UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA and the STATE OF NORTH CAROLINA, Plaintiffs, v. THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, d/b/a CAROLINAS HEALTHCARE SYSTEM, Defendant.	Case No. 3:16-cv-00311-RJC-DCK

PLAINTIFF UNITED STATES' UNOPPOSED MOTION AND MEMORANDUM FOR ENTRY OF MODIFIED PROPOSED FINAL JUDGMENT AND CLARIFICATION OF RESPONSE TO PUBLIC COMMENT

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)-(h) (the "APPA" or "Tunney Act"), Plaintiff United States moves for entry of the modified proposed Final Judgment submitted herewith as Exhibit A and clarifies its Response to Public Comment (Dkt. No. 97). The modified proposed Final Judgment incorporates changes to Paragraph IX(B) of the proposed Final Judgment agreed to by all parties, while otherwise maintaining the substantive provisions in the proposed Final Judgment filed with the Court on November 15, 2018.[1] Defendant The Charlotte-Mecklenburg Hospital Authority, formerly known as Carolinas HealthCare System and now doing business as Atrium Health ("Atrium"), and Plaintiff State of North Carolina do not oppose entry of the modified proposed Final Judgment.

[1] *See* Dkt. No. 87-1. The United States attaches as Exhibit B a redline reflecting the changes in the modified proposed Final Judgment compared to the original proposed Final Judgment.

I. Background

On June 9, 2016, the United States and the State of North Carolina filed a civil antitrust lawsuit against Atrium to enjoin it from using steering restrictions in its agreements with health insurers in the Charlotte, North Carolina area. The Complaint alleges that Atrium's steering restrictions are anticompetitive and violate Section 1 of the Sherman Act, 15 U.S.C. § 1. On November 15, 2018, the United States filed a proposed Final Judgment and a Stipulation signed by the parties that consents to entry of the proposed Final Judgment after compliance with the requirements of the APPA. (Dkt. No. 87-1.) On December 4, 2018, the United States filed a Competitive Impact Statement ("CIS") describing the proposed Final Judgment. (Dkt. No. 89.) As set forth in the CIS, the proposed Final Judgment, now modified, will prevent Atrium from impeding insurers' steered plans and transparency initiatives as those terms are defined in the modified proposed Final Judgment and restore competition among healthcare providers in the Charlotte area.

During the December 13, 2018 hearing on Plaintiff's Unopposed Motion to Enter Joint Stipulation and Order and Stay the Action (Dkt. No. 93.), the Court raised questions regarding the rules of interpretation that the Court should apply in enforcing the Final Judgment set forth in Paragraph IX(B) of the proposed Final Judgment. Plaintiffs and Defendant have conferred and agreed to modify the proposed Final Judgment to address the Court's concerns. The Parties have agreed to modify Paragraph IX(B) to provide:

> The Parties hereby agree that the Final Judgment should be interpreted using ordinary tools of interpretation, except that the terms of the Final Judgment should not be construed against either Party as the drafter. The parties further agree that the purpose of the Final Judgment is to redress the competitive harm alleged in the Complaint, and that the Court may enforce any provision of this Final Judgment that is stated specifically and in reasonable detail, *see* Fed.R.Civ.P. 65(d), whether or not such provision is clear and unambiguous on its face.

See Exhibit A at 13.[2]

The United States understands that the Court's primary concern regarding Paragraph IX(B) of the original proposed Final Judgment was the directive that the Final Judgment "should be interpreted to give full effect to the procompetitive purposes of the antitrust laws." *See, e.g.*, 12/13/2018 Tr. 12:25—13:4 (discussing the Court's concerns regarding Paragraph IX(B)'s references to the procompetitive purposes of the antitrust laws). Accordingly, the parties have agreed to delete Paragraph IX(B)'s references to the procompetitive purposes of the antitrust laws. The modified proposed Final Judgment now provides only that the parties have "agreed that the purpose of the Final Judgment is to redress the competitive harm alleged in the Complaint."

The Parties have also agreed to modify this provision to address the remaining concern of the Court with respect to the rules of interpretation to be applied in enforcing the modified proposed Final Judgment in the future. *See, e.g.*, 12/13/2018 Tr. 13:25—14:9 (discussing the Court's concerns regarding Paragraph IX(B)'s directives regarding whether or not a provision is clear and unambiguous on its face).

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[2] Paragraph IX(B) of the original proposed Final Judgment provided:

> The Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore all competition Plaintiffs alleged was harmed by the challenged conduct. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either Party as the drafter.

Dkt. No. 87-1 at 13.

First, the parties have agreed to make explicit that the Final Judgment should be interpreted using the ordinary tools of interpretation, with the exception that the terms of the Final Judgment should not be construed against either party as the drafter. The United States understands that the Court is comfortable with that exception. *See* 12/13/2018 Tr. 14:11-19.

Second, the parties have agreed to make clearer that the Court may enforce any provision of the Final Judgment, so long as that provision is stated specifically and in reasonable detail, as required by Federal Rule of Civil Procedure 65(d).[3] *See* 12/13/2018 Tr. 12:13-23.

Third, the parties have agreed that so long as a provision of the Final Judgment complies with Rule 65(d), the Court may enforce that provision, "whether or not such provision is clear and unambiguous on its face." Importantly, this provision does not direct the Court to diverge from the usual tools of interpretation applicable to a vague or ambiguous provision of a consent decree. Those rules remain the same—the Court "may consider extrinsic evidence to ascertain the parties' intent, including the circumstances surrounding the formation of the decree" and "the purpose of the provision in the overall context of the judgment at the time the judgment was entered," including to redress the competitive harm alleged in the Complaint. *United States v. Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001) (citations omitted).[4] However, the

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[3] While the original proposed Final Judgment did not explicitly cite to Rule 65(d), it did echo the Rule's requirements that an injunction must "state its terms specifically" and "describe in reasonable detail ... the act or acts restrained."

[4] *See also United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree."); *Anita's New Mexico Style Food v. Anita's Mexican Foods Corp.,* 201 F.3d 314, 319 (4th Cir. 2000) (citations omitted) (noting that "the rules of contract construction appl[y] when determining the scope of a consent decree")

provision prevents Defendant from arguing in the future that any provision of the Final Judgment is unenforceable because such provision is not clear and unambiguous on its face. The inclusion of this language in the modified proposed Final Judgment (and in the original proposed Final Judgment[5]) is an integral part of the United States' decision to settle this case on the terms that it did. Further, Atrium—a sophisticated entity represented by able counsel—agreed to waive any future argument that the Final Judgment is unenforceable because its provisions might be construed as vague and ambiguous at some point in the future. Just as defendants may waive various rights that they may otherwise hold, Atrium can agree to the entry of a Final Judgment that waives its right to argue in a future proceeding that the Final Judgment is not enforceable because it is not clear and unambiguous on its face. *See, e.g., United States v. Blick,* 408 F.3d 162, 169 (4th Cir. 2005) (criminal defendant may waive the right to appeal if that waiver is knowing and intelligent); *CFTC v. Shepherd,* No. 13-cv-00370-FDW-DSC, 2016 WL 8257689, at *1 (Conrad J.) (entering consent decree providing that defendant had waived ability to oppose enforcement of the order by alleging order failed to comply with Rule 65(d)); *cf United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 338 (D.C. Cir. 2014) (defendant forfeited argument that consent decree language was not clear and unambiguous). Further, preventing Defendant from arguing that a provision is vague and ambiguous will simplify the United States' and the Court's efforts to enforce the Final Judgment and encourage greater compliance with the Final Judgment generally.

[5] Paragraph IX(B) of the original proposed Final Judgment provided in relevant part: "Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, *whether or not it is clear and unambiguous on its face*." Dkt. No. 87-1 at 13 (emphasis added).

II. The United States respectfully requests the Court to enter the modified proposed Final Judgment

A. The requirements of the APPA have been satisfied

The APPA requires a 60-day period for the submission of written comments relating to the proposed Final Judgment.[6] In compliance with the APPA, the United States filed the proposed Final Judgment and the CIS with the Court on November 15, 2018, and December 4, 2019, respectively; published the proposed Final Judgment and CIS in the *Federal Register* on December 11, 2018, *see* 83 Fed. Reg. 63,674, and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in *The Charlotte Observer* and *The Washington Post* for seven days beginning on December 7, 2018, and ending on December 13, 2018. The United States received one comment submitted by the North Carolina State Health Plan for Teachers and State Employees and the State Treasurer of North Carolina (collectively the "State Health Plan"), which it published along

[6] The changes in the modified proposed Final Judgment do not require an additional notice and comment period under the APPA, 15 U.S.C. § 16. The modifications do not alter the structure of substance of the remedy and will not materially affect Atrium's obligations. Courts have previously entered modified final judgments without requiring additional notice and comment. *See, e.g., United States v. Anheuser-Busch InBev SA/NV*, No. 16-1483 (D.D.C. Oct. 22, 2018) (entering final judgment modified to provide for the application of a new burden of proof and fee-shifting in contempt proceedings, the availability of a one-time extension of the term of the decree in the event of a violation, and a mechanism for the United States to terminate the decree before the end of its term); *United States v. Gen. Elec. Co.*, No. 17-1146 (D.D.C. Oct. 16, 2017) (entering final judgment modified to extend defendant's time to divest certain assets, include a monetary incentive for defendant to timely divest the assets, and reserve the United States' right to seek civil contempt sanctions if defendants failed to timely divest the assets and attorneys' fees and costs incurred during an investigation of further delay); *United States v. Star Atl. Waste Holdings, L.P.*, No. 12-1847 (D.D.C. June 13, 2013) (modifying final judgment to extend term for required divestitures to enable defendants and acquirers to obtain required state regulatory approvals); *United States v. Grupo Bimbo, S.A.B. de C.V.*, No. 11-1857 (D.D.C. Oct. 3, 2012) (modifying final judgment to allow for the sale of a closed, rather than an operational, commercial bakery plant); *United States v. Verizon Commcn's, Inc.*, No. 08-1878, 2011 WL 18882488, at *1, *9 (D.D.C. Apr. 8, 2011) (modifying final judgment to extend the term of transition services agreements).

with the United States' Response in the *Federal Register* on April 11, 2019. *See* 84 Fed. Reg. 14,675.

The Certificate of Compliance with the APPA filed simultaneously with this Motion demonstrates the parties are in compliance with the APPA. *See* Certificate of Compliance, attached as Exhibit C.

B. Clarification of the United States' Response to Public Comment

As noted above, the United States received one comment on the original proposed Final Judgment submitted by the State Health Plan.

The United States hereby clarifies a statement made in its Response to Comment filed on April 1. In its Response, the United States noted that "[e]ntry of the proposed Final Judgment will neither impair nor assist any private antitrust damage action. Therefore, the State Health Plan remains free to pursue an action for monetary damages or other remedies." Dkt. No. 97 at 14.

This statement refers to the effect of the United States' resolving its claims against Atrium in this matter. Resolution of the United States' claims against Atrium by entry of the proposed Final Judgment will neither impair nor assist any private antitrust damage action. The United States, however, takes no position on whether North Carolina's settlement with Atrium has any *res judicata* effect on the State Health Plan's ability to seek monetary damages or other remedies from Atrium. Because the Tunney Act applies only to the United States' settlement of its claims, any effect of North Carolina settling its claims is outside the scope of the Tunney Act process.

C. Standard of judicial review under the APPA

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which

the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, "shall consider":

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B).

The Court can make the public-interest determination based on the CIS and the Response to Public Comment alone. Section 16(e)(2) of the APPA states that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene."

In its CIS and Response to Public Comment, the United States explained the meaning and proper application of the public interest standard under the APPA and now incorporates those portions of the CIS and Response by reference. The public has had the opportunity to comment on the proposed Final Judgment. As explained in the CIS and Response to Public Comment, entry of the modified proposed Final Judgment is in the public interest.

III. Conclusion

For the reasons set forth in this Motion and Memorandum, the CIS, and the Response to Public Comment, the United States respectfully requests that the Court find that the modified proposed Final Judgment is in the public interest and be entered at this time.

Dated: April 11, 2019

Respectfully submitted,

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