UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

DANIELLE SEAMAN, individually and on behalf of all others similarly situated, *Plaintiff,* v. DUKE UNIVERSITY, *et al.*, *Defendants.*	Civil No. 1:15-cv-462-CCE-JLW Judge Catherine C. Eagles

MEMORANDUM IN SUPPORT OF THE
UNITED STATES OF AMERICA'S UNOPPOSED MOTION TO INTERVENE

The United States, pursuant to Rule 24 of the Federal Rules of Civil Procedure, respectfully submits this memorandum in support of its unopposed motion to intervene for the limited purpose of joining in the proposed settlement and thereby obtaining the right to enforce any injunctive relief entered by the Court against Defendant Duke University and any related Duke entities named as defendants in this case (hereafter, the "Duke Defendants")[1] in the resolution of this case.

On March 7, 2019, the United States filed a Statement of Interest pursuant to 28 U.S.C. § 517 to assist the Court in adjudicating two issues before it at the summary judgment stage of this litigation. Statement of Interest, Doc. 325. At that time, the United States advised the Court of its "strong interest in the correct application of the federal antitrust laws." *Id*. at 1.

[1] The Second Amended Complaint also named Duke University Health System and Does 1-20 as defendants. Doc. 109.

The United States recently learned that the Plaintiff Class[2] intends to submit a preliminary proposed settlement agreement to the Court on May 14, 2019. Memorandum for Extension of Time to File Motion for Preliminary Approval of Settlement, Doc. 347. The deadline for submission of the motion for preliminary approval of settlement was later extended to May 17, 2019. Minute Entry, May 14, 2019. Counsel for the Plaintiff Class and the Duke Defendants informed the United States that the preliminary proposed settlement agreement will include provisions pertaining to post-settlement injunctive relief and, if approved and entered by this Court, would include a compliance program, certification and notice requirements, and rights to enforce violations of this Court's Final Judgment.

The United States has in the past entered into consent judgments involving "no-poach" agreements as part of its enforcement of the antitrust laws. Here, the United States seeks intervention pursuant to Fed. R. Civ. P. 24(b)(2)(A) and (B) to protect its interests in enforcing Section 1 of the Sherman Act, which is the basis of the Plaintiff Class' claim, and to enforce the Duke Defendants' settlement commitment not to enter into unlawful no-poach agreements. The United States has brought this motion as expeditiously as possible upon learning of the impending filing of the Plaintiff Class and following discussion with the parties about this motion. The Plaintiff Class and the Duke Defendants do not oppose the United States' motion to intervene for these purposes.

I. Background

On June 9, 2015, Dr. Danielle Seaman, Assistant Professor of Radiology at Duke University School of Medicine, filed a proposed class action suit alleging that Duke had conspired with the University of North Carolina not to hire their medical faculty in an effort to

[2] Dr. Danielle Seaman is the class representative of the Plaintiff Class. Memorandum Opinion and Order, Feb. 1, 2018, Doc. 189 at 25.

suppress wages and that this no-poach agreement was a *per se* violation of Section 1 of the Sherman Act. Complaint, Doc. 1. On August 12, 2015, plaintiff filed an amended complaint to add Dr. William Roper, the Dean of the University of North Carolina School of Medicine and Vice-Chancellor of Medical Affairs, as a defendant and to identify the University of North Carolina, including its School of Medicine, and the University of North Carolina Health Care System (collectively, the "UNC Entities") as unnamed co-conspirators. *See* First Amended Complaint, Doc. 15.

Defendants moved to dismiss the Section 1 claims under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). This Court denied the motions on February 12, 2016, and stayed the litigation for fourteen days to allow an appeal to the Court of Appeals for the Fourth Circuit. Doc. 39. On June 3, 2016, the Fourth Circuit denied the defendants' petition for appeal. Doc. 50. After settlement and dismissal of the UNC Entities, the remaining Defendants are Duke University, Duke University Health System, and Does 1-20. Final Judgment and Dismissal, Jan. 4, 2018, Doc. 186. The Second Amended Complaint (Doc. 109), which is the operative complaint, was filed on October 4, 2017, two months after the preliminary settlement with the UNC Entities was filed. Doc. 81.

On January 22, 2019, the Court set a comprehensive schedule for summary judgment briefing. Doc. 299. On March 7, 2019, the United States filed a Statement of Interest addressing two substantive issues – (a) the proper application of the state action doctrine under *Parker v. Brown*, and (b) the standard for judging the legality of alleged no-poach agreements under Section 1 of the Sherman Act. (Doc. 325 at 6-18; 19- 29). The United States subsequently made oral arguments on these issues at a hearing on March 12, 2019. Doc. 346.

Following the hearing on summary judgment, the Plaintiff Class and the Duke Defendants advised the Court that they had reached an agreement in principle to settle the case, and the Court subsequently stayed the litigation. Minute Entry, April 18, 2019. After learning that Plaintiff Class and the Duke Defendants intended to enter into a settlement agreement and consent decree, the United States advised the parties of its interest in intervening for the purpose of obtaining the rights discussed herein. Counsel for Plaintiff Class and the Duke Defendants do not oppose the United States' motion to intervene for the limited purpose of obtaining the right to enforce any injunctive relief entered as part of the settlement. The United States has a significant interest in the proposed injunctive relief because the United States enforces the federal antitrust laws, and it has repeatedly enforced the antitrust laws against anticompetitive no-poach agreements. *See United States v. Knorr-Bremse AG, et al.*, No. 18-cv-747-CKK, Final Judgment, Doc. 19 (D.D.C. July 11, 2018); *United States v. eBay, Inc.*, No. 12-cv-5869, Final Judgment, Doc. 66 (N.D. Cal. Sept. 2, 2014); *United States v. Lucasfilm Ltd.*, No. 1:10-cv-2220, Final Judgment, Doc. 6-1 (D.D.C. May 9, 2011); *United States v. Adobe Sys., Inc.*, No. 1:10-cv-1629, Final Judgment, Doc. 17 (D.D.C. Mar. 18, 2011).

II. Intervention by the United States is timely and should be granted to enforce the federal antitrust laws.

Federal Rule of Civil Procedure 24(b)(2) provides that on "timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2).

The United States, through the Antitrust Division of the Department of Justice, is charged with enforcing the federal antitrust laws, including Section 1 of the Sherman Act. *See* 15 U.S.C.

§ 4. Here, the Plaintiff Class brought this action alleging that a no-poach agreement violated Section 1 of the Sherman Act. Complaint, Doc.1 at 17-18. As part of its settlement agreement and the post-settlement relief in this case, the Plaintiff Class and the Duke Defendants will agree to injunctive relief to deter and avoid future violations of Section 1 of the Sherman Act based on an unlawful no-poach agreement.

The parties are discussing including in their settlement agreement terms similar to those contained in judgments obtained by the United States in other cases involving alleged no-poach agreements, including *United States v. Knorr-Bremse-AG,* No. 18-cv-747, Final Judgment Doc. 19 (D.D.C. July 11, 2018). In each of these prior matters, of course, the United States has the right to seek enforcement of these decrees if a defendant were to violate a term in the decree. Allowing the United States to intervene in this matter will further the United States' significant interest in preventing anticompetitive no-poach agreements in the future.

In addition to having a strong interest in enforcing the injunctive relief in this matter, the United States respectfully submits that the present motion is timely and should be granted. To permit intervention under Rule 24, the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24 (b)(3). Here, the United States contacted the parties' counsel and expeditiously sought intervention after learning of Plaintiff Class's impending filing to seek this Court's preliminary approval of its settlement. In addition, the motion to intervene is not opposed by the parties whose rights are being adjudicated, strongly demonstrating a lack of prejudice. Further, the United States' interest in this matter is limited to the post-settlement injunctive relief that the parties are in the process of negotiating and finalizing. Details of the parties' post-settlement injunctive relief have not yet been presented to the Court, so there is neither prejudice nor undue delay as a result

of this motion. *See* Fed. R. Civ. P. 24(b)(3).

III. Conclusion

For the reasons stated above, the United States respectfully requests that the Court grant its unopposed motion to intervene. The limited purpose of the intervention is to allow the United States to join in the proposed settlement and thereby obtain the right to enforce any injunctive relief entered by the Court against any of the Duke Defendants in the resolution of this case.

Respectfully submitted,

Dated: May 20, 2019

/s/ Barry L. Creech
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Specially Appearing Under Local Rule 83.1(d)

CERTIFICATE OF SERVICE

I, Barry L. Creech, hereby certify that on May 20, 2019, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties by operation of the Court's electronic filing systems.

Dated: May 20, 2019

/s/ Barry L. Creech
Barry L. Creech