IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 1:05-cv-431
vs.	)	
	)	Hon. Sandra S. Beckwith, C.J.
FEDERATION OF PHYSICIANS AND	)	
DENTISTS, *et al.*,	)	Hon. Timothy S. Hogan, M.J.
	)	
Defendants.	)	

United States' Memorandum in Opposition to American Association of Orthopaedic Surgeons' [AAOS] Motion for Leave to File Reply

Plaintiff United States of America submits this response to the "Motion For Leave to File American Association of Orthopaedic Surgeons Reply To Plaintiff United States' Response To Public Comments," (Dkt. Entry # 94) ("Proposed Reply"). The AAOS filed its motion and proposed reply one week after the Court, on February 28, 2008, entered the Final Judgment. The AAOS's motion and proposed reply amounts to asking this Court to set aside the Final Judgment that it has recently entered. In particular, the AAOS asks the Court to (1) obtain additional input from third parties, (2) order the United States to further respond to its comment, and (3) hold a hearing on the "issuance of compliance" with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 ("APPA"). Proposed Reply 4-5.

The AAOS's pleadings assert no valid factual or legal bases for the Court to grant the requested relief. The AAOS's arguments amount to a repetition of the same points that it raised in its comment (Dkt. Entry # 81-2) during the now-completed APPA

public comment period. The AAOS reiterates its contention that this case "is the result of the antitrust laws not being applied equally to the insurance industry as they are to physicians or other professions" and that the Court should consider this purported inequality in the APPA proceeding. Proposed Rely at 2. The United States explained in its Response to Public Comments ("Response to Comments") (Dkt. Entry ## 90, 91 § XI) that the AAOS's argument is outside the scope of the APPA proceeding because the APPA does not permit the Court to review the merits of the United States' decision not to pursue a claim against an entity. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995); *United States v. SBC Communications, Inc.*, 489 F. Supp.2d 11-15 (D.D.C. 2007); *United States v. The Thomson Corp*, 949 F. Supp. 907, 913 (D.D.C. 1996).

The United States and the Court have fully complied with the APPA, including the notice and comment provisions. Accordingly, the Court should deny the AAOS's motion.

Discussion

A. The Court Should Reject the AAOS's Request that the Court Obtain Additional Input from Third-Parties, or Order the United States to Further Respond to Comments.

The Court should not obtain additional third-party input, or order the United States to further respond to comments. The United States has complied with the APPA, which prescribes a sixty-day period for the public to submit comments on the proposed Final Judgment following publication of notices and certain documents. 15 U.S.C. §§ 16(b)-(c). Pursuant to 15 U.S.C. § 16(b), the United States had the proposed Final

Judgment and Competitive Impact Statement ("CIS") published in the Federal Register, along with the Complaint, on July 18, 2007, at 72 Fed. Reg. 39,450. Further, a summary of the terms of the proposed Final Judgment and CIS was published for seven consecutive days in the Cincinnati Enquirer from July 20 through July 26, 2007, and in the *Washington Post* from July 18 through July 24, 2007, also pursuant to the APPA. The sixty-day comment period commenced on July 27, 2007, and ended on September 24, 2007.

The United States received five comments on the proposed Final Judgment, (Dkt. Entries # 86-1, 2, 3, 4, 5), and on December 17, 2007, pursuant to 15 U.S.C. § 16(d), the United States filed its Response to Comments. On January 24, 2008, pursuant to 15 U.S.C. § 16(d), the United States had its Response to Comments published in the Federal Register at 73 Fed. Reg. 4,268, and the Court entered the Final Judgment on February 28, 2008. That the AAOS disagrees with the United States' and the Court's evaluation of its position does not warrant conducting what would amount to a second comment period and a second review of the Final Judgment, outside of the APPA's prescribed framework.

B. The Court Should Reject the AAOS's Request that It Hold a Hearing.

The Court should reject the AAOS's request that the Court hold a hearing. Again, the Court should not re-open this proceeding because the United States and the Court have fully complied with the APPA, the Court has entered the Final Judgment, and the AAOS has raised no new issues of fact or law. Moreover, in its 2004

amendments, Congress made clear 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." 15 U.S.C. § 16(e)(2). The procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC*, 489 F. Supp. 2d at 11. Here, the Court has already concluded that its review of the record was sufficient to determine that the Final Judgment is in the public interest.

C. The 2004 Amendments to the APPA Do Not Provide Any Bases For the Court to Set Aside the Final Judgment.

The only legal and factual assertions that the AAOS makes in its pleadings are that the United States' Response to Comments is "incorrect" because (1) the "Response ignores that the APPA was amended in 2004 to expand the Court's authority in approving proposed judgments," and (2) the AAOS's comment "directly related to the underlying litigation." Proposed Reply 2-4. The AAOS supports both points by referring to Congress's addition of language to the APPA in 2004 that requires courts to consider "the impact of entry of such judgment upon competition in the relevant market or markets,"15 U.S.C. § 16(e)(1)(b). Proposed Reply 2-3. According to the AAOS, the 2004 amendments "ostensibly . . . overrule[d]" the standards and the cases on which the United States relied in its Response to Comments, including *Microsoft*, *supra*, and *The Thompson Corp.*, *supra*. Proposed Reply 3-4.

The AAOS's arguments conflict with the holding of the only case on which the AAOS relies, *SBC*, *supra*. In *SBC,* the court held that "a close reading of the law demonstrates that the 2004 amendments effected minimal changes, and that this Court's scope of review remains sharply proscribed by precedent and the nature of [APPA] proceedings." *Id*. at 11. The *SBC* court rejected the same argument that the AAOS makes here: that the 2004 amendments' requirement that courts consider the judgment's impact "upon competition in the relevant market or markets" allows the court to look beyond the complaint's allegations. *Id.* at 14-15.

Instead the *SBC* court held that "a district court is not permitted to 'reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made.' " *Id*. at 14 (quoting *Microsoft*, 56 F.3d at 1459) (emphasis in original). The court's holding relied upon, and quoted from, the *Microsoft* opinion that the AAOS incorrectly maintains the 2004 amendments overruled. The court continued that because "review [under the 2004 amendments] is focused on the 'judgment', it again appears that the Court cannot go beyond the scope of the complaint." *Id.*

The United States alleged in the complaint that the defendants coordinated a price-fixing conspiracy among Cincinnati-area obstetrician-gynecologists ("OB-GYNs"). Accordingly, contrary to the AAOS's claim, the 2004 amendments to the APPA, as interpreted and applied by the *SBC* court, require the court to evaluate the effect of the "judgment upon competition" among providers of OB-GYN services. 15 U.S.C. § 16(e)(1)(b). Because the United States did not allege that health insurers had violated

the antitrust laws, it is not appropriate for the court to seek to determine whether insurers have in fact engaged in anticompetitive conduct and the potential effects of such conduct.

In short, the AAOS's motion and proposed reply are repetitions of its previous comment that cite no new facts or law that warrant the Court to reconsider its decision that the Final Judgment is in the public interest.

Dated: March 31, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following ECF participants:

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