

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, <i>et al.</i> ,)	Hon. Timothy S. Hogan, M.J.
)	
Defendants.)	

**Memorandum in Support of Plaintiff’s Motion for Entry of Final Judgment
as to the Federation of Physicians and Dentists and Lynda Odenkirk**

Pursuant to Section 2(e)-(f) of the Antitrust Procedures and Penalties Act (“the APPA”), 15 U.S.C. § 16(e)-(f), and with the consent of defendants Federation of Physicians and Dentists and Lynda Odenkirk (Dkt. Entry # 81), the United States moves for entry of the proposed Final Judgment as to the Federation of Physicians and Dentists and Lynda Odenkirk (“Final Judgment”) (lodged on June 19, 2007 as Dkt. Entry # 81-2) in this civil antitrust action. The United States’ Certificate of Compliance, certifying that the parties have complied with all applicable provisions of the APPA and that the waiting period imposed by the APPA has expired, is being filed concurrently with this Memorandum. The previously filed Competitive Impact Statement (Dkt. Entry # 84) demonstrates that the proposed Final Judgment is in the public interest, and the United States requests that the Court enter the Final Judgment after the Court determines that its entry is in the public interest.

I. The United States and the Defendants have complied with the APPA

The APPA 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). The sixty-day comment period commenced on July 27, 2007, and ended on September 24, 2007. During this period, the United States received five comments on the proposed Final Judgment. (Dkt. Entries # 86-1, 2, 3, 4, 5). On December 17, 2007, pursuant to 15 U.S.C. § 16(d), the United States filed its Response to Comments. (Dkt. Entry # 86).

As the Certificate of Compliance with the APPA, filed by the United States concurrently with this Memorandum, demonstrates, the parties have completed all of the steps required by the APPA before the proposed Final Judgment may be entered. It is now appropriate for the Court to determine, pursuant to 15 U.S.C. § 16(e), whether the proposed Final Judgment is in the public interest and, upon so finding, then to order entry of the Final Judgment. After entry, the Court will retain jurisdiction to construe, modify, or enforce the Final Judgment.

II. The Proposed Final Judgment Satisfies the “Public Interest” Standard

The United States incorporates here by reference its previously filed Competitive Impact Statement (Dkt. Entry # 84) in which it explained how the proposed Final Judgment effectively remedies the defendants’ violation alleged in the Complaint and prevents its recurrence. The United States’ Response to Comments reviews the five comments received (which are attached to the response) and explains why the United

States believes that nothing in the comments warrants a change in the proposed Final Judgment or suggests that the proposed Final Judgment is not in the public interest.

(Dkt. Entry # 86).¹ There has been no showing that the proposed settlement, embodied in the Final Judgment, constitutes an abuse of the Department of Justice's discretion or that it is not consistent with the public interest, or is otherwise inadequate under the

¹ After the United States filed its Response to Comments, the Court received a letter dated February 12, 2008, from Michael Pierce Connair, M.D. (Dkt. Entry # 87), who had previously submitted a comment during the public comment period (Dkt. Entry # 86-2) and to which the United States had responded (Plaintiff United States' Response to Public Comments at 8-10). Dr. Connair's February 12 letter reiterates the disagreement expressed in his prior comment with the United States' decision to file this civil action. (Dkt. Entry 86-2). As the United States explained in its response to Dr. Connair's first comment, his reiterated claims are beyond the scope of an APPA proceeding and they are also incorrect as a matter of fact and law.

Dr. Connair's letter also lodges a claim of prosecutorial "corruption" against the United States, which he did not raise in his public comment, and, invoking the 2004 Amendments to the Tunney Act, asks the Court for a hearing. Dr. Connair presents no factual basis for his "corruption" charge, and thus there is no factual dispute remotely suggesting any benefit from an evidentiary hearing to determine whether entry of the proposed Final Judgment is in the public interest. The Amendments, moreover, do not require a hearing. In the Amendments, Congress clearly expressed its intent to preserve the practical benefits of consent decrees in antitrust enforcement, adding the unambiguous instruction 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). This statutory language incorporated what the Congress that enacted the Tunney Act in 1974 had intended, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, 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." *United States v. SBC Comm'ns, Inc.*, 489 F.Supp.2d 1, 11 (D.D.C. 2007).

applicable standard of review, as explained at pages 10-11 of the Competitive Impact Statement. (Dkt. Entry # 84).

III. Conclusion

For the reasons set forth in this Memorandum, the Competitive Impact Statement, and the Response to Comments, the Court should find that the proposed Final Judgment is in the public interest and grant Plaintiff's motion to enter the Final Judgment.

Dated: February 27, 2008

Respectfully submitted,

/s/ Gerald F. Kaminski
Gerald F. Kaminski
(Bar No. 0012532)
Assistant United States Attorney

Office of the United States Attorney
221 E. 4th Street, Suite 400
Cincinnati, Ohio 45202
(p) 513-684-3711
Attorney for plaintiff United States

/s/ Steven Kramer
Steven Kramer
Paul Torzilli

Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530
(p) 202-514-8349
paul.torzilli@usdoj.gov
Attorneys for plaintiff United States

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 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 CM/ECF participants:

Thomas W. Brooks
David Marvin Cook
Kimberly L. King
Robert E Rickey

Attorneys for Defendants Federation of Physicians & Dentists and Lynda Odenkirk

s/ Paul Torzilli
Paul Torzilli
Attorney for the United States of America
United States Department of Justice
Antitrust Division
1401 H Street, NW, Suite 4000
Washington, DC 20530
(p) 202-514-8349
(f) 202-307-5802
E-Mail: paul.torzilli@usdoj.gov