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.	)	

Memorandum in Support of Plaintiff's Motion for Entry of Final Judgment As To Settling Physician Defendants

Pursuant to Section 2(e)-(f) of the Antitrust Procedures and Penalties Act ("the APPA"), 15 U.S.C. § 16(e)-(f), and Fed.R.Civ.P. 54, with the consent of Defendants Dr. Warren Metherd, Dr. James Wendel, and Dr. Michael Karram, (the "Settling Physician Defendants") and without objection from the other defendants in this action, Federation of Physicians and Dentists, and Lynda Odenkirk, the United States moves for entry of the proposed Final Judgment as to Settling Physician Defendants ("Final Judgment") in this civil antitrust action. Plaintiff's 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 simultaneously with this Memorandum. The proposed Final Judgment may be entered, if the Court determines that its entry is in the public interest, and directs its entry under

Fed.R.Civ.P. 54(b), upon its express determination that there is "no just reason for delay."

I. Background

On June 24, 2005, the United States filed this antitrust action, alleging that the Settling Physician Defendants, obstetrician-gynecologist physicians ("Ob-Gyns") practicing in the Cincinnati, Ohio, participated in a conspiracy that has unreasonably restrained interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The plaintiff has further alleged that this agreement has raised fees paid by health insurers to Ob-Gyns in the Cincinnati area above the levels that would have resulted if competitive negotiations occurred. The fee increases are ultimately borne by employers and their employees.

The Complaint in this action includes the following allegations. In the spring of 2002, the Settling Physician Defendants joined the Federation of Physicians and Dentists ("Federation"), a membership organization of physicians and dentists, headquartered in Tallahassee, Florida. The Federation offers its member physicians who are economically independent private practitioners, assistance in negotiating fees and other terms in their contracts with health care insurers.

Cincinnati Ob-Gyns became interested in joining the Federation to obtain higher fees from health care insurers. The Settling Physician Defendants assisted the Federation in recruiting other Cincinnati-area Ob-Gyns as members. By June 2002, the

membership included a majority of competing Ob-Gyn physicians in the Cincinnati area.

With substantial participation by the Settling Physician Defendants, the Federation coordinated and helped implement its members' concerted demands to insurers for higher fees and related terms, accompanied by threats of contract terminations. From September 2002, through the fall of 2003, the Settling Physician Defendants communicated with Federation employees, each other, and other Cincinnati-area Ob-Gyn Federation members to assist the Federation in coordinating members' contract negotiations with health care insurers. The Settling Physician Defendants assisted the Federation in developing a strategy for the Federation to intensify members' pressure on health insurers to renegotiate their contracts, informed each other and other physicians about their own practice group's negotiations, worked primarily through the Federation to inform Federation members about steps to take to coordinate their negotiations, and led a campaign for Federation members to endorse insurers that agreed to meet all Federation members' fee demands.

On June 24, 2005, the United States lodged the proposed Final Judgment, along with a Stipulation signed by the United States and the Settling Physician Defendants (Dkt. Entry #4). In the Stipulation, the United States and the Settling Physician Defendants agreed to entry of the Final Judgment following compliance with the APPA. Counsel for the other defendants in this action, Federation of Physicians and Dentists and Lynda Odenkirk, has authorized Plaintiff to represent to the Court that such defendants do not

oppose entry of the proposed Final Judgment. The Federation of Physicians and Dentists, and Lynda Odenkirk are not parties to the settlement.

The proposed Final Judgment enjoins the Settling Physician Defendants from participating in any agreement with competing physicians concerning any health care payer contract, or the provision of any contract or negotiating consulting services. The Settling Physicians are also prevented from using the Federation's consulting or negotiation services. The proposed Final Judgment also prohibits certain communications between any Settling Physician and any competing physician. The Competitive Impact Statement (Dkt. Entry #17) explains the basis for the Complaint, and sets forth the reasons why entry of the proposed Final Judgment will be in the public interest. The Stipulation provides that the proposed Final Judgment may be entered by the Court after completion of the procedures required by the APPA.

When multiple defendants are involved in a civil action, a Court may direct entry of a final judgment as to less than all defendants if the Court expressly finds "there is no just reason for delay." Fed.R.Civ.P. 54(b). The Court must also expressly direct the entry of such judgment. *Id.*

II. Plaintiff and the Settling Defendants Have Complied with the APPA

The APPA prescribes a sixty-day period for the submission of comments on the proposed Final Judgment, following completion of the requisite publications. 15 U.S.C. § 16(b). The sixty-day comment period commenced on August 18, 2005, and ended on

October 16, 2005. During this period, the United States received no comments on the proposed Final Judgment.

As the Certificate of Compliance filed by the United States simultaneously with this Memorandum demonstrates, the settling parties have completed all procedures required by the APPA for entry of the proposed Final Judgment. It is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e), and to enter the Final Judgment. The Court will retain jurisdiction to construe, modify or enforce the Final Judgment.

III. The Proposed Final Judgment Satisfies the "Public Interest" Standard

Before entering the proposed Final Judgment, the Court must determine that the Judgment "is in the public interest." In making this determination, the Court may consider:

> (1) 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, and any other considerations bearing upon the adequacy of such judgment; and
>
> (2) the impact of entry of such judgment 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).

The APPA permits a Court in making a public-interest determination to consider, among other things, the relationship between the remedy secured and the specific

allegations set forth in the complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995). In conducting this inquiry, "[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."[1] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508 at 71,980 (W.D. Mo. 1977).

Accordingly, in assessing the adequacy of the relief secured by the decree, a Court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v.*

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[1] 119 Cong. Rec. 24,598 (1973). *See United States v. Gillette Co.*, 406 F.Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and, where public comments have been filed, the Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), such procedures are discretionary. A Court need not invoke any of them unless it believes that the proposed Final Judgment raises significant issues and that further proceedings would aid the Court in resolving those issues. *See* H.R. Rep. No. 93-1463 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6539.

Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)). *See also Microsoft*, 56 F.3d at 1458. As another Court of Appeals observed,

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

"[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of the public interest.' "[3]

Plaintiff incorporates by reference here those portions of its previously filed Competitive Impact Statement (pages 4-6) in which the United States explained how the proposed Final Judgment effectively remedies the Settling Physician Defendants' violation alleged in the Complaint and prevents its recurrence. The public, including affected competitors and customers, has had an opportunity to comment on the

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[2] *Bechtel*, 648 F.2d at 666 (citations omitted) (emphasis added). *See BNS*, 858 F.2d at 462; *United States v. Nat'l Broadcasting Co.*, 449 F.Supp. 1127, 1143 (C.D. Cal. 1978); *Gillette*, 406 F.Supp. at 716. *See also Microsoft*, 56 F.3d at 1461 (district court to decide whether "the remedies [obtained in the decree] were not so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

[3] *United States v. American Tel. and Tel. Co.*, 552 F.Supp. 131, 151 (D.D.C. 1982), *aff'd sub nomine Maryland v. United States*, 460 U.S. 1001 (1983) (quoting *Gillette Co.*, 406 F.Supp. at 716). *Accord United States v. Alcan Aluminum, Ltd.*, 605 F.Supp. 619, 622 (W.D. Ky. 1985).

proposed Final Judgment as required by statute. No comments were received. 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.

IV. There Is No Just Reason for Delay in Entering the Proposed Final Judgment

Since the proposed Final Judgment applies to less than all defendants in this action, and two defendants remain active litigants, Fed.R.Civ.P. 54(b) governs the treatment of the proposed Final Judgment. Under Rule 54(b), the Court may direct entry of the Final Judgment as to less than all parties upon concluding "there is no just reason for delay." The Court must also make "an express direction for the entry of judgment." *Id.* The discretion of the Court whether to direct the entry of a final judgment under Rule 54(b) "is to be exercised 'in the interest of sound judicial administration.' "*Curtiss-Wright v. General Electric*, 446 U.S. 1, 8 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956)). When considering whether there is no just reason for delay in directing a judgment under Rule 54(b), courts must attempt to avoid permitting piecemeal appeals. *Curtiss-Wright*, 446 U.S. 1, 8 (1980); *Akers v. Alvey*, 338 F.3d 491, 495 (6th Cir. 2003).

The applicable considerations here weigh strongly in favor of directing the entry of the proposed Final Judgment under Rule 54(b). The proposed Final Judgment resolves the claims pleaded in the Complaint against the Settling Physician Defendants, and creates no risk of piecemeal appeals by the Settling Physician Defendants because no party to the consent decree has sought to preserve a right to appeal. *See Laczay v. Ross*

Adhesives, 855 F.2d 351, 354 (6th Cir. 1988) ("While it is possible for a party to consent to a judgment and still preserve his right to appeal, he must reserve that right unequivocally, as it will not be presumed." (quoting *Coughlin v. Regan*, 768 F.2d 468, 470 (1st Cir. 1985))).

Moreover, directing the entry of the proposed Final Judgment, which will effectively terminate the Settling Physician Defendants' participation as parties in this action, will enable them to reduce their litigation expenses as the action proceeds with the remaining parties. Entry of the proposed Final Judgment under Rule 54(b) also advances the underlying remedial objectives of the consent decree, and is consistent with previous judicial decisions. The proposed Final Judgment, among other things, enjoins the Settling Physician Defendants from engaging in activity that gave rise to allegations pleaded in the Complaint. Entry of the proposed Final Judgment will help prevent the recurrence of the alleged illegal conduct. Finally, in previous cases, district courts have directed entry under Rule 54(b) of consent decrees involving less than all parties. *See, e.g., United States v. Cannons Eng'g, et al.*, 720 F.Supp. 1027 (D. Mass. 1989) (CERCLA case); *United States v. Bristol-Myers, et al.*, 82 F.R.D. 655 (D.D.C. 1979).

Thus, there is no just reason to delay the entry of the proposed Final Judgment under Rule 54(b).

V. Conclusion

For the reasons set forth in this Memorandum and in the Competitive Impact Statement, the Court should find that the proposed Final Judgment is in the public interest. Further, there is no just reason to delay the entry of the judgment as a final judgment under Fed.R.Civ.P. 54(b). Accordingly, the Court should enter the Order Plaintiff will submit to Chambers as prescribed by the CM/ECF Manual, which expressly directs entry of the Final Judgment.

Dated: November 9, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2005, I electronically filed the foregoing Memorandum in Support of Plaintiff's Motion for Entry of Final Judgment As To Settling Physician Defendants with the Clerk of the Court using CM/ECF system which will send notification of such filing to G. Jack Donson, Esq. (Trial Attorney for Defendant Dr. Michael Karram), and Donald J. Mooney, Jr., Esq. (Trial Attorney for Defendant Federation of Physicians and Dentists, and Defendant Lynda Odenkirk). I further certify that I have caused the document to be sent via electronic mail (or facsimile as indicated below) and first-class U.S. Mail, postage prepaid, to the following non-CM/ECF participants:

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