, or using, a messenger for any competing physicians with offices in Hillsborough, Pinellas, or Pasco County, Florida, unless:

(a) At the outset of its involvement with any payer as a messenger (or within 30 days of the entry of this Final Judgment for any ongoing involvement with a payer), and annually thereafter, it informs the payer in writing that, at any time, (i) the payer is free to decline to communicate with any participating physician through it, and (ii) any participating physician is free to communicate with the payer individually without its involvement;

(b) When first designated by any participating physician as a messenger (or within 30 days of the entry of this Final Judgment for any ongoing involvement, on behalf of a participating physician, with a payer), and annually thereafter, it informs the

participating physician in writing that he or she is free at any time to communicate with any payer individually without its involvement;

(c) When first designated by any participating physician as a messenger and at the outset of its involvement with any payer as a messenger (or within 30 days of the entry of this Final Judgment for any ongoing involvement, on behalf of a participating physician, with a payer), and annually thereafter, it informs the participating physician and any payer with whom it communicates as a messenger on behalf of the participating physician in writing that it cannot negotiate, collectively or individually, for any participating physician any payer contract or contract term but can act only as a messenger as permitted by this Final Judgment;

(d) It informs the participating physician of any payer's decision not to communicate or to discontinue communicating with any participating physician through PYA;

(e) It communicates all competitively sensitive information that it receives from any payer separately to each participating physician designated by the payer;

(f) It does not communicate any competitively sensitive information obtained from any participating physician to anyone other than to payers;

(g) It ensures that (i) any oral communication between it and any payer or any participating physician is contemporaneously memorialized in writing and shows the date, participants to, and substance of the communication, and the person making the record; (ii) such memorialization and any written communication between it and any payer or participating physician are preserved for two years; (iii) any correspondence between it and a participating physician is addressed individually to that participating physician only; and (iv) no correspondence between it and a payer that includes the competitively sensitive information of a participating physician is sent to any other competing physician; and

(i) It does not violate any of the provisions of Section IV (B)(1)-(8) of this Final Judgment.

V.

NOTIFICATIONS

(A) Within 30 days from the entry of this Final Judgment, FCSSI shall notify, in writing, each payer (1) with which FCSSI negotiated any contract or currently is attempting to negotiate any contract or (2) that FCSSI approached on behalf of any FCSSI physician, that FCSSI will no longer represent any FCSSI physician in any manner relating to payer contracts or contract terms.

(B) Within 30 days from the entry of this Final Judgment, FCSSI shall notify, in writing, each payer with which FCSSI has negotiated a contract that any contract between FCSSI

and the payer may be terminated by the payer upon written notice to FCSSI given within 30 days following FCSSI's written notification.

(C) After entry of this Final Judgment, FCSSI shall notify each payer that inquires about contracting through or with FCSSI that FCSSI does not represent any FCSSI physician in any manner relating to payer contracts or contract terms.

(D) FCSSI shall notify plaintiff at least 30 days prior to any proposed (1) dissolution of FCSSI, (2) sale or assignment of claims or assets of FCSSI resulting in the emergence of a successor corporation, or (3) change in corporate structure of FCSSI that may affect compliance obligations arising out of Section VII of this Final Judgment.

VI.

PERMITTED CONDUCT

Notwithstanding any other provision of this Final Judgment, PYA may:

(A) At a participating physician's request, communicate to the participating physician accurate, factual, and objective information about a proposed payer contract offer or contract terms, including, if requested, objective comparisons with terms offered to that participating physician by other payers; and

(B) Engage in activities reasonably necessary to facilitate lawful activities by physician network joint ventures and multiprovider networks as those terms are used in

Statements 8 and 9 of the 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153.

VII.

COMPLIANCE PROGRAM

(A) FCSSI shall maintain an antitrust compliance program (unless FCSSI dissolves without any successors or assigns) that shall include:

(1) Distributing, within 60 days from the entry of this Final Judgment, a copy of the Final Judgment and Competitive Impact Statement to all FCSSI physicians and distributing in a timely manner a copy of the Final Judgment and Competitive Impact Statement to any physician who subsequently joins FCSSI;

(2) Obtaining, within 120 days from the entry of this Final Judgment, and annually thereafter, and retaining for the duration of this Final Judgment, a certificate from each then current FCSSI physician that he or she has received, read, understands, and agrees to comply with the Final Judgment and understands that he or she may be held in civil or criminal contempt for failing to do so.

(B) PYA shall maintain an antitrust compliance program, which shall include:

(1) Distributing within 60 days from the entry of this Final Judgment, a copy of the Final Judgment and Competitive Impact Statement to all of its shareholders, agents, representatives, employees, officers, and directors (in such capacity only) who provide, or supervise the provision of, services to competing physicians;

(2) Distributing in a timely manner a copy of the Final Judgment and Competitive Impact Statement to any person who succeeds to a position described in Paragraph VII (B)(1);

(3) Holding an annual seminar explaining to all of its shareholders, agents, representatives, employees, officers, and directors (in such capacity only) who provide, or supervise the provision of, services to competing physicians, the antitrust principles applicable to their work, the restrictions contained in this Final Judgment, and the implications of violating the Final Judgment;

(4) Maintaining an internal mechanism by which questions from any of its shareholders, agents, representatives, employees, officers, and directors (in such capacity only) about the application of the antitrust laws to the representation of competing physicians, whether as a messenger or as some other representative, can be answered by counsel as the need arises;

(5) Obtaining, within 120 days from the entry of this Final Judgment, and retaining for the duration of this Final Judgment a certificate from each of its shareholders,

agents, representatives, employees, officers, and directors (in such capacity only) who provide, or supervise the provision of, services to competing physicians with offices in Hillsborough, Pinellas, or Pasco County, Florida, that he or she has received, read, and understands this Final Judgment, and that he or she has been advised and understands that he or she must comply with the Final Judgment and may be held in civil or criminal contempt for failing to do so.

(C) FCSSI and PYA shall maintain for inspection by plaintiff a record of recipients to whom this Final Judgment and Competitive Impact Statement have been distributed and from whom annual written certifications have been received.

VIII.

CERTIFICATION

(A) Within 75 days after entry of this Final Judgment, FCSSI and PYA shall certify to plaintiff that it has distributed the Final Judgment and Competitive Impact Statement as respectively required by Paragraph VII (A)(1) and VII (B)(1);

(B) For a period of ten years following the date of entry of this Final Judgment, unless they dissolve without any successors or assigns, FCSSI and PYA shall certify annually to plaintiff that they have complied with the provisions of this Final Judgment; and

(C) Within 75 days after entry of this Final Judgment, FCSSI shall certify to plaintiff that it has made the notifications required by Section V.

IX.

PLAINTIFF'S ACCESS

(A) For the purposes of determining or securing compliance with this Final Judgment or determining whether this Final Judgment should be modified or terminated, and subject to any legally recognized privilege, authorized representatives of the Antitrust Division of the United States Department of Justice, shall upon written request of the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to FCSSI or PYA, be permitted:

(1) Access during regular business hours to inspect and copy all records and documents in the possession, custody, or under the control of FCSSI or PYA, which may have counsel present, relating to any matters contained in this Final Judgment;

(2) To interview FCSSI's or PYA's members, shareholders, partners, officers, directors, employees, agents, and representatives, who may have counsel present, concerning such matters; and

(3) To obtain written reports from FCSSI or PYA, under oath if requested, relating to any matters contained in this Final Judgment.

(B) FCSSI and PYA shall have the right to be represented by counsel in any process under this Section.

(C) No information or documents obtained by the means provided in this Section shall be divulged by the plaintiff to any person other than duly authorized representatives of the Executive Branch of the United States, except in the course of legal proceedings to which the United States 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 defendant to plaintiff, defendant 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)(7) of the Federal Rules of Civil Procedure, and defendant will mark each pertinent page of such material, “subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,” then 10-days notice shall be given by plaintiff to defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which defendant is not a party.

X.

JURISDICTION RETAINED

This Court retains jurisdiction to enable any party to this Final Judgment, but no other person, to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

XI.

EXPIRATION OF FINAL JUDGMENT

This Final Judgment shall expire ten (10) years from the date of entry.

XII.

PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest.

Dated:

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

United States District Judge