

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 95-1211 (RCL)
)	
v.)	Judge Royce C. Lamberth
)	
AMERICAN BAR ASSOCIATION,)	
)	
Defendant.)	
_____)	

UNITED STATES' RESPONSE TO PUBLIC COMMENTS
ABOUT PROPOSED MODIFICATION OF FINAL JUDGMENT

The United States is filing this response to the public comments it has received about the proposed Modification Of Final Judgment, pursuant to the United States' Explanation Of Procedures filed on April 3, 2000. The United States has carefully reviewed the public comments and determined that entry of the proposed Modification Of Final Judgment is in the public interest.

In 1995, after a substantial year-long investigation, the United States filed this Civil Action, alleging that the ABA had violated the antitrust laws by fixing faculty compensation at ABA-approved law schools and by limiting competition from non-ABA-approved schools through particular boycott activities. The ABA and the United States agreed to a settlement, and on June 25, 1996, the Court entered the Final Judgment, enjoining these activities. 934 F. Supp. 435 (D.D.C. 1996). The Judgment also contained several provisions designed to open up the accreditation process to additional public review and restrict the influence of professional law

school personnel in that process. One of these provisions expanded the oversight role of the ABA's House of Delegates to give it final decision-making authority on certain accreditation matters. The Department of Education ("DOE") has determined that giving the House this authority violates the legal requirement that a DOE-recognized accrediting agency be "separate and independent" from an affiliated trade association, as mandated by the Higher Education Act ("HEA"), 20 U.S.C. §§ 1099b(a)(3), 1099b(b), and DOE regulations promulgated pursuant to it, 34 C.F.R. § 602.3(d) (1994-1999), recodified effective July 1, 2000 at 34 C.F.R. § 602.14(a), (b), 64 Fed. Reg. 56612, 56618-19 (October 20, 1999) (hereinafter "34 C.F.R. § 602.14(a), (b)").¹ Consequently, the parties agreed to modify the Final Judgment.

On April 3, 2000, the parties filed a Joint Motion To Modify The Final Judgment; and the United States filed a Stipulation pursuant to which the parties consented to entry of the Modification Of Final Judgment, the United States' Memorandum In Support Of The Joint Motion For Modification Of The Final Judgment ("U.S. Memorandum In Support Of Modification") explaining the proposed modifications and the reasons for them, and an Explanation Of Procedures.² Pursuant to those procedures, the Justice Department published notice of the joint motion to modify the Final Judgment in the Federal Register on April 25, 2000, 65 Fed. Reg. 24226, and in the Washington Post on April 19-25, 2000. The notice invited members of the public to submit comments about the modification to the Department over a 60-

¹ Because the commenters and other pleadings in this case cite to the previous regulation, 34 C.F.R. § 602.3, parallel citations will be provided in this brief.

² These settlement procedures that the United States is following are similar to those followed under the Tunney Act, 15 U.S.C. § 16(b)-(h). See United States' Explanation Of Procedures (filed April 3, 2000).

day period. Five people (two of whom wrote jointly) submitted comments, which are attached as exhibits. The United States has carefully reviewed the comments and has determined that entry of the proposed modification remains in the public interest.

I. THE LEGAL STANDARD GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION

The Court has jurisdiction to modify the Final Judgment, under both Section XI of the Judgment ("Jurisdiction is retained by the Court . . . to modify or terminate any of its provisions") and Federal Rule of Civil Procedure 60(b)(5). When considering an agreed-upon motion to modify an existing Judgment, the Court's role is limited to determining whether the proposed modified judgment is within the "zone of settlements" consistent with the public interest. As the D.C. Circuit has explained,

the "public interest test", as applied to a modification assented to by all parties to a decree, "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the zone of settlements consonant with the public interest today." That formulation made clear that it was not up to the court to reject an agreed-on change simply because the proposal diverged from its view of the public interest. Rather, the court was bound to accept any modification that the Department (with the consent of the other parties, we repeat) reasonably regarded as advancing the public interest.

United States v. Western Electric Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993) (citation omitted).

As the Circuit later explained in United States of America v. Microsoft Corp., "the court's function is not to determine whether the resulting array of rights and liabilities 'is the one that will best serve society,' but only to confirm that the resulting settlement is 'within the reaches of the public interest.'" 56 F.3d 1448, 1460 (D.C. Cir. 1995). See also United States v. Bechtel, 648 F.2d 660, 666 (9th Cir.) (same 1981); United States v. Gillette Co., 406 F. Supp. 713, 716

(D. Mass. 1975). Unless a court "has exceptional confidence that adverse antitrust consequences will result -- perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency," a court should not reject a decree (or by analogy, a modification to a decree). Microsoft, 56 F.3d at 1460 (quoting Western Electric, 993 F.2d at 1577). Congress did not intend the Tunney Act to lead to protracted hearings on the merits, and thereby undermine the incentives for defendants and the Government to enter into consent judgments. S. Rep. No. 298, 93d Cong. 1st Sess. 3 (1973). The same is true of agreements to modify consent decrees.

In the analogous Tunney Act situation, review is confined to the terms of the proposed decree and their adequacy as remedies for the violations alleged in the Complaint. Microsoft, 56 F.3d at 1459-60. The Tunney Act does not contemplate an evaluation by the Court of the wisdom or adequacy of the Government's Complaint or a consideration of what relief might be appropriate for violations that the United States has not alleged; id., nor does it contemplate inquiring into the Government's exercise of prosecutorial discretion in deciding whether to make certain allegations or why others may have been bargained away. Id. at 1455, 1459.

The United States -- not a third party -- represents the public interest in Government antitrust cases. See, e.g., Bechtel Corp., 648 F.2d at 660, 666; United States v. Associated Milk Producers, 534 F.2d 113, 117 (8th Cir. 1976); United States v. International Business Machines Corp., 1995-2 Trade Cases ¶ 71,135 at 75,546 (S.D.N.Y. 1995). No third party has a right to demand that the Government's proposed modification be rejected or modified simply because a

different decree would better serve its private interests in obtaining accreditation or being awarded damages. Thus, a district court "should not reject an otherwise adequate remedy simply because a third party claims it could be better treated." Microsoft, 56 F.3d at 1461 n.9.

II. THE COURT SHOULD ENTER THE PROPOSED MODIFICATION

A. An Explanation Of The Remedies In The Final Judgment

The accreditation process is administered by the ABA's Section of Legal Education and Admissions to the Bar. The Section is governed by a Council with supervisory authority on all accreditation matters. The Council is the entity that DOE has recognized as the body that accredits law schools. The Council has a number of committees, including the Accreditation Committee, which makes recommendations about accrediting individual schools, and the Standards Review Committee, which reviews and proposes Accreditation Standards, Interpretations of those Standards, and Rules.³ For many years, the Council had forwarded its recommendations on proposed Standards, but not Interpretations or Rules, to the ABA's House of Delegates for approval. Likewise, the Council had traditionally forwarded its recommendations about accrediting individual schools to the House of Delegates for approval.

In June 1995, the United States filed this Civil Action, alleging that the ABA had violated Section 1 of the Sherman Act in its law school accreditation activities.⁴ The Complaint did not

³ The Standards set forth the minimum requirements for legal education that must be met to obtain and keep ABA approval. "Interpretations" are formal substantive explanations of how the Standards are to be applied; "Rules" are primarily procedural requirements.

⁴ The Justice Department filed this complaint after conducting a substantial investigation of the ABA's conduct. This included the review of over 200 boxes of documents submitted by the ABA, the review of numerous boxes of documents submitted by the Massachusetts School of Law, the taking of over

attack all aspects of the ABA accreditation process, as many of the ABA's procedures serve legitimate educational purposes. The Complaint alleged, however, that the ABA had restrained competition among professional personnel at ABA-approved law schools by fixing their salaries and other compensation levels and by undertaking certain activities that limit competition from non-ABA-approved schools. The United States and the ABA entered a consent decree containing strong injunctions against anticompetitive conduct on the part of the ABA. These injunctions, contained in Section IV of the decree, prohibit four activities. First, the ABA may not fix salaries or compensation levels of faculty and other professional personnel. Second, the ABA may not prevent ABA-accredited law schools from accepting transfer credits from state-accredited, but not ABA-accredited, law schools. Third, the ABA may not bar ABA-accredited schools from accepting into their LL.M. programs graduates of such state-accredited schools. Fourth, the ABA may not deny accreditation because a school is organized as a for-profit entity.

Because these anticompetitive activities resulted from the misuse of the accreditation process by law school personnel with a direct economic interest in its outcome, Section VI of the decree contains several provisions that increased oversight and review of the accreditation process by people outside the law school environment. The modification relates primarily to only one of them, Section VI(A), which subjected Interpretations and Rules to the same review and approval by the House of Delegates that Standards had received for years. There are 10 other oversight provisions that will remain unaffected. Section VI(B) allows appeals of certain Accreditation Committee actions to the Council. Prior to the entry of the decree, these actions remained within

25 depositions, the review of 40 depositions submitted by MSL that were taken as part of its private action, and interviews of numerous witnesses.

the Committee. Sections VI(C)-(E) required changes to the membership of the Council and of the Accreditation and Standards Review Committees by requiring half of their membership to be non-academicians, imposing term limits, and requiring the reporting of appointments and elections of members to the ABA's Board of Governors. Sections VI(F)-(G) increased the number of members from outside academia on the teams that evaluate individual law schools for accreditation and on the Nominating Committee, which nominates members of both the Accreditation and Standards Committee, to include more members from outside academia. Section VI contains several other provisions that increase oversight of accreditation activities. See Sections VI(H)-(K).

B. The Department of Education's Determination
 That Is Cause For Modifying The Decree

Section VI(A) of the Final Judgment subjected Standards, Interpretations, and Rules to "the same public comment and review process and approval procedures." This provision was intended to require that the House of Delegates review and approve Interpretations and Rules, as it had reviewed and approved Standards for years. At the time the Final Judgment was entered, the Department of Justice and the ABA believed that Section VI fully complied with DOE rules and regulations. See U.S. Memorandum In Support Of Modification at 8-9.

In 1997, the ABA came before DOE to begin review of its petition for renewal as a nationally-recognized accrediting agency, a process that was completed in February 2000. DOE determined that placing final decision-making authority in the House of Delegates violated the legal requirement that certain types of DOE-recognized accrediting agencies be "separate and independent" from an affiliated trade association, as mandated by the HEA, 20 U.S.C.

§ 1099b(a)(3), (b) (1998), and DOE regulations, 34 C.F.R. § 602.14(a), (b) (previously § 602.3(a), (b)). Under this rule, the affiliated trade association may not make final accreditation policies or decisions. Nor may the body that makes those decisions be elected or selected by the board or chief executive officer of the related trade association. 20 U.S.C. § 1099b(b)(1); 34 C.F.R. § 602.14(b)(1) (previously § 602.3(b)(1)). Furthermore, 1/7 of the accrediting agency's decision-making body must be members of the general public, not the trade association. 20 U.S.C. § 1099b(b)(2); 34 C.F.R. § 602.14(b)(2) (previously § 602.3(b)(2)). See U.S. Memorandum In Support Of Modification at 5-6.

Without a waiver of these requirements, the ABA's accreditation process could not fulfill the separate and independent requirement. Under the Final Judgment, the House of Delegates, an elected body of delegates from the trade association membership, would make the final decision on certain accreditation matters. Moreover, because the House consists only of ABA members with no public representatives, it could not meet the 1/7 public membership requirement without significantly changing its composition. See U.S. Memorandum In Support Of Modification at 5-6. After the ABA came up for review in 1997, DOE determined that the ABA did not qualify for a waiver. Under DOE regulations, 34 C.F.R. § 602.14(d) (previously 602.3(d)), a waiver may not be granted if the trade association plays any role in the "making or ratifying" of accreditation decisions, or engages in sharing of the accrediting agency's non-public information, both of

which the ABA did. See U.S. Memorandum In Support Of Modification at 5-6; letter from Karen Kershenstein, Director, Accreditation and State Liaison, U.S. Department of Education at 3 (November 16, 2000) (Exhibit 5).⁵

Accordingly, during the course of its review in 1997, DOE indicated to the ABA that it needed to change its procedures if the Council, the recognized entity, was to meet the separate and independent requirement. This required, among other things, that the Council be the final decision-making authority in accreditation matters, including setting policies, Interpretations, and Standards for the process. The ABA and the Justice Department were interested in preserving the oversight role of the House of Delegates to the extent allowable under the law. Consequently, advice was sought from DOE about how to accomplish that goal. DOE determined that the "separate but independent" criteria of the HEA would not be violated if the House was allowed to review and remand Council decisions for further consideration. The ABA has adopted rules to provide the House of Delegates with this type of role. Under them, the Council will report its decisions to the House, so the House will continue to review them. The House may remand Council decisions, but not reverse them. The Council must reconsider remanded decisions. The

⁵ The Justice Department mistakenly stated in the U.S. Memorandum In Support Of Modification that the ABA had previously received a waiver. Id. at 6. After the 1992 amendments to the HEA were passed, DOE needed to conduct a thorough review of 80-100 accrediting agencies to determine whether each met the new requirements for recognition by DOE that were contained in the 1992 amendments. By statute, the review process had to include a detailed investigation of each agency, site visits by DOE, third-party comments, and a hearing before an Advisory Committee Act committee. As a result, DOE had to schedule the reviews over several years. In the interim, it advised agencies of the new requirements and asked that the agencies notify it of any problems. The ABA sent a letter stating that, in its opinion, it complied with the waiver requirement. Based on that assurance, DOE scheduled the ABA for review in 1997. During this review, DOE determined that the ABA was not entitled to a waiver based on the House of Delegates' role in approving accreditation policies, making final accrediting decisions, and hearing appeals, and on the sharing of non-public accrediting information between the Council and the ABA's Governing Board, which was permitted by the Final Judgment. See Kershenstein Nov. 16, 2000 letter at 1-3 (Exhibit 5).

House will be limited to two remands of a Council decision, except for a decision to remove accreditation, for which there would be one remand. After the Council reconsiders its decision after the last permitted remand, the Council's decision becomes final. DOE has approved this procedure. See U.S. Memorandum In Support Of Modification at 2-3. Accordingly, the parties have moved the Court to modify the Final Judgment to conform the ABA's obligations under the Judgment with DOE's requirements. See id.

The Final Judgment as modified, which includes the strong injunctive provisions in Section IV and the numerous oversight provisions in Section VI, would clearly be within the zone of settlements consistent with the public interest. The continued House of Delegates' review of Standards, Interpretations, Rules, and individual accreditation decisions, coupled with the many other oversight provisions in the Final Judgment, will allow for significant oversight and open debate of the Council's accreditation activities. Consequently, the Court should enter the proposed modification order.

III. RESPONSE TO PUBLIC COMMENTS

The United States received public comments from Larry Velvel, Dean of the Massachusetts School of Law; Robert J. D'Agostino, Dean of the John Marshall Law School; John Elson, Professor of Law at Northwestern University School of Law jointly with Gary Palm, a former professor at the University of Chicago Law School; and Tom Leahy, former President of the Illinois State Bar Association.

A. Larry Velvel, Dean, Massachusetts School of Law (Exhibit 1)

Massachusetts School of Law ("MSL") is a state-accredited law school that was denied ABA accreditation -- a decision that it twice litigated and lost.⁶ Dean Velvel submitted a 47-page comment that, in large part, is irrelevant to this proceeding. It attacks the Final Judgment entered in June 1996 as inadequate to resolve MSL's lengthy controversy with the ABA or to remedy MSL's antitrust concerns. MSL requests that the Department bring a second case against the ABA or that the Department be subject to some type of special investigation. Much of MSL's comment relates to conduct that is beyond the violations alleged in the Complaint in this case. Other portions of the comment claim that the decree as entered was insufficient to resolve the problems alleged by the United States in the Complaint. These are not new allegations by MSL; it raised many of the same issues in the Tunney Act proceeding before this Court prior to entry of the Final Judgment. This Court implicitly rejected those criticisms when it entered that Judgment. Indeed, most of MSL's criticism is beyond the scope of this proceeding, which deals only with the modification of provisions in the decree relating to the need to conform the role of the House of Delegates to the strictures of the HEA and DOE regulations.

MSL begins its comment by implying, without any basis, that Judge Williams of the Court of Appeals had described the consent decree as a "sell-out." In 1997, the Court of Appeals upheld this Court's denial of MSL's motion to intervene to challenge the decree. Massachusetts

⁶ MSL filed a federal antitrust case against the ABA, which it lost in 1996. The decision of the district court was affirmed by the Third Circuit. Massachusetts School of Law v. American Bar Ass'n, 937 F. Supp. 435 (E.D. Pa. 1996), aff'd, 107 F.3d 1026 (3rd Cir. 1997). MSL also lost a case alleging that the ABA's accreditation activities violated Massachusetts state laws. Massachusetts School of Law v. American Bar Ass'n, No. 95-CV-12320-MEL, 1997 WL 263732, 1997 U.S. Dist. LEXIS 7033, (D. Mass. May 8, 1997), aff'd, 142 F.3d 26 (1st Cir. 1998).

School of Law v. United States, 118 F.3d 776 (D.C. Cir. 1997).⁷ Judge Williams, writing for the Court, found that "the decree clearly represents a material accomplishment," id. at 783, and stated explicitly, "There is, in short, no reason to infer a sell-out by the Department," id. at 784.

The Final Judgment contains strong relief that benefits the public interest: enjoining the fixing of faculty compensation and the three boycott practices set out in Section IV.⁸ Furthermore, the Final Judgment significantly increased oversight of accreditation activities in order to deter such anticompetitive conduct in the future. The Final Judgment includes 11 oversight provisions, 10 of which will remain unaffected by the modification. The modification proposed by the parties affects only one provision. Under it, the House of Delegates will continue to review Council accreditation actions and may remand decisions back to the Council. The Council, in acting on the remand, must consider the reasons specified by the House. Hence, active oversight and open debate of the Council's accreditation activities will continue in the House of Delegates. The agreed-upon modifications are necessary to conform the Final Judgment

⁷ In seeking to intervene, MSL had made the same argument that it makes in its current comment: the decree did not go far enough in remedying alleged antitrust violations and contained what MSL considered to be weak oversight and enforcement mechanisms. In ruling on the appeal, the Court of Appeals rejected these claims. Id. at 778, 783-84. Although the appellate court allowed MSL, as a procedural matter, to intervene to question whether the Justice Department was required to disclose certain documents as part of the Tunney Act proceeding, it upheld this Court in ruling that the Department was not required to do so. Id. at 778.

⁸ In its comment, MSL criticizes the ending of the boycott practices, arguing that it harms state-accredited schools, as students at these schools can now choose to attend ABA-accredited schools where they were once limited to state-accredited ones. Ending the boycott is required by the antitrust laws. It has strongly benefitted student consumers. As MSL apparently admits in its comment, it initially complained about and sought Department of Justice action to stop the boycott practice in 1994.

and the role of the House of Delegates to requirements under the HEA and DOE regulations.

The Final Judgment, as the parties seek to modify it, requires oversight of the accreditation process by the House to the maximum extent allowed by the HEA and DOE regulations.

MSL has completely litigated its denial of accreditation by the ABA. The district and appellate courts have rejected its claims. See supra note 6. The present modification, which is necessitated only by a need to allow the ABA to conform with education law requirements, is not a vehicle for MSL to relitigate its denial of ABA accreditation or to force the Justice Department to do so on MSL's behalf. Indeed, MSL was given ample opportunity to present its views on the Final Judgment before this Court entered it in 1996. At that time, MSL made many of the same arguments that appear in its current letter.⁹ Despite MSL's arguments, this Court entered the Final Judgment. In addition, in ruling on MSL's motion to intervene for purposes of appeal, the Court of Appeals endorsed the consent decree. 118 F.3d at 783. In any event, the purpose of this proceeding is not to question whether the Final Judgment should have been entered or the scope of the case that the United States alleged in the Complaint, but to decide the narrow issue of whether to modify the role of the House of Delegates in the decree as mandated by the HEA and DOE regulations. Despite the lack of relevance of most of Dean Velvel's points, the Department briefly addresses specific arguments raised in MSL's comments below.

⁹ In 1995, MSL submitted lengthy comments under the Tunney Act to the United States. Later, MSL wrote a 99-page amicus brief criticizing portions of the Final Judgment and criticizing the Special Commission required by the decree. Brief of Amicus, the Massachusetts School of Law, Responding to the Report of the American Bar Association Board of Governors (filed April 3, 1996). In June 1996, MSL filed a three-inch thick response to the United States' brief about the Special Commission's report, again criticizing the Final Judgment and Commission. Response Of Amicus, The Massachusetts School of Law, To The Government's Brief On Supplemental Public Comments (filed June 5, 1996). MSL also criticized the Final Judgment and the remedies therein in its brief to the Court of Appeals, which rejected MSL's criticisms. See 118 F.3d at 783-84.

In its comment, MSL criticizes various provisions of the Final Judgment that are not currently before this Court. MSL attacks Section VII of the Final Judgment, which set up a Special Commission that reviewed accreditation requirements concerning student-faculty ratios, faculty teaching hours, leaves of absence, physical facilities, the allocation of resources to a law school by its parent university, and the treatment of bar preparation courses. These activities, unlike the fixing of faculty compensation and the group boycott, had education policy implications that warranted treatment in this manner, as the United States said in its Competitive Impact Statement (at 12-13), and the Court of Appeals agreed. 118 F.3d at 784. Thus, as the ABA had already initiated a Special Commission in response to academic criticism of its accreditation process and its perception of possible antitrust problems, the United States agreed that the ABA could attempt to reconcile antitrust and educational concerns through its Commission. Competitive Impact Statement at 12-13. This Court delayed entry of the decree until after the Special Commission had made its recommendation to allow for the consideration of public comments on those recommendations. MSL was given the opportunity to comment, and filed a brief criticizing the Special Commission's report, see Response Of Amicus, The Massachusetts School of Law, To The Government's Brief On Supplemental Public Comments (filed June 5, 1996). After reviewing the Commission's Report and public comments about it, the United States determined that it would accept the Commission's recommendations and filed the public comments and its response with the Court. The Court subsequently entered the consent decree. Thus, this Court rejected MSL's criticism of the Commission when it entered the Final Judgment. Moreover, MSL's criticism of the Special Commission has been rejected by the Court of Appeals. 118 F.3d at 784.

MSL's comment further criticizes the oversight provisions in Section VI of the decree as weak and as failing to prevent the "capture" of the accreditation process by professional law school personnel. As explained, supra at 6-7, the decree contains several provisions that increase oversight of the accreditation process. The membership of the Council, Accreditation and Standards Review Committee, and Nominating Committee was opened up to people other than academicians with an economic interest in the outcome of the accreditation process. MSL made a similar argument in 1995, claiming that the decree's oversight provisions did not adequately remedy capture.¹⁰ This Court implicitly rejected MSL's position when it entered the decree. Moreover, the Court of Appeals, in denying MSL's motion to intervene, rejected this argument, 118 F.3d at 784.

In its comment, MSL also criticizes the Justice Department for failing to prevent the ABA from requiring use of the LSAT for law school admissions and for failing to alter the ABA's requirements for law school libraries. This is outside the scope of this proceeding, which concerns modification of the House of Delegates' role. Moreover, the accreditation standards about the use of the LSAT and library requirements were not challenged in the Complaint as antitrust violations.

MSL further complains that the Justice Department had not made available to it the evidence collected as part of its original investigation. This evidence, obtained through Civil Investigative Demands issued under the Antitrust Civil Process Act, 15 U.S.C. §§ 1312-1314, is

¹⁰ MSL made this argument in its comments submitted under the Tunney Act and in its Motion That The Court Either (A) Grant MSL The Status Of Intervenor Or, (B) In the Alternative, Grant MSL The Status Of Amicus Curiae While Reserving Decision On A Later Grant Of Intervenor Status If An Appeal Is Sought at 6-13 (filed September 26, 1995).

subject to strict confidentiality restrictions. The Justice Department may not simply give its investigatory materials to MSL. See 15 U.S.C. § 1313(c). In addition, this Court has already ruled that the Tunney Act does not require the United States to disclose the documentary evidence gathered in its investigation to MSL, a decision upheld by the Court of Appeals. See 118 F.3d at 784-85.

In addition, MSL seeks an investigation of the Justice Department for entering the Final Judgment and for not bringing a second case against the ABA that contains allegations MSL believes to be appropriate. MSL incorrectly claims, without any evidence, that the decree gave "special breaks" to the ABA. Its comment contains numerous unsupported assertions that the Justice Department favored the ABA in settling the case.¹¹ MSL has no evidence connecting any of its highly speculative theories to the entry of the decree. In any event, MSL's unfounded conspiracy theory has nothing to do with the matter before the Court: the modification of the decree to comply with DOE's requirements. MSL appears to have launched this theory in an attempt to re-open the entry of the original decree. The Justice Department treated the ABA as it treats the subjects of other antitrust investigations. The Department determined that it would sue the ABA based upon specific competitive concerns and then negotiated a consent decree that

¹¹ The following are illustrative of the thin threads from which MSL tries to weave its claim of favoritism. MSL points out that the ABA is composed of lawyers and judges, and that the Justice Department prosecutors are lawyers. MSL observes that First Lady Hillary Clinton, ABA President Roberta Ramo, and Pauline Schneider, an ABA member active in accreditation matters, attended a Women's Bar Association honors dinner, and that Deputy Assistant Attorney General Jamie Gorelick introduced Ramo as the keynote speaker. MSL notes that former Assistant Attorney General Joel Klein had served in the White House Counsel's Office before he left to join the Antitrust Division, that Klein had known the President for many years, and that Klein had been asked to take Vince Foster's place as Deputy White House Counsel. MSL tries to somehow connect the dots between its observation that Michael H. Cordozo, who was active in accreditation matters 30 years ago, has a son who was an Executive Director of President Clinton's legal defense fund.

resolved these concerns. The ABA indicated its willingness to reform its accreditation process before the Complaint was filed. After preliminary discussions with the Department, the ABA even began implementing these reforms. The Department, however, insisted that the reform process and injunctive provisions should be subject to the terms of a court-supervised consent decree.

Furthermore, the United States' decision to accept the Final Judgment in 1995, and any decisions about whether to bring another action, are matters committed to the United States' prosecutorial discretion. As the D.C. Circuit has concluded in the analogous Tunney Act situation, "the district court is not empowered to review the actions or behaviors of the Department of Justice; the court is only authorized to review the decree itself." Microsoft, 56 F.3d at 1459.¹² "An agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). This is because the United States' decision not to bring a particular case is based on the facts and law before it at a particular time. Like any other decision not to prosecute, it "involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise." Chaney, 470 U.S. at 831. The Supreme Court has long recognized that a Government antitrust consent decree is an agreement between the parties to settle their disputes and differences, United States v. ITT Continental Baking Co., 420 U.S. 223,

¹² The Microsoft Court observed that, "Even when a court is explicitly authorized to review government action under the Administrative Procedure Act, 'there must be a strong showing of bad faith or improper behavior' before the court may 'inquir[e] into the mental processes of administrative decisionmakers.'" Microsoft, 56 F.3d at 1459. Not only is this not a case subject to the Administrative Procedure Act, but MSL has made no actual showing of bad faith; it has simply strung together an unsupported conspiracy theory involving attendance at a Women's Bar Association awards dinner, the fact that the President knew the Assistant Attorney General before appointing him, and other similar facts.

235-38 (1975); United States v. Armour & Co., 402 U.S. 673, 681-82 (1971), and "normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." Armour, 402 U.S. at 681.

Within its lengthy comment, MSL makes two points that are marginally related to the proposed modification. First, it alleges that the Department of Justice ignored DOE warnings that the role of the House of Delegates might violate the separate and independent requirement.¹³ Second, it alleges that DOE made its determination that the ABA violated the HEA and regulations because it had been influenced by the ABA's Council on Legal Education. Both arguments are without merit.

The Justice Department consulted DOE about the decree before it was entered. DOE objected to certain provisions in the proposed decree related to the selection of ABA Committee members, and the Justice Department made changes to accommodate DOE's concerns.¹⁴ During DOE's review of the ABA in 1997-2000, it determined that the HEA and the regulations thereunder do not permit the Council to be the recognized entity if the House is the final decision maker. This was the first time the Justice Department became aware of this conflict, and after

¹³ Other commenters have taken the opposite position, contending that letters issued by DOE contained assurances that the Final Judgment was consistent with DOE regulations and statutes. See comment from John Elson and Gary Palm, June 26, 2000 (Exhibit 3a).

¹⁴ DOE did not, at that time, object to Section VI(A) of the Final Judgment, which requires the ABA to subject Interpretations and Rules "to the same public comment and review process and approval procedures that apply to proposed Standards." The parties intended this to mean that the House of Delegates would approve Interpretations and Rules, as it had done for Standards for many years. See U.S. Memorandum In Support Of Modification at 4-5. DOE did not realize that this was the intent of Section IV(A). See Kershenstein Nov. 16, 2000 letter at 5 (Exhibit 5).

becoming aware, the Department had discussions with DOE about preserving as much of the oversight authority as possible. The Justice Department is proposing the current modification because it is required by the statute and the regulations, and for no other reason.

In fact, the issue of the House's decision-making authority did not arise until the 1997-2000 DOE review of the ABA. The "separate and independent" provision was enacted in 1992, and is part of a larger initiative to require extensive, individualized review of every accrediting body seeking to be "recognized" by the Secretary of Education. 20 U.S.C. §§ 1011c, 1099b. After the passage of these amendments, DOE promulgated regulations to carry out the legislation, including procedures to conduct a complete and thorough review of each body. The ABA's Council did not come before DOE for review for compliance with the new recognition requirements until 1997. Upon completing the review process, which included a staff investigation and site visit, taking of third-party comments, and a hearing before a committee authorized under the Federal Advisory Committee Act, the Secretary held that the ABA was out of compliance with the separate and independent requirement, which has necessitated the current modification. See supra note 5, and Kershenstein Nov. 16, 2000 letter at 1-2 (Exhibit 5). DOE's conclusion was based, in part, on a conclusion by the National Advisory Committee on Institutional Quality and Integrity ("NAC") that the ABA had violated the separate and independent requirement by vesting decision-making authority in the House of Delegates, rather than the entity that was recognized. See Kershenstein Nov. 16, 2000 letter at 3 (Exhibit 5).¹⁵

¹⁵ The NAC advises the Secretary of Education about criteria for recognizing accrediting agencies. MSL cites some of the NAC's criticisms about the validity of certain ABA standards from an educational policy perspective. This, however, is irrelevant to the issue before this Court.

MSL contends that DOE favored the ABA in requiring the modification of the House's authority. MSL claims that the Council asked DOE to do so. Not only has MSL produced no evidence of this, but its claims are without merit. DOE, not the Council, initiated the review of the ABA and other agencies to determine whether they conformed to the HEA. It is the HEA and the regulations thereunder that require the Council, not the House, to be the final decision maker, if the Council is to be the recognized entity. These requirements apply to many accreditation agencies and were not promulgated solely to relieve the ABA House of Delegates of its approval authority. See Kershenstein Nov. 16, 2000 letter at 5 (Exhibit 5).

B. Dean Robert J. D'Agostino (John Marshall Law School) (Exhibit 2)

Robert D'Agostino is Dean of the John Marshall School of Law, an Atlanta law school. Dean D'Agostino's comment is devoted to contesting the ABA Accreditation Committee's recommendation against provisional accreditation for his school.

First, John Marshall argues that because academic insiders dominate the accreditation process, the House of Delegates should continue to have final decision-making authority. The Final Judgment obtained strong relief from ABA violations of the antitrust laws. As explained above, it significantly increased outside oversight and review of ABA accreditation activities. The proposed modification affects only one of these sections, VI(A), and is required by law. The remaining 10 oversight provisions will remain in effect, and a new one will explicitly give the House oversight responsibilities for the accreditation of individual schools. See supra at 6-7. The House of Delegates will continue to review Council accreditation activities and will have authority to remand decisions to the Council.

Second, John Marshall argues that the ABA violated the Final Judgment in considering its application for provisional ABA accreditation, a matter about which it has complained to the Justice Department. John Marshall has complained to the Justice Department that the Accreditation Committee's April 1999 recommendation against provisional accreditation was based on standards and interpretations that the ABA had informed the Court it had modified as a result of the recommendations made by the Special Commission pursuant to Section VII of the Final Judgment.¹⁶ Whether John Marshall is inappropriately being denied ABA accreditation is outside the scope of this proceeding, which deals with the issue of whether to modify the House of Delegates' role to conform to education law requirements. The Justice Department, of course, takes seriously allegations of decree violations and investigates them appropriately. The Justice Department is investigating John Marshall's complaint. As part of its investigation, the Assistant Attorney General has required the ABA, pursuant to Section X of the Final Judgment, to produce documents related to John Marshall's claim, and the Department is reviewing these documents. If the Department concludes that a violation has occurred, it will take appropriate action.

Finally, John Marshall claims that the ABA has engaged in antitrust violations outside the consent decree, by demanding that the school enlarge its library collection and budget, and by requiring schools seeking provisional ABA approval to admit students with certain minimum LSAT scores. These matters are outside the scope of the Final Judgment and this proceeding, which deals with the modification of the House of Delegates' role to comport with DOE

¹⁶ In Spring 2000, John Marshall was re-inspected. The Accreditation Committee recommended against provisional accreditation, alleging John Marshall had low bar passage rates and high drop-out rates, a weak academic support program, limited courses, and inadequacies in its school's library collection, among other findings.

requirements. Moreover, the ABA Standards on core library collection and budget, student admissions, and bar passage rates were not challenged in the Complaint as antitrust violations.

C. John Elson And Gary Palm (Exhibits 3a, 3b, and 3c)

Professor John Elson and former Professor Gary Palm submitted three comments opposing the proposed modification on June 26, 2000, October 5, 2000, and October 18, 2000.¹⁷ First, they argue that the United States cited the wrong legal standard in its Memorandum In Support Of The Modification. Second, they criticize DOE's determination that the House of Delegates may not have decision-making authority.

The commenters mistakenly argue that the proper standard in reviewing a motion for modification is that applied by the Supreme Court in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1991), rather than the "within the reaches of the public interest" standard articulated by the D.C. Circuit in Western Electric and Microsoft. See June 26, 2000 letter (Exhibit 3a). This Circuit has explicitly held that the standard for modifying an antitrust consent decree where the parties to a consent decree agree to the changes is whether the modification is "within the zone of settlements consonant with the public interest today." Western Electric, 993 F.2d at 1576. As the appellate court explained, "it was not up to the court to reject an agreed-on change simply because the proposal diverged from its view of the public interest. Rather, the court was bound to accept any modification that the Department (with the consent of the other parties, we repeat) reasonably regarded as advancing the public interest." Id. The commenters completely ignore

¹⁷ Although the October 5 and October 18 letters were outside the comment period, the Justice Department did consider them and is responding to them here.

this ruling, as well as the D.C. Circuit's ruling in Microsoft, where it came to the same conclusion: the court's function is not to determine whether an agreed-upon decree modification "' is the one that will best serve society,' but only to confirm that the resulting settlement is within the reaches of the public interest." 56 F.3d at 1460.¹⁸ Thus, the only issue before the Court is whether the modified Final Judgment taken as a whole is within "the zone of settlements consonant with the public interest," see supra at 3-4. For the reasons stated supra at 5-10, and in the U.S. Memorandum In Support Of Modification at 7-10, the Government has met this standard.

The remainder of the June 26 comment and the October 5 and 18 comments are devoted to what appears to be a challenge to DOE's regulations in the guise of making a public comment about modification of this antitrust consent decree. The propriety of DOE's regulations is not properly before this Court. The only issue before the Court is simply whether the modified Final Judgment, taken as a whole, is within the reaches of the public interest. The regulations may be challenged only in a proceeding brought under the Administrative Procedure Act by a person who is "suffering legal wrong" or "adversely affected or aggrieved by agency action." 5 U.S.C. § 702; Federation for American Immigration Reform v. Reno, 93 F.3d 897, 900 (D.C. Cir. 1996).

Furthermore, while the professors or any other members of the public may petition the Secretary of Education to change or repeal the regulations under the Administrative Procedure Act, 5 U.S.C. § 553(3), neither professor has taken such action in the six years since they were first

¹⁸ Professors Elson and Palm wish to apply the Rufo standard, requiring "a significant change, either in factual conditions or in law" to modify the decree. 502 U.S. at 384. When the Government and an antitrust defendant disagree about modifying a decree restriction, courts generally apply this stricter standard. Such circumstances usually arise when a defendant wishes to be relieved from a decree restriction that the Department of Justice believes should continue in effect. See Western Electric, 46 F.3d 1198-99, 1202-04 (D.C. Cir. 1995). There is no question that when, as here, the parties to the decree have agreed to the modification, the Rufo standard is inapplicable.

adopted. See Kershenstein Nov. 16, 2000 letter at 4 (Exhibit 5). DOE promulgated these regulations, then 34 C.F.R. § 602.3, after a proper notice and comment rule making in 1994.¹⁹ Because the regulations were properly promulgated, they are presumed valid and have the force of law, and DOE must apply them. Tribune Co. v. FCC, 133 F.3d 61, 68 (D.C. Cir. 1998); see also Com-Co Insurance Agency v. West Bend Mutual Insurance Co., 666 F. Supp. 1126, 1129 (N.D. Ill. 1987) (validly promulgated regulations have the force and effect of law and are presumed valid).²⁰

The commenters also contend that the proposed modification of the consent decree reflects a change in DOE's interpretation of the "separate and independent" requirement. They claim that DOE had originally been of the view that a decision-making role for the House of

¹⁹ See 59 Fed. Reg. 3578 (Jan. 24, 1994) (providing notice of proposed amended regulations and seeking comments); 59 Fed. Reg. 22250 (April 29, 1994) (responding to comments and adopting the amended regulations). The regulations were recodified effective July 1, 2000 at 34 C.F.R. § 602.14, 64 Fed. Reg. S6612, S6618-19, again after a notice and comment rule making, see 64 Fed. Reg. 34466 (June 25, 1999) (providing notice of proposed re-codification and seeking comments); 64 Fed. Reg. 56612 (Oct. 20, 1999) (responding to comments and adopting re-codification).

²⁰ This antitrust consent decree proceeding is not the proper place to address a challenge to, or the propriety of, DOE's regulations. Nonetheless, the professors' claims are without merit. Much of the professors' comments are devoted to arguing that, despite DOE regulations, the HEA requires DOE to waive the separate and independent requirement for the ABA. Yet, as DOE has explained, the HEA, by its terms, gives the Secretary broad discretionary authority to decide whether or not to waive the requirement, stating that "the Secretary may waive" the requirement. 20 U.S.C. § 1099b(a)(3)(C); Kershenstein Nov. 16, 2000 letter at 3 (Exhibit 5). In their October 5 and 18 letters, the professors assert that DOE regulations misinterpret the HEA and that the separate and independent requirement does not apply to the ABA. The HEA authorizes the Secretary to waive the requirement for agencies that conduct accreditation through voluntary professional organizations. See 20 U.S.C. § 1099b(a)(3)(C) and § 1099b(a)(2)(C). The ABA is such an agency. Kershenstein Nov. 16, 2000 letter at 3-4 (Exhibit 5). This waiver provision would be meaningless if the separate and independent requirement did not itself apply to such agencies, id.

Delegates did not violate the separate and independent requirement. As DOE has explained, however, it was not until the Secretary reviewed the ABA in 1997-2000 that DOE identified the problem with the ABA's compliance.²¹

Finally, Professors Elson and Palm recommend that the ABA relinquish its status as a DOE-approved accrediting agency, thus eliminating the need to comply with DOE requirements and to modify the Final Judgment. Under their proposal, law schools could seek accreditation from other DOE-recognized agencies. They argue that university-related law schools are approved for federal student aid purposes through the accreditation of their universities by regional institutional accrediting bodies recognized by DOE. They further claim that the 20 independent, or non-university-affiliated schools, could obtain accreditation through these regional bodies. This would be impracticable, according to DOE. It would be difficult and time consuming for the independent law schools to obtain regional accreditation.²² Furthermore, no third party has the right to demand that a proposed modification to a Final Judgment be rejected and another modification be substituted because, in its view, the modified decree does not best serve society. The issue before the Court is only whether the Final Judgment, as the parties propose to modify it, is "within the reaches of the public interest." United States v. Microsoft, 56

²¹ As stated supra at note 14, DOE did not understand, when it originally reviewed the decree, that Section VI(A) required the House of Delegates to review and approve Standards, Interpretations, and Rules. See Kershenstein Nov. 16, 2000 letter at 5 (Exhibit 5).

²² Although the HEA allows a school accredited by an agency that loses DOE recognition to continue to participate in student aid programs for 18 months, the process of obtaining regional accreditation would almost certainly take longer than 18 months, thus making these schools ineligible for student aid programs. See Kershenstein Nov. 16, 2000 letter at 4 (Exhibit 5).

F.3d 1448, 1460 (D.C. Cir. 1995).²³ For the reasons stated above at 5-9, the modified Final Judgment clearly meets this test.²⁴

D. Tom Leahy (Exhibit 4)

Tom Leahy, a past President of the Illinois State Bar Association and member of the ABA's House of Delegates, also opposes entry of the proposed modification. Mr. Leahy believes that giving law students clinical skills training is very important and that the ABA Standards should be amended to provide for more clinical training, such as externship programs. Mr. Leahy has had difficulty convincing the Section on Legal Education of this need. Mr. Leahy believes that because the House of Delegates had decision-making authority, he has been able to obtain modifications to the Standards to support clinical education. He believes that, if the House no longer has this authority, the Section would be able to resist attempts to increase clinical education. Moreover, he has met resistance from the Section to his efforts to obtain for clinical faculty the same perquisites and status as purely academic faculty.

²³ Moreover, even if the ABA is not DOE-recognized, most law schools will almost certainly continue to seek accreditation from the ABA since many state supreme courts require such approval to allow the school's graduates be admitted to the state bar. The ABA process would, however, no longer need to conform to any DOE requirements, and there would be no DOE oversight. DOE recognition of accrediting agencies ensures that each accrediting agency is a reliable authority as to the quality of education offered by its member institutions.

²⁴ In addition to these arguments, Professors Elson and Palm argued that the ABA violated its constitution in adopting the provision giving the House of Delegates review and remand authority rather than final decision-making authority. They argue that the ABA's constitution requires the House to supervise the Section on Legal Education. Whether the ABA followed its own rules in adopting the change is immaterial to the issue before the Court. The only issue before the Court is whether the modification proposed is in the public interest, not whether the ABA procedures to implement the modification violate its own procedures.

The modification to the House of Delegates' authority is required by the HEA and DOE regulations. The House is not legally permitted to be the final decision-maker, if the Council is to remain the entity recognized by the Secretary. Moreover, while Mr. Leahy's efforts to increase clinical education may be laudable, the focus of the consent decree was to remedy specific violations of the antitrust laws by the ABA. ABA requirements for clinical training were not among the conduct challenged in the Complaint in this case and are outside the scope of the decree. In addition, the decree is certainly not intended to increase the perquisites of any faculty. The issue before the Court is not whether the best solution is for the House of Delegates to have final decision-making authority. Rather, the issue is whether remedies in the decree, taken as a whole, are within the "zone of settlements consonant with the public interest," see supra at 3-4, given the violations alleged in the Complaint. For the reasons explained above, see supra at 5-10, the remedies clearly meet this standard. Under the modified decree, the House of Delegates will continue to oversee accreditation activities, although it will no longer be the final authority. The other 10 oversight provisions in the decree will remain unaffected. The modified decree will contain strong injunctions on the fixing of faculty compensation and the boycott activity, and continue oversight of the critical committees and Section to deter the behavior that led to these alleged in the Complaint.

CONCLUSION

Having reviewed the public comments, the United States has determined that the proposed modified Final Judgment is in the public interest. Accordingly, the Court should enter the Modification To Final Judgment as proposed by the parties.

Dated: NOVEMBER 20, 2000

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 20, 2000, I caused a copy of the United States' Response to Public Comments About Proposed Modification Of Final Judgment and the Motion To Enter Modification Of Final Judgment to be served upon:

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