

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF ARIZONA

3 United States of America and the State of
4 Arizona,

5 Plaintiffs,

6 v.

7 Arizona Hospital and Healthcare
8 Association and AzHHA Service
9 Corporation,

10 Defendants.

CASE NO. CV07-1030-PHX

FINAL JUDGMENT

11 **FINAL JUDGMENT**

12
13 WHEREAS, Plaintiffs, United States of America and the State of Arizona, filed their
14 Complaint on May 22, 2007, alleging Defendants' violation of Section 1 of the Sherman Act,
15 15 U.S.C. § 1, and the State of Arizona has also alleged Defendants' violated Section 44-1402
16 of Arizona's Uniform State Antitrust Act, A.R.S. § 44-1402, and Plaintiffs and Defendants, by
17 their respective attorneys, have consented to the entry of this Final Judgment without trial or
18 adjudication of any issue of fact or law, and without this Final Judgment constituting any
19 evidence against or admission by Defendants, or any other entity, as to any issue of fact or law;

20 AND WHEREAS, the essence of this Final Judgment is the prohibition of certain
21 agreements on bill rates and competitively sensitive contract terms, and actions coordinating and
22 supporting those agreements, by the Arizona Hospital and Healthcare Association, its subsidiary
23 the AzHHA Service Corporation, and their participating member hospitals;

24 NOW THEREFORE, before any testimony is taken, without trial or adjudication of any
25 issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND
26 DECREED:
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- 1 H. "Per Diem Registry" means the Registry Program used by Participating Hospitals for
2 the purchase of Temporary Nursing Personnel on an ad hoc or as needed basis,
3 including both the Northern and Southern regions of the Registry Program.
- 4 I. "Program Contract" means any contract used by the Defendants to set the terms and
5 conditions of the contractual relationship between Participating Hospitals and
6 Participating Agencies for the Per Diem Registry and the Travel Registry.
- 7 J. "Registry Program" means the program for the purchase of Temporary Nursing
8 Personnel through the Per Diem Registry or the Travel Registry operated by the
9 AzHHA Service Corporation, or any such program operated by AzHHA or the
10 AzHHA Service Corporation in the future.
- 11 K. "Temporary Nursing Personnel" means registered nurses, licensed practical nurses,
12 certified nurse assistants, operating room technicians, behavioral health technicians,
13 and sitters whom offer their services on a temporary basis.
- 14 L. "Travel Registry" means the Registry Program used by Participating Hospitals for
15 the purchase of Temporary Nursing Personnel for thirteen weeks or longer.

16 **III. Applicability**

17 This Final Judgment applies to AzHHA, the AzHHA Service Corporation, and all other
18 persons in active concert or participation with any of them who receive actual notice of this Final
19 Judgment by personal service or otherwise.

20 **IV. Prohibited Conduct**

- 21 A. The Defendants shall not include in any Program Contract any provision setting,
22 prescribing, or imposing, directly or indirectly:
- 23 1. rates paid by Participating Hospitals to Participating Agencies, including the
24 process or manner by which Participating Agencies submit, negotiate, or
25 contract for rates with Participating Hospitals;
 - 26 2. a common rate structure, including shift differentials;
 - 27 3. payment terms between Participating Hospitals and Participating
28 Agencies;

4. any cancellation policy or penalty for cancellation by Participating Hospitals or Participating Agencies;
5. the payment of bonuses by Participating Hospitals or Participating Agencies; or,
6. any requirement or encouragement of Participating Hospitals to give priority to or deal with Participating Agencies, including any minimum usage requirements of Participating Hospitals or Participating Agencies.

B. The Defendants shall not:

1. impose on, encourage, facilitate, induce, or require, directly or indirectly, Participating Hospitals to (a) use any Registry Program or Participating Agencies exclusively, or grant right of first refusal to any Registry Program or Participating Agencies, (b) boycott, exclude, refuse to deal with, or discriminate against Non-Participating Agencies, or (c) meet any minimum requirements for use of Participating Agencies; except that the Defendants may promote features of the Registry Program to Participating Hospitals, Participating Agencies, and other persons, provided such promotion does not include rebates or other financial incentives for participation;
2. require, encourage, or induce Participating Agencies to deal with Participating Hospitals through the Registry Program;
3. encourage, facilitate, induce, participate in, or undertake any understanding or agreement among AzHHA members or Participating Hospitals (a) to adopt the Program Contract or participate in the Registry Program, or (b) regarding Competitively Sensitive Contract Terms;
4. provide any rebates or other direct financial incentives to Participating Hospitals to encourage or increase their participation in

1 the Registry Program or use of Participating Agencies, except that, if
2 the Defendants change the Registry Program so that fees are paid by
3 Participating Hospitals rather than by Participating Agencies, then the
4 fee structure may recognize Participating Hospitals' volume of usage
5 of the Registry Program;

- 6 5. receive, gather, or collect Competitively Sensitive Contract Terms,
7 except for such Competitively Sensitive Contract Terms as are
8 necessary to operate the Registry Program, provided access to the
9 Competitively Sensitive Contract Terms obtained is restricted to those
10 AzHHA employees performing ministerial tasks for the Registry
11 Program;
- 12 6. communicate, convey, announce, share, or disseminate to any
13 AzHHA member, Participating Hospital, or Participating Agency, the
14 Competitively Sensitive Contract Terms of any other AzHHA
15 member, Participating Hospital or Participating Agency;
- 16 7. select, or consider selection of, agencies for participation in the
17 Registry Program, directly or indirectly, on the basis of Competitively
18 Sensitive Contract Terms;
- 19 8. select, or consider selection of, agencies for participation in the
20 Registry Program based on the amount of hours provided to
21 Participating Hospitals through the Registry Program before or after
22 the entry of this Final Judgment, except that the Defendants may
23 establish a required annual minimum volume of commerce, measured
24 by the aggregate fees paid to the Defendants by a Participating
25 Agency, which agencies must meet to continue their participation in
26 the Registry Program, provided that those requirements are uniformly
27 applied to all Participating Agencies and are based on the objective
28 costs of operating the Registry Program; or,

- 1 9. communicate, convey, announce, share, or disseminate information
2 regarding Registry Program usage by Participating Hospitals or
3 Participating Agencies, except that the Defendants may tabulate and
4 disseminate the total annual usage of the Registry Program by all
5 Participating Hospitals.

6 **V. Mandated Conduct**

7 The Final Judgment is effective upon entry, except that the Defendants shall
8 have ninety days (90) days from entry to amend the Program Contract to comply
9 with Section IV(A)(1)-(6) of this Final Judgment.

10 **VI. Permitted Conduct**

11 A. Subject to Sections IV and V of this Final Judgment, the Program
12 Contract may:

- 13 1. establish definitions of nurse types, e.g., “specialty” and “non-
14 specialty”;
15 2. establish payment terms between the Registry Program and
16 Participating Agencies, including any participation fees;
17 3. establish a credentialing program, including auditing and file
18 retention requirements required of Participating Agencies;
19 4. establish requirements for personnel hired from Participating
20 Agencies, including background checks, drug panel screens,
21 and prior experience;
22 5. establish insurance and indemnification requirements to be met
23 by Participating Agencies; and
24 6. allow Participating Hospitals and Participating Agencies to
25 independently and individually negotiate and reach agreement
26 on Competitively Sensitive Contract Terms.

1 B. The Defendants may:

- 2 1. solicit information and views from Participating Hospitals
3 about the Registry Program or the Program Contract, so long as
4 the Defendants do so consistently with Sections IV and V of
5 this Final Judgment, and do not share any Participating
6 Hospital's information or views about any Competitively
7 Sensitive Contract Terms with any other Participating Hospital;
8 2. establish the terms of the Program Contract, and create
9 mechanisms for its administration, consistently with Sections
10 IV, V and VI(A) of this Final Judgment;
11 3. meet with Participating Hospitals to choose criteria for
12 selecting Participating Agencies, provided those criteria
13 conform with the requirements given in Section IV(A) of this
14 Final Judgment and the meetings are conducted in accordance
15 with the prohibitions found in Section IV(B) of this Final
16 Judgment;
17 4. communicate with Participating Hospitals the results of audits
18 or file reviews performed on Participating Agencies; and
19 5. communicate to Participating Hospitals or Participating
20 Agencies any information or message from a Participating
21 Hospital or Participating Agency, provided that the
22 communication does not otherwise violate Section IV of this
23 Final Judgment.

24 C. Nothing in this Final Judgment shall prohibit AzHHA or its members,
25 the AzHHA Service Corporation, Participating Agencies, or
26 Participating Hospitals, from advocating or discussing, in accordance
27 with the doctrine established in Eastern Railroad Presidents
28 Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), United

1 Mine Workers v. Pennington, 381 U.S. 657 (1965), and their progeny,
2 any legislative, judicial, or regulatory actions, or other governmental
3 policies or actions.

4 **VII. Antitrust Compliance and Notification**

- 5 A. AzHHA shall establish an Antitrust Compliance Office, including
6 appointment of an Antitrust Compliance Officer (“Antitrust
7 Compliance Officer”) within thirty (30) days of entry of this Final
8 Judgment, and a successor within thirty (30) days of a predecessor’s
9 vacating the appointment. Each Antitrust Compliance Officer
10 appointed shall not have had previous involvement with the Registry
11 Program prior to the entry of this Final Judgment.
- 12 B. Each Antitrust Compliance Officer appointed pursuant to Section
13 VII(A) shall be responsible for establishing and implementing an
14 antitrust compliance program for the Defendants and ensuring the
15 Defendants’ compliance with this Final Judgment, including the
16 following:
- 17 1. The Defendants shall furnish a copy of this Final Judgment (a)
18 within thirty (30) days of entry of this Final Judgment to each
19 of Defendants’ directors and officers, and each employee of the
20 Defendants who is involved in the Registry Program, and (b)
21 within thirty (30) days of their appointment to each person who
22 succeeds to any such position.
 - 23 2. Within thirty (30) days of furnishing a copy of this Final
24 Judgment to any person pursuant to Section VII(B)(1), the
25 Defendants shall obtain from such person a signed certification
26 that the person has read, understands, and agrees to comply
27 with the provisions of this Final Judgment, to the best of his/her
28 knowledge at the time the certification is made is not aware of

1 any violation of this Final Judgment by Defendants that has not
2 already been reported to the Antitrust Compliance Officer, and
3 understands that failure to comply with this Final Judgment
4 may result in conviction for criminal contempt of court.

5 3. Upon learning of any potential violation of any provision of this
6 Final Judgment, the Antitrust Compliance Officer shall
7 forthwith take appropriate action to terminate or modify the
8 activity so as to comply with this Final Judgment. Any such
9 action shall be reported in the annual compliance report
10 required by Section VII(B)(4) of this Final Judgment.

11 4. For each year during the term of this Final Judgment, on or
12 before the anniversary date of this Final Judgment, the Antitrust
13 Compliance Officer shall file with the Plaintiffs a report as to
14 the fact and manner of its compliance with the provisions of
15 this Final Judgment.

16 5. The Defendants shall furnish a copy of this Final Judgment to
17 each current Participating Hospital and current Participating
18 Agency, and shall in the future furnish a copy of this Final
19 Judgment to new Participating Hospitals or Participating
20 Agencies within thirty (30) days of their agreement to the
21 Program Contract. The Defendants shall require all
22 Participating Hospitals to furnish a copy of this Final Judgment
23 to managerial employees involved in hiring or contracting
24 Temporary Nursing Personnel within thirty (30) days of entry
25 of this Final Judgment or of succeeding to the position. Within
26 forty-five (45) days of entry of this Final Judgment, the
27 Defendants shall require each Participating Hospital to certify
28 that it has received a copy of this Final Judgment and has

1 furnished a copy of this Final Judgment to managerial
2 employees then involved in temporary nurse hiring or
3 contracting.

4 **VIII. Compliance Inspection**

- 5 A. For purposes of determining or securing compliance with this Final
6 Judgment, or of determining whether this Final Judgment should be
7 modified or vacated, and subject to any legally recognized privilege,
8 from time to time authorized representatives of the Plaintiffs,
9 including consultants and other persons retained by the United States
10 or the State of Arizona, shall, upon written request of an authorized
11 representative of the Assistant Attorney General in charge of the
12 Antitrust Division, or the Attorney General of the State of Arizona,
13 and on reasonable notice to the Defendants be permitted:
- 14 1. Access during the Defendants' office hours to inspect and copy,
15 or at the option of the Plaintiffs, to require the Defendants to
16 provide copies of all documents, as defined by Rule 34 of the
17 Federal Rules of Civil Procedure, in the possession, custody, or
18 control of the Defendants, relating to any matters contained in
19 this Final Judgment; and
 - 20 2. To interview, either informally or on the record, the
21 Defendants' officers, employees, agents, or other
22 representatives, who may have their individual counsel present,
23 regarding such matters. Any interview shall be subject to the
24 reasonable convenience of the interviewee and without restraint
25 or interference by the Defendants.
- 26 B. Upon the written request of an authorized representative of the
27 Assistant Attorney General in charge of the Antitrust Division, or the
28 Attorney General of the State of Arizona, the Defendants shall submit

1 written reports and interrogatory responses, under oath if requested,
2 relating to any of the matters contained in this Final Judgment, as may
3 be requested.

4 C. No information or documents obtained by the means provided in this
5 section shall be divulged by the United States to any person other than
6 an authorized representative of the executive branch of the United
7 States, except in the course of legal proceedings to which the United
8 States is a party (including grand jury proceedings), or for the purpose
9 of securing compliance with this Final Judgment, or as otherwise
10 required by law.

11 D. No information or documents obtained by the means provided in this
12 section shall be divulged by the State of Arizona to any person other
13 than an authorized representative of the executive branch of the State
14 of Arizona, except in the course of legal proceedings to which the
15 State of Arizona is a party (including grand jury proceedings), or for
16 the purpose of securing compliance with this Final Judgment, or as
17 otherwise required by law.

18 E. When information or documents are furnished by the Defendants to
19 the Plaintiffs, if the Defendants represent and identify in writing the
20 material in any such information or documents to which a claim of
21 protection may be asserted under Rule 26(c)(7) of the Federal Rules of
22 Civil Procedure, and the Defendants mark each pertinent page of such
23 material, "Subject to claim of protection under Rule 26(c)(7) of the
24 Federal Rules of Civil Procedure," then the Plaintiffs shall give
25 Defendants ten (10) calendar days notice prior to divulging such
26 material in any legal proceeding other than a grand jury proceeding.
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IX. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

X. Term

This Final Judgment shall expire ten (10) years after the date of its entry.

XI. Public Interest Determination

The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States’ response to comments. Based upon the record before this Court, which includes the Competitive Impact Statement and any comments and response to comments filed with this Court, entry of this Final Judgment is in the public interest.