UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLESTON AREA MEDICAL CENTER, INC. and ST. MARY'S MEDICAL CENTER, INC.,

Defendants.

Case No.: 2:16-cv-03664-DLT

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On April 14, 2016, the United States filed a civil antitrust Complaint alleging that Defendants Charleston Area Medical Center ("CAMC") and St. Mary's Medical Center ("St. Mary's") violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleges that CAMC and St. Mary's agreed to unlawfully allocate territories for the marketing of competing healthcare services and to limit competition between themselves. Specifically, according to the Complaint, CAMC and St. Mary's entered into an agreement under which they agreed not to advertise on billboards or in print in each others' home counties in West Virginia. The

agreement eliminated a significant form of competition to attract patients and overall substantially diminished competition to provide healthcare services. Defendants' agreement to allocate territories for marketing is *per se* illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1.

With the Complaint, the United States filed a Stipulation and proposed Final Judgment that, as explained more fully below, enjoins Defendants from (1) agreeing with any healthcare provider to prohibit or limit marketing or to allocate any service, customer, or geographic market or territory, and (2) communicating with each other about marketing, subject to narrow exceptions.

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS

A. Background on Defendants and their Marketing Activities

Defendants CAMC and St. Mary's are healthcare providers that operate general acute-care hospitals in Charleston, Kanawha County, West Virginia, and Huntington, Cabell County, West Virginia, respectively. CAMC and St. Mary's compete with each other to provide hospital and physician services to patients. Hospitals compete through price, quality, and other factors to sell their services to patients, employers, and insurance companies.

Marketing is an important tool that hospitals use to compete for patients. Hospitals use marketing to inform patients about a hospital's quality, scope of services, and the expertise of its

physicians. Defendants' marketing methods include print advertisements, such as newspaper advertisements, and outdoor advertisements, such as billboards. Healthcare provider advertisements on billboards and newspapers helps enable patients to make more informed healthcare choices, including choosing healthcare providers that offer higher quality care and more convenient services. Advertising also spurs competition for patients, which can lead hospitals to invest in providing better care and a broader range of services.

B. Defendants' Unlawful Agreement to Limit Marketing

Since at least 2012, CAMC and St. Mary's have agreed to limit their marketing for competing services. CAMC agreed not to place print or outdoor advertisements in Cabell County, and St. Mary's agreed not to place print or outdoor advertisements in Kanawha County. Defendants' marketing departments have monitored and enforced this agreement. Defendants' documents show the impact of this agreement on the Defendants' marketing.

In January 2012, a CAMC urology group asked CAMC's marketing department to advertise its physicians in *The Herald Dispatch*, a Cabell County newspaper. In response, a CAMC marketing department employee emailed the CAMC Director of Marketing, noting that CAMC does not typically advertise in *The Herald Dispatch* because of its "'gentleman's agreement'" with St. Mary's. Consistent with its agreement with St. Mary's, CAMC did not place the newspaper advertisement.

In May 2013, St. Mary's Director of Marketing complained to CAMC's Director of Marketing after CAMC ran a newspaper ad promoting a CAMC physicians' group in *The Herald Dispatch*, and succeeded in getting CAMC to agree to remove the advertisement. In an email from St. Mary's Director of Marketing to other St. Mary's senior executives, he wrote, "I talked with CAMC and they agreed this ad violated our agreement not to advertise in Charleston paper if they didn't advertise in Huntington paper. Their director of marketing Says she pulled

the ad but was concerned it might still run again one more time this Sunday. I can't call the HD [*Herald Dispatch*] and make sure because they could challenge this type of handshake agreement That [sic] prevents them from getting advertising dollars from a different advertiser. We'll see and I'll follow up from there but after Sunday I am confident we won't see CAMC again in HD." Consistent with its agreement with St. Mary's, and as described by St. Mary's Director of Marketing , CAMC asked the *Herald Dispatch* to remove the advertisement.

In June 2014, when a CAMC-owned physicians' group requested marketing in Cabell County, a CAMC marketing department employee responded by telling the group's representative that CAMC does not market specialist physicians in Cabell County and St. Mary's does not market specialists in Kanawha County. Consistent with its agreement with St. Mary's, CAMC refused to market that physicians' group in Cabell County.

In August 2014, when another CAMC-owned physicians' group requested billboard advertising in Cabell County, a CAMC marketing representative wrote to CAMC's Director of Marketing, "They had asked for print and billboard placement in Huntington. I explained our informal agreement. They understood." CAMC's Director of Marketing replied, "Just watch the county line my friend." Consistent with its agreement with St. Mary's, CAMC did not place print or billboard advertising for the physician practice in Cabell County.

Defendants' anticompetitive agreement is not reasonably necessary to further any procompetitive purpose. Defendants' agreement allocates territories for marketing and constitutes a naked restraint of trade that is *per se* unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972) (holding that naked market allocation agreements among horizontal competitors are plainly anticompetitive and illegal per se); *United States v. Cooperative Theatres of Ohio*, Inc., 845 F.2d 1367, 1371, 1373 (6th Cir. 1988) (holding that the defendants' agreement to not "*actively*

solicit[] each other's customers" was "undeniably a type of customer allocation scheme which courts have often condemned in the past as a *per se* violation of the Sherman Act"); *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995) (holding that the "[a]greement to limit advertising to different geographical regions was intended to be, and sufficiently approximates[,] an agreement to allocate markets so that the *per se* rule of illegality applies").

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will prevent the continuation and recurrence of the violations alleged in the Complaint and restore the competition restrained by Defendants' anticompetitive agreement. Section VIII of the proposed Final Judgment provides that these provisions will expire five years after its entry.

A. Prohibited Conduct

Under Section IV of the proposed Final Judgment, Defendants cannot agree with any healthcare provider to prohibit or limit marketing or to allocate any service, customer, or geographic market or territory, unless such agreement is reasonably necessary to further a procompetitive purpose concerning the joint provision of services. The joint provision of services is any past, present, or future coordinated delivery of any healthcare services by two or more healthcare providers. Defendants also are prohibited from communicating with each other about any Defendant's marketing, subject to three narrow exceptions. There is an exception for communication about joint marketing if the communication is related to the joint provision of services. In addition, there are exceptions for communications about marketing that are part of customary due diligence relating to a merger, acquisition, joint venture, investment, or divestiture, and communications about false or misleading statements made in a Defendant's marketing.

These prohibited conduct provisions will restore the competition lost as a result of CAMC's and St. Mary's unlawful agreement to allocate territories for the marketing of competing healthcare services.

B. Compliance and Inspection

The proposed Final Judgment sets forth various provisions to ensure Defendants' compliance with the proposed Final Judgment. Section V of the proposed Final Judgment requires each Defendant to appoint an Antitrust Compliance Officer within 30 days of the Final Judgment's entry. The Antitrust Compliance Officer must furnish copies of this Competitive Impact Statement, the Final Judgment, and an approved notice explaining the obligations of the Final Judgment to each Defendant's officers, directors, and marketing managers, and to any person who succeeds to any such position. The Antitrust Compliance Officer must also obtain from each recipient a certification that he or she has read and agreed to abide by the terms of the Final Judgment, and must maintain a record of all certifications received. Recipients must also certify that they are not aware of any violation of the Final Judgment. Additionally, each Antitrust Compliance Officer shall annually brief each person required to receive a copy of the Final Judgment and this Competitive Impact Statement on the meaning and requirements of the Final Judgment and the antitrust laws. Each Antitrust Compliance Officer shall also annually communicate to all employees that any employee may disclose, without reprisal, information concerning any potential violation of the Final Judgment or the antitrust laws.

For a period of five years following the date of entry of the Final Judgment, the Defendants separately must certify annually to the United States that they have complied with the provisions of the Final Judgment. Additionally, upon learning of any violation or potential violation of the terms and conditions of the Final Judgment, Defendants must within thirty days

file with the United States a statement describing the violation or potential violation, and must promptly take action to terminate or modify the activity in order to comply with the Final Judgment.

To facilitate monitoring of the Defendants' compliance with the Final Judgment, Section VI of the proposed Final Judgment requires each Defendant to grant the United States access, upon reasonable notice, to Defendant's records and documents relating to matters contained in the Final Judgment. Defendants must also make their employees available for interviews or depositions and answer interrogatories and prepare written reports relating to matters contained in the Final Judgment upon request.

These provisions are designed to prevent recurrence of the type of illegal conduct alleged in the Complaint.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against the Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the

United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Peter J. Mucchetti
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 4100
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendants. The United States is satisfied, however, that the relief

proposed in the Final Judgment will prevent the recurrence of the violation alleged in the Complaint and ensure that patients and physicians benefit from competition between the Defendants. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) 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, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, 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)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one, because the government is entitled to "broad discretion to settle with the Defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting the court has broad discretion over the adequacy of the

relief at issue); *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (describing the public-interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").[1]

Under the APPA, a court considers, 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 Microsoft*, 56 F.3d at 1458-62. With respect to 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) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. One court explained:

> [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. The court's role in protecting the public interest is one of [e]nsuring 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.

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[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. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted); *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that room must be made for the government to grant concessions in the negotiation process for settlements) (citing *Microsoft*, 56 F.3d at 1461); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements

[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 76 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As a court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of using 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); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (noting that a court is not required to hold an evidentiary

hearing or to permit intervenors as part of its review under the Tunney Act). The language captured Congress's intent when it enacted the Tunney Act in 1974. Senator Tunney explained: "The 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." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3] A court can make its public-interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76.

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) ("Absent 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."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: April 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system and sent it via email to the following counsel at the email addresses below.

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