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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. CV 96-121-M-CCL
	)	
GENERAL ELECTRIC COMPANY,	)	
	)	
Defendant.	)	
	)	

COMPETITIVE IMPACT STATEMENT

This Competitive Impact Statement ("CIS") sets forth the information necessary to enable the Court and the public to evaluate the proposed consent judgment that the parties have filed in this case, a Final Judgment that would terminate the litigation. The CIS, which explains why the proposed Judgment is in the public interest, is filed pursuant to the requirements of the Antitrust Procedures and Penalties Act of 1974 ("APPA"), 15 U.S.C. § 16. The APPA subjects proposed consent judgments in government antitrust cases to public scrutiny and comment, after which the Court may enter the judgment if it finds that it is in the public interest.

I.

NATURE AND PURPOSE OF THE PROCEEDINGS

The United States filed the Complaint in this civil antitrust suit on August 1, 1996. The Complaint alleged that GE has entered into agreements with hospitals in the United States that illegally restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and that constituted a combination to monopolize in violation of Section 2 of that act, 15 U.S.C. § 2. The agreements alleged to be illegal are provisions of license agreements under which the hospitals have been granted the right to use specialized diagnostic software and other tools and manuals developed by GE ("advanced service materials") on the GE medical imaging equipment owned by the hospitals. The advanced service materials enable service personnel to more quickly calibrate and repair the GE medical imaging equipment. Under the agreements challenged in this case, the licensee hospitals agreed not to compete with GE in the servicing of any medical imaging equipment or medical equipment, in exchange for the right to use the valuable advanced service materials.

GE is the world's leading manufacturer of medical imaging equipment (such as magnetic resonance imagers, computed tomography scanners, and x-ray machines) and is the leading servicer of such machines in the United States. Hospitals with in-house service capabilities are actual or potential competitors of GE in the servicing of medical imaging equipment and other medical equipment. The agreements harmed competition by foreclosing actual and potential competition from offering service. To remedy the competitive harm done by the illegal agreements, the Complaint asks the Court to declare the agreements to be unlawful and to enter an injunction barring GE from enforcing or renewing the illegal agreements.

The government and GE have reached a proposed settlement that eliminates the need for a trial in this case. The settlement terms are found in the parties' proposed Final Judgment. The parties have stipulated that the Court may enter this Judgment after compliance with the APPA, unless the government first withdraws its consent. The Court's entry of the Judgment will terminate this civil action against GE, except that the Court will retain jurisdiction over any future proceedings to construe, modify, or enforce the judgment, or to punish violations of its provisions. Entry of the Judgment would not constitute evidence against, or an admission by, any party with respect to any issue of fact or law involved in the case and is conditioned upon the Court's finding that its entry is in the public interest, as provided by Section 2(e) of the APPA, 15 U.S.C. § 16(e).

II.

DESCRIPTION OF THE PRACTICES GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

GE sells a wide variety of medical imaging equipment. Hospitals, clinics, and doctors use such equipment to create images of the body's internal structure. Complaint at ¶ 4. Such equipment is essential to the diagnosis of numerous injuries and illnesses. Id. at ¶ 16. Imaging equipment, like other medical equipment, requires regular, high-quality service. Such service ensures that the equipment functions accurately and reliably. Id. at ¶ 1. Some hospitals employ and retain service engineers "in house" to service the hospital's medical equipment. Id. at ¶¶ 3, 22. Other hospitals hire outside parties such as GE to service their imaging equipment. GE services many types of medical equipment, including equipment manufactured by other companies. Id. at ¶ 20.

GE has developed advanced service materials that enable service engineers to service certain GE imaging equipment much more quickly than otherwise possible. Id. at ¶ 27. GE

makes the advanced service materials available to hospitals with in-house service groups. Such hospitals may be actual or potential competitors to GE in servicing other health care providers' medical equipment. Id. at ¶¶ 3, 23, 31.

To gain access to GE's advanced service materials, however, hospitals licensing GE's advanced service materials have had to agree not to compete with GE in servicing third-parties' medical imaging equipment or other medical equipment. The specific terms of this agreement changed somewhat over time. The 1988 to 1992 version of the license agreement for the advanced service materials restricted the hospital licensee from servicing any other person's medical imaging equipment; the 1992 to 1996 version was broader, restricting the licensee from servicing any other person's medical equipment (which would include non-imaging medical equipment); and the 1996 to present version — adopted in the face of the government's investigation — is narrower, restricting the licensee from servicing any other person's GE diagnostic imaging equipment that is of the same type (i.e., modality) as the model(s) for which the hospital has licensed advanced service materials from GE. More than 500 potentially competing hospitals have agreed to these restrictions. Id. at ¶¶ 32, 33, 35.

The non-compete agreements are not ancillary to any legitimate business interest that GE had in licensing advanced service materials, particularly since they were not reasonably necessary to prevent the hospitals from using the advanced service materials on third-party equipment, in a manner not authorized by the license agreements. As a result of software security procedures adopted by GE, the advanced service materials will only work on the specific GE machine to which the license agreement relates. Furthermore, the advanced service materials are model specific, i.e., the advanced service materials for one model of GE imaging equipment cannot be used on another model, even if the two models are of the same "modality"

(e.g., if both are GE CT scanners), and cannot be used on other manufacturers' equipment. Id. at ¶ 30. Given the machine and model-specific nature of the software, the restrictions imposed by the license agreements on third-party service are unrelated to any legitimate interest GE has in preventing the unauthorized use of its software. Id. at ¶ 8.

By exacting a commitment from hospitals not to provide any outside service in competition with GE in exchange for the advanced service materials, the complaint alleged that GE has harmed competition for the service of medical equipment. Id. at ¶¶ 38-41. Hospitals have been forced to abandon their efforts to provide medical equipment service to other nearby health care facilities, id. at ¶¶ 31, 39, and other hospitals have, consequently, paid supra-competitive prices for equipment service and purchased less service than they otherwise would have paid. Id. at ¶¶ 40, 43.

GE's license restrictions have also reduced competition in the sale of medical imaging equipment. Health care facilities need prompt and affordable repairs for their imaging equipment. Because of the cost and delays of travel, proximity to a service provider is an important consideration when a hospital is considering the purchase of medical imaging equipment. Hospitals are reluctant to purchase a piece of imaging equipment unless someone near their facility can service it. Id. at ¶¶ 17, 19.

Because manufacturers cannot economically place their own service engineers in areas where they do not have a large installed base, they need someone else in those areas who is qualified to service their equipment. Id. at ¶ 19. Hospitals with in-house service departments could provide such service for a given manufacturer's equipment. Id. at ¶¶ 3, 39. But, because GE exacted agreements from hospitals not to provide third-party service, the complaint alleged that GE has disadvantaged its equipment manufacturing competitors. Id. at ¶ 44. As a result,

GE has restrained health care facilities in Montana and similar areas from purchasing imaging equipment from manufacturers other than GE, even though the equipment may have better suited the facilities' needs. Id. at ¶¶ 42, 45.

In addition to alleging that GE's license agreements violated Section 1 for the reasons set forth above, the complaint alleged that the license agreements for advanced service materials between GE and the hospitals constituted a combination between GE and the hospitals that had the specific intent of excluding competition in violation of Section 2 of the Sherman Act. Id. at ¶ 47. Shortly after the complaint was filed, GE moved to dismiss both the Section 1 and Section 2 claims. The Court denied GE's motion as to the government's Section 1 claims; however, the Court dismissed the Section 2 claims because the complaint did not allege that the hospitals shared GE's intent to monopolize the service markets for medical equipment. Thus, only the Section 1 claims remain in the case. The proposed settlement resolves those claims.

III.

EXPLANATION OF THE PROPOSED CONSENT JUDGMENT

The proposed Final Judgment sets forth the conduct that GE is prohibited from engaging in, certain conduct that GE may engage in without violating the Judgment, the compliance program that GE must follow, and the procedures available to the government to determine and secure compliance with the Final Judgment.

A. Prohibited Conduct

Section IV(A) of the Final Judgment prohibits GE from entering into or enforcing any agreement in conjunction with the licensing of advanced service materials or related training whereby (a) the end-user represents that it has not, does not, or will not perform third-party medical equipment service or (b) the end-user is prevented or restrained from providing third-

party service. The Judgment defines third-party service to mean the service of any medical equipment in the United States not owned, leased, or operated by the party performing the service. Section IV(B) prohibits GE from requiring that a potential licensee give GE information regarding that person's current or prospective practice with regard to the provision of third-party service. Section IV(C) enjoins GE from stating publicly or to any end-user of medical equipment that GE has a policy or general practice of refusing to license advanced service materials for medical equipment, or of refusing to provide training thereon, because an end-user offers third-party medical equipment service. Section IV(D) prohibits GE from offering to sell or license advanced service materials to end-users of medical equipment on terms that vary depending on whether the end-user has provided, does provide, or will provide third-party medical equipment service.

B. Limiting Conditions

Section V of the Final Judgment sets forth certain conduct that the Judgment does not prohibit. Section V clarifies that the Judgment does not prohibit GE from refusing to license its advanced service materials to independent service organizations or to any other person who is not an end-user of GE medical equipment. The Final Judgment also does not limit GE's pricing discretion as long as its pricing does not otherwise violate the Judgment. Section V also makes clear that the Final Judgment does not prohibit GE from using site-specific or equipment-specific licensing of its advanced service materials or from limiting the use of the licensed materials to an end-user's full-time employees. The Final Judgment also does not prohibit GE from implementing security procedures intended to prevent the misappropriation or unauthorized use of its advanced service materials.

The limiting conditions are consistent with the relief sought in the Complaint. The Complaint alleged that GE had used its advanced service materials to induce hospitals with in-house service capability to agree not to compete with GE in the servicing of medical equipment. The Complaint did not allege that GE's refusal to license its intellectual property to any or all persons who might seek such licenses violated the antitrust laws, and the Final Judgment is silent as to that conduct.

C. Defendant's Compliance Program

Section VI of the proposed Final Judgment requires GE to distribute copies of the Judgment to certain employees and to provide notice of the change in its licensing policy to the licensees of its advanced service materials. Within seventy-five (75) days of its entry, GE must certify that it has distributed all such materials. Finally, under Section VIII of the proposed Final Judgment, GE will make its records and personnel available to the Justice Department upon reasonable notice in order to determine or secure its compliance with the Judgment.

D. Scope of the Proposed Final Judgment

The proposed Final Judgment expressly provides in Section II that its provisions apply to GE, its officers, directors, agents, employees, successors, and assigns, and to all other persons in active concert or participation with any of them who have received actual notice of the terms of the Judgment. Section IX provides that the proposed Final Judgment will expire on the tenth anniversary of its entry.

E. Effect of the Proposed Final Judgment on Competition

Health care providers in the United States spend more than $3 billion a year for medical equipment service. The Department's lawsuit sought to ensure access for these consumers to a wider choice of medical-equipment service providers across the country by preventing GE from

using its advanced service materials to induce hospitals to agree not to compete with GE in the provision of third-party service on medical equipment. The proposed Final Judgment achieves this goal. It should enable some hospitals with in-house service capability to initiate or expand third-party service to other users of medical equipment, thereby increasing actual and potential competition in the markets for medical equipment service.

Entry of the Judgment should also increase the number of local service providers that are available to act as service providers for medical equipment manufacturers who lack a sufficient installed base in an area to support one of their own field service engineers. By making such manufacturers' equipment more competitive from a service perspective, the Judgment should lead to increased competition among manufacturers of medical equipment to the benefit of purchasers of such equipment.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

After entry of the proposed Final Judgment, any person who has been harmed by the alleged violation will retain the same right to sue for monetary damages and any other legal and equitable remedies that such person had before its entry. A person may not use the Judgment, however, as prima facie evidence in any subsequent private litigation, pursuant to Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a).

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED JUDGMENT

The parties have stipulated that the Court may enter the proposed Final Judgment after compliance with the APPA, provided that the United States has not withdrawn its consent. The

APPA conditions that entry upon the Court's finding that the proposed Final Judgment is in the public interest. 15 U.S.C. § 16(e). Any person who wishes to comment on the proposed Judgment may, for a sixty-day period subsequent to the publishing of this document in the Federal Register, submit written comments. All such comments must be addressed to the United States Department of Justice, Antitrust Division, Attention: Ms. Mary Jean Moltenbrey, 325 Seventh Street, N.W., Suite 300, Washington, D.C. 20530. The government will evaluate all comments submitted to determine whether any reason exists for the withdrawal of its consent to the proposed Final Judgment. The government will file any such comments and its response to them with the Court and also publish them in the Federal Register.

The proposed Final Judgment provides that the Court will retain jurisdiction over this action in order to permit any of the parties to apply for such orders as may be necessary or appropriate to construe or modify the judgment, to enforce compliance with it, or to punish any violations of its provisions.

VI.

ALTERNATIVE TO THE PROPOSED JUDGMENT

The government's alternative to the proposed final judgment is a trial on the merits. Because the government considers the final judgment to remedy fully the anticompetitive effects of GE's agreements not to compete, it does not believe that a trial would result in any further relief.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the government be subject to a sixty-day comment period, after which the Court determines whether entry of the proposed Final Judgment "is in the public interest." In making this determination, the Court may consider:

> (1) the competitive impact of the judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of the judgment;
>
> (2) the impact of entry of the judgment upon the public generally and upon 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 Court of Appeals for the D.C. Circuit has held that the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's 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, 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." 119 Cong. Rec. 24598 (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 the government's response to the comments filed pursuant to the APPA. Although the APPA authorizes the use of

additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

The Court of Appeals for this Circuit has held that a district court judge, in making the public interest determination, should not engage "in an unrestricted evaluation of what relief would best serve the public." Rather

> [t]he 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. See United States v. National Broadcasting Co., 449 F.Supp. 1127 (C.D.Cal. 1978). 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." Id. At 1143 (quoting United States v. Gillette Co., 406 F.Supp. 713, 716 (D.Mass. 1975)). More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

United States v. Bechtel Corporation, 648 F.2d 660, 666 (9th Cir. 1981).

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[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 public interest.' " United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), (quoting Gillette Co., 406 F. Supp. at 716 (citations omitted)); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII.

DETERMINATIVE MATERIALS
AND DOCUMENTS

The APPA requires that the government file with the Court any documents that the government considers to have been determinative in formulating the proposed Final Judgment. 15 U.S.C. § 16(b); see Massachusetts School of Law v. United States, 118 F.3d 776, 784-85 (D.C.Cir. 1997). The government considered no materials or documents determinative in formulating the proposed Final Judgment. It therefore files no such documents.

Dated: July 13, 1998

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

By: /s/

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