2711.3–1. In the event of sale, the unreserved mineral estate will be conveyed simultaneously with the surface estate. The unreserved mineral interests have been determined to have no known mineral value pursuant to 43 CFR 2720.2 (a). Acceptance of the sale offer will constitute an application for conveyance of the unreserved mineral interests. The purchaser will be required to pay a $50.00 non-refundable filing fee for conveyance of the available mineral interests.

Competitive Sale Procedures

The sales will be by sealed bid, followed by oral auction. Sealed bids must be received at the BLM Boise District Office at the above address no later than 4:30 p.m. MDT on the day before the sale. Federal law requires that bidders must be U.S. citizens 18 years of age or older, or in the case of a corporation, subject to the laws of any State of the U.S. Proof of citizenship shall accompany the bid.

At 10 a.m. MDT on May 6, 2008, sealed bids will be opened at the BLM Boise District Office, and the highest acceptable sealed bid will be determined for each parcel. An oral auction will follow the determination of the highest acceptable sealed bid at or in excess of the appraised fair market value, with the opening oral bid being for not less than the highest acceptable sealed bid. Oral bidding will continue until the highest bid is determined. If no oral bids are received, the highest acceptable sealed bid will be considered the purchaser. If neither a sealed nor an oral bid is received for a particular parcel, that parcel will remain available for over-the-counter sale at the appraised fair market value for a period of 180 days following the sale date.

The purchaser will have 30 days from the date of acceptance of the high bid to submit a deposit of 20 percent of the purchase price and the $50.00 filing fee for conveyance of mineral interests. The purchaser must remit the remainder of the purchase price within 180 days from the date of the sale. Payments must be by certified check, postal money order, bank draft or cashiers check payable to the U.S. Department of the Interior—BLM. Failure to meet conditions established for this sale will void the sale, and any monies received will be forfeited to the BLM.

Public Comments: For a period until March 10, 2008, the public and interested parties may submit written comments regarding the proposed sale to the BLM Four Rivers Field Manager at the above address. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

The BLM will make available for public review, in their entirety, all comments submitted by businesses or organizations, including comments by individuals in their capacity as an official or representative of a business or organization.

Any adverse comments on the proposed sales will be reviewed by the BLM Idaho State Director, who may sustain, vacate, or modify this realty action and issue a final determination. In the absence of any objections, the realty action will become the final determination of the Department of the Interior. (Authority: 43 CFR 2711.1–2(a)). Protests on the proposed plan amendment must be received or postmarked no later than February 25, 2008 and must be sent to the Director (760), Chief, Planning and Environmental Coordination, at the above address. Any protest to the plan amendment should include: (1) Name, address, telephone number and interest of protesting party, (2) identification of the issue being protested, (3) a statement on the parts of the plan being protested, (4) a copy of all documents addressing the issues that were submitted during the planning process, and (5) a concise statement explaining why the State Director's decision is believed to be in error. The State Director will make a final decision on this proposed plan amendment following the Governor's consistency review and resolution of any protests that may be received by the Director. (Authority: 43 CFR 1610.5–2) Parcels 1 through 5, which require a plan amendment, will not be sold prior to the completion of the plan amendment.

Dated: January 16, 2008.

John Sullivan,

Acting Four Rivers Field Manager.

[FR Doc. E8–1162 Filed 1–23–08; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF JUSTICE

Antitrust Division

Public Comment and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below five comments received on the proposed Final Judgment in *United States* v. *Federation of Physicians and Dentists,* Case No. 1:05–cv–431, which were filed on December 17, 2007, in the United States District Court for the Southern District of Ohio, together with the United States' response to the comments.

Copies of the comments and the response are available for inspection at the Department of Justice, Antitrust Division; 325 Seventh Street, NW.; Room 200; Washington, DC 20530 (telephone (202) 514–2481); and at the Office of the Clerk of the United States District Court for the Southern District of Ohio, Potter Stewart U.S. Courthouse, Room 103, 100 East Fifth Street, Cincinnati, Ohio 45202 (telephone (513) 564–7500). Copies of any of these materials may be obtained upon request and payment of a copying fee.

J. Robert Kramer II,

Director of Operations, Antitrust Division.

In the United States District Court for the Southern District of Ohio Western Division

United States of America, Plaintiff, vs. Federation of Physicians and Dentists, et al., Defendants.

[Case No. 1:05–cv–431]

Hon. Sandra S. Beckwith, C.J.

Hon. Timothy S. Hogan, M.J.

Plaintiff United States' Response to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), the United States submits this response to five public comments relating to the proposed Final Judgment that has been lodged with the Court for eventual entry in this case. After review of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. Following publication of the comments and this response to them in the **Federal Register,** pursuant to 15 U.S.C. 16(d), the United States will request that the Court enter the proposed Final Judgment.

I. Procedural History

On June 24, 2005, the United States filed this civil antitrust action, alleging that the Federation of Physicians and Dentists (''Federation'') and Federation employee Lynda Odenkirk, along with physician co-defendants Drs. Warren Metherd, Michael Karram, and James Wendel, coordinated a conspiracy

among about 120 obstetrician-gynecologist physicians (''OB–GYNs'') practicing in greater Cincinnati, Ohio, that unreasonably restrained interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The physician defendants agreed to a judgment that was filed concurrently with the Complaint and entered by this Court on November 14, 2005, as being in the public interest. (Dkt. Entry #36). The Federation and Ms. Odenkirk (the ''Federation defendants''), however, contested the charges.

On January 26, 2006, the United States filed with the Court a motion seeking entry of partial summary judgment on liability against the Federation defendants. (Dkt. entry ## 40, 47). After briefing on this motion was completed, the Federation defendants filed an unopposed motion requesting the Court to order that the case be referred to mediation. (Dkt. entry # 63). On April 14, 2006, the Court ordered that the case be referred to mediation.

Following two mediation conferences and protracted settlement negotiations, on June 19, 2007, the United States filed with the Court a settlement stipulation (Dkt. Entry # 81) with the Federation defendants, consenting to entry of the proposed Final Judgment (Dkt. entry # 81–2), which was lodged with the Court pending the parties' compliance with the APPA. On July 18, 2007, the United States published the Stipulation, proposed Final Judgment, and Competitive Impact Statement (''CIS'') (Dkt. Entry # 84) in the **Federal Register** 39450 (2007), as required by the APPA to facilitate public comments on the proposed Final Judgment. A summary of the terms of the proposed Final Judgment and CIS was published for seven consecutive days in the Cincinnati Enquirer from July 20 through July 26, 2007, and in the *Washington Post* from July 18 through July 24, 2007, also pursuant to the APPA. The 60-day period for public comments on the proposed Final Judgment began on July 27, 2007, and expired on September 24, 2007. During that period, five comments were submitted.

II. Summary of the Complainant's Allegations

The Federation is a membership organization of physicians and dentists, headquartered in Tallahassee, Florida. the Federation's membership includes economically independent physician groups in private practice in many states, including Ohio. The Federation has offered member physicians assistance in negotiating fees and other terms in their contracts with health care insurers.

In spring 2002, several Cincinnati OB–GYNs became interested in joining the Federation to negotiate higher fees from health care insurers. The physician defendants assisted the Federation in recruiting other Cincinnati-area OB–GYNs as members. By June 2002, the membership of the Federation had grown to include a large majority of competing OB–GYN physicians in the Cincinnati area.

Withe substantial assistance from the physician defendants and Ms. Odenkirk, 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, Ms. Odenkirk communicated with the physician defendants and other cincinnati-area OB–GYN Federation members to coordinate their contract negotiations with health care insurers. Along with the physician defendants, Ms. Odenkirk developed a strategy to intensify Federation member physicians' pressure on health care insurers to renegotiate their contracts, including informing member physicians about the status of competing member groups' negotiations and taking steps to coordinate their negotiations.

The agreement coordinated by the Federation defendants forced Cincinnati-area health care insurers to raise fees paid to Federation member OB–GYNs above the levels that would likely have resulted if Federation members had negotiated competitively with those insurers. As a result of the conspirators' conduct, the three largest Cincinnati-area health care insurers each were forced to increase fees paid to most Federation member 0B-GYNs by approximately 15–20% starting July 1, 2003, followed by cumulative increases of approximately 20–25% starting January 1, 2004, and approximately 25–30% effective January 1, 2005. This conduct by Federation member OB-GYNs, coordinated by the Federation defendants, also caused other insurers to raise the fees that they paid to Federation OB-GYN members. The increased fees paid by health care insurers to Federation OB-GYN members in the Cincinnati area are ultimately borne by employers and their employees.

iii. Summary of Relief to be Obtained Under the Proposed Final Judgment

The proposed Final Judgment is designed to enjoin the Federation defendants from taking future actions that could facilitate private-practice physicians in coordinating their dealings with payers for health care services. It accordingly prohibits the Federation defendants from being involved in its private-practice members' negotiations or contracting with health insurers or other payers for health care services anywhere in the United States.

The proposed Final Judgment prohibits the Federation defendants from providing any services to any physician in private practice (defined as an ''independent physician'') regarding such physician's negotiation, contracting, or other dealings with any payer. The proposed Final Judgment also prohibits the Federation defendants from (1) representing any independent physician with any payer (including as a messenger); (2) reviewing or analyzing, for any such physician, any proposed or actual contract or contract term between the physician and any payer; and (3) communicating with any independent physician about the status of that physician's, or any other physician's, negotiations, contracting, or participation with any payer. The Federation defendants are also generally prohibited from communicating about any proposed or actual contract or contract term between any independent physician and any payer. In addition, the proposed Final Judgment enjoins the Federation defendants from responding to any question initiated by any payer, except to state that the Final Judgment prohibits such a response. Finally, the proposed Final Judgment generally prohibits the Federation defendants from training or educating, or attempting to train or educate, any independent physician in any aspect of contracting or negotiating with any payer.

The proposed decree includes exceptions to these prohibitions covering conduct that neither threatens competitive harm nor undermines the clarity of the prohibitions. For example, the proposed decree limits its prohibition on training or educating independent physicians in any aspect of contracting or negotiating with payers by allowing the Federation defendants to

(1) Speak on general topics (including contracting), when (a) invited to do so as part of a regularly scheduled medical educational seminar offering continuing medical education credit, (b) advance written notice has been given to Plaintiff, and (c) documents relating to what was said by the Federation defendants are retained by them for possible inspection by the United States.

(2) Publish articles on general topics (including contracting) in a regularly disseminated newsletter; and

(3) Provide education to independent physicians regarding the regulatory structure (including legislative developments) of workers compensation, Medicaid, and Medicare, except Medicare Advantage,

provided that such conduct does not violate any other injunctive provision of the proposed Final Judgment.

In a section titled ''permitted conduct,'' the proposed decree permits certain other conduct as well:

(1) Federation defendants may engage in activities involving physician participation in written fee surveys that are covered by the ''safety zone'' under Statement 6 of the 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153, which addresses provider participation in exchanges of price and cost information;

(2) Federation defendants and Federation members may engage in lawful union organizational efforts and activities;

(3) Federation defendants may petition governmental entities in accordance with doctrine established in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and its progeny; and

(4) Federation physician members may choose independently, or with other members or employees of such member's bona fide solo practice or practice groups, the health insurers with which to contract, and/or to refuse to enter into discussions or negotiations with any health care payer.

The proposed Final Judgment clarifies that it does not alter the Federation's obligations under the decree entered by the district court in Delaware in a prior, similar case against the Federation, *United States* v. *Federation of Physicians and Dentists, Inc.,* CA 98–475 JJF (D. Del., consent judgment entered Nov. 6, 2002) (the ''*Delaware* decree''). If there is any conflict between the injunctive provisions of the proposed Final Judgment and the injunctive provisions or conduct permitted by the *Delaware* decree, the proposed Final Judgment controls. The proposed Final Judgment embodies more stringent relief than that provided by the *Delaware* decree because it prohibits the Federation, for example, from representing physicians in their dealings with payers as a messenger and reviewing and analyzing physician contracts with any payer. The *Delaware* decree had permitted such conduct in limited circumstances.

IV. Summary of Public Comments and the United States' Responses to Them

During the 60-day public comment period, the United States received comments from one individual and four medical societies. Upon review, 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. None of the comments contend that the proposed decree fails adequately to redress the violations and competitive harm alleged in the Complaint. Rather, two of the comments contend that the proposed Final Judgment is too stringent, and another implies the same point. Two other comments contend that this case resulted from an unfair application of the antitrust laws to physicians in their dealings with insurers. The remaining comment generally criticizes what is characterized as an unreasonably aggressive antitrust enforcement policy by the Department of Justice and Federal Trade Commission with respect to physicians. The United States addresses these concerns below and explains why the proposed Final Judgment is appropriate.

A. Comments Questioning the Charges Brought Against the Federation Defendants

1. Summary of Comments Submitted by Dr. Michael Connair and the American Academy of Orthopaedic Surgeons

Dr. Michael Connair, an orthopedic surgeon in Connecticut and a Vice President of the defendant Federation of Physicians and dentists, has submitted a comment (attachment 1) that criticizes the United States' Competitive Impact Statement (''CIS'') (Dkt. Entry # 84) as ''reflect[ing] a misguided DOJ enforcement policy that ignores antitrust principles and that encourages anticompetitive behavior by insurers.'' According to Dr. Connair, the CIS ignores that Cincinnati ''physicians were forced to react to anti-competitive behaviors by Cincinnati insurers because the Department of Justice did not enforce antitrust principles against those insurers.''

Similarly, the American Academy of Orthopaedic Surgeons' comment (Attachment 2) expresses the Academy's belief that this case ''is the result of the antitrust laws not being applied equally to the insurance industry as they are to physicians or other professions,'' which ''would reduce competition in the insurance industry and, ultimately, harm consumers.'' The Academy's comment also asserts that ''[i]n this case, the physicians appeared to be reacting to anticompetitive behaviors by Cincinnati insurers which artifically lowered prices below Medicare levels.''

2. United States' Response to Comments Submitted by Dr. Michael Connair and the American Academy of Orthopaedic Surgeons

Dr. Connair's and the Academy's comments challenge the United States' decision to prosecute the defendants' alleged anticompetitive conduct, rather than alleged anticompetitive actions by health insurers. Such an argument is outside the scope of this APPA proceeding because the APPA does not permit the Court to review the efficacy or ''correctness'' of the United States' enforcement policy or its determination to pursue—or not pursue—a particular claim in the first instance. As explained by the District Court for the District of Columbia, in a Tunney Act ''public interest'' proceeding, the district court should not second-guess the prosecutorial decisions of the Antitrust Division regarding the nature of the claims brought in the first instance; ''rather, the court is to compare the complaint filed by the United States with the proposed consent decree and determine whether the proposed decree clearly and effectively addresses the anticompetitive harms initially identified.'' *United States* v. *The Thomson Corp,* 949 F. Supp. 907, 913 (D.D.C. 1996); *accord, United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1459 (D.C. Cir. 1995) (in APPA proceeding, ''district court is not empowered to review the actions or behavior of the Department of Justice; the court is only authorized to review the decree itself'').

Although the comments of Dr. Connair and the Academy are beyond the scope of an APPA proceeding, the United States nevertheless observes that their comments are incorrect as a matter of fact and law. The United States believes that the uncontested evidence and law presented in support of its motion for summary judgment, which the Court was not called on to decide in view of the parties' proposed settlement, strongly supports the Complaint's allegations that the Federation defendants violated the antitrust laws. (Dkt. Entry ## 1, 47). Further, even if the Federation defendants believed that Cincinnati insurers had colluded on payments made to OB–GYNs, as the comments imply, such circumstances would provide no defense for the Federation defendants' coordination of Cincinnati OB–GYNs price fixing. Controlling law is clear ''[t]hat a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it.'' *FTC* v. *Indiana Fed'n of Dentists,* 476 U.S. 447, 465 (1986).

B. Comments Arguing that the Proposed Final Judgment is Overly Restrictive

1. Summary of Comments Submitted by the Connecticut State Medical Society, Connecticut Orthopedic Society, and Utah State Orthopaedic Society

The Connecticut State Medical Society (CSMS) comments (Attachment 3) that the proposed Final Judgment is ''unnecessarily restrictive and more onerous than final decrees typically proposed by both the [Department of Justice] and the Federal Trade Commission (FTC) under similar circumstances in that it precludes the Federation from engaging in *lawful* conduct including representing physicians in their dealing with payers as messengers and from reviewing and analyzing physician contracts with any third-party payer.'' The CSMS asks the United States to modify the proposed Final Judgment to allow the defendant Federation to participate in (1) qualified risk-sharing and qualified clinically integrated joint arrangements, (2) messenger-model arrangements, and (3) communications with physicians about insurer contracts. The Connecticut Orthopedic Society comments (Attachment 4) in support of the letter submitted by the CSMS.

The Utah State Orthopaedic Society's (''USOS's'') comment (Attachment 5) states that the defendant Federation has served as a messenger for orthopedists in Utah with productive results. Based on the Utah experience, the comment ''presume[s] that the activities in Cincinnati have been handled in a similar fashion by the Federation.'' The USOS's comment further expresses the ''hope * * * [that] the 'messenger model' throughout the country is managed legally by those that employ it.''

2. United States' Response to Comments Submitted by the Connecticut State Medical Society, Connecticut Orthopedic Society, and Utah State Orthopaedic Society

These comments seek entry of a decree that essentially tracks the *Delaware* decree. The United States had agreed to resolve its earlier case against the Federation, in part, to give the Federation an opportunity to conduct some of its activities in a lawful manner that should not have led to anticompetitive results. The Federation defendants' actions in Cincinnati, as alleged in the United States' Complaint (Dkt. Entry # 1) and demonstrated in its summary judgment brief (Dkt. Entry # 47), however, have shown that such a decree is insufficient to prevent the Federation defendants from engaging in substantial anticompetitive conduct and, therefore, that a more restrictive decree is appropriate. The Federation defendants' alleged conduct in Cincinnati demonstrates that the USOS's expressed ''hope'' that the Federation defendants have employed the ''messenger model'' appropriately elsewhere has not been realized.

Had the Federation defendants' complied with the *Delaware* decree, it plainly would have prevented them from coordinating Cincinnati OB-GYNs' fee negotiations with health insurers. The Federation defendants nonetheless have steadfastly maintained that their conduct challenged in this matter complied with the *Delaware* decree, which—like the proposed Final Judgment—is nationwide in scope. Accordingly, the United States decided in this matter to negotiate a more restrictive proposed Final Judgment with the Federation defendants that assures that the Federation will not again engage in conduct that has the anticompetitive effect alleged in the complaint. The proposed Final Judgment thus provides appropriate additional assurance that the type of conduct that occurred in Cincinnati, despite the *Delaware* decree, will not recur.

In short the orthopedic groups' comments fail to recognize that the Federation defendants' conduct in Cincinnati has shown that the *Delaware* decree is insufficient to prevent their recurrent anticompetitive conduct and, therefore, that a more stringent decree is required. ''While the resulting [proposed Final Judgment] may curtail the exercise of liberties that the [Federation defendants] might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the [recurrent] violation.'' *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 697 (1978). Although the proposed Final Judgment ''goes beyond a simple proscription against the precise conduct previously pursued[,] that is entirely appropriate'' under the circumstances. *Id.* at 698.

Conclusion

After considering the five comments received, the United States continues to believe that the proposed Final Judgment reasonably and appropriately addresses the harm alleged in the Complaint. Therefore, following publication of this response to comments in the **Federal Register** and submission of the United States' certification of compliance with the APPA, the United States intends to request entry of the proposed Final Judgment once the Court determines that entry is in the public interest.

Dated: December 17, 2007.

Respectfully submitted,

For Plaintiff United States of America

Gregory G. Lockhart,

United States Attorney.

/s/ Gerald F. Kaminski

Gerald F. Kaminski,

Assistant United States Attorney,

Bar No. 0012532.

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

/s/ Steven Kramer

Steven Kramer

Attorney, Antitrust Division.

U.S. Department of Justice, 1401 H Street, NW., Suite 4000, Washington, DC 20530, (202) 307–0997, *steven.kramer@usdoj.gov*.

BILLING CODE 4401–11–M

ATTACHMENT 1

MICHAEL P. CONNAIR, M.D.
ORTHOPAEDIC SURGERY
12 Village Street, Suite 8
North Haven, CT 06473
Phone: (203) 777-2044 Fax: (203) 773-3641

September 7, 2007

Joseph Miller., Esq., Acting Chief
United States Department of Justice
Antitrust Division
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

Via Federal Express

Dear Attorney Miller:

The "Plaintiff's Competitive Impact Statement Concerning the Proposed Final Judgment as to the Federation of Physicians & Dentists and Lynda Odenkirk" (Case No. 1:05-CV-431 filed on 7-2-07) is inaccurate in several respects and harmful not only to the Federation, but to any physician who must contract with a managed care insurer and chooses to use the third-party messenger system to negotiate a fair deal.

Here are the problems with the Competitive Impact Statement:

- The Statement ignores the fact that physicians were forced to react to anti-competitive behaviors by Cincinnati insurers because the Department of Justice did not enforce antitrust principles against those insurers. The DOJ allowed a monopsony of insurers to impose unrealistic contract terms on obstetricians and to fix prices below fair value. These insurers had driven prices to below Medicare levels, which created an unsustainable financial loss for those doctors. Most physicians charge at least 2-3 times Medicare rates as a fair price.

- The actions of the doctors are inaccurately described as a "...conspiracy to artificially raise fees by healthcare insurers to Federation members in the Cincinnati area... ". The doctors were actually trying to partially reverse the *artificial depression* of fees resulting from the concerted, unopposed and unwarranted fee depression by the insurance monopsony in Cincinnati.

- The Statement ignores the consequences of *not resisting* the artificial depression of fees by insurers in Cincinnati. Financial hardship caused by unfair reimbursement would have caused many Cincinnati obstetricians to stop practicing there, compromising patient access to a critical specialty. This is an example of price fixing by insurers resulting secondarily in harm

to the public; this anticompetitive pricing by insurers has not been addressed by the DOJ, typical of DOJ enforcement policy in general.

- The prosecution of doctors in Cincinnati is not an isolated case of the DOJ attacking physicians for alleged antitrust activity while ignoring the anticompetitive activities of insurers that triggered the physician actions. The AMA has cited more than twenty (20) antitrust cases against physicians in the last few years and not a single example of the DOJ prosecuting an insurance company for predatory contracting practices. The cases usually settle by consent decree because of the threat of huge defense costs. The cost to defend such cases properly is punitive, not within the reach of small physician organizations or a non-profit Union like the Federation of Physicians & Dentists. The cost to defend the orthopedic surgeons in Delaware from similar antitrust charges was $1.5 million. The one-sided antitrust enforcement policy of the DOJ and the political motivations for that policy are therefore not exposed publicly in court.

- The consent decree is supposed to "... eliminate a substantial restraint on price competition among competing ob-gyns..." The only real effect of the consent decree will be to eliminate physician resistance to the downward unopposed coordinated pressure on fees by insurers.

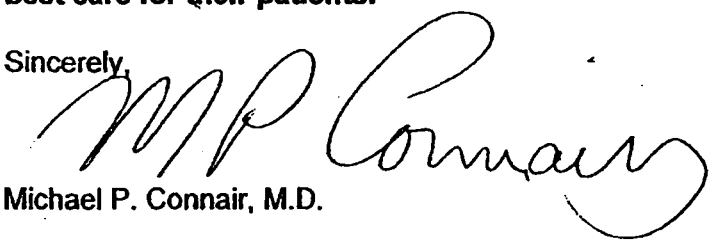
- Neutralizing the Federation will eliminate a strong proponent for the proper use of the third-party messenger system. The Federation has educated physicians in many states in its proper use, often preventing the misuse of the technique. Without an experienced nonprofit organization like the Federation, doctors will be less willing to use the third-party messenger system for fear of making errors resulting in DOJ prosecution.

- The insurers have the ear of the DOJ and the DOJ responds to requests from insurers to initiate the investigation and prosecution of physician organizations that resist unfair contracts and fee schedules. It is the experience of the Federation that the DOJ does *not* respond to similar physician requests for help against anti-competitive insurance company behavior including price fixing. Mr. Kramer has stated that the DOJ will prosecute insurers for price fixing. I ask that your department provide me with some examples of such investigations and/or prosecution of insurers.

- The one-sided DOJ enforcement policy against physicians and in favor of insurers perverts the intent of the Sherman Act. Antitrust rules are supposed to prevent huge corporations from taking advantage of consumers (patients) and small businesses (doctor offices). The large insurers in this case and similar cases use the DOJ as a weapon against physician resistance to unfair contracts to increase insurer profits.

This Competitive Impact Statement reflects a misguided DOJ enforcement policy that ignores antitrust principles and that encourages anticompetitive behavior by insurers. The enforcement policy interferes with the ability of physicians to manage a medical practice and to continue to provide the best care for their patients.

Sincerely,



Michael P. Connair, M.D.

Past President, Connecticut Orthopaedic Society
Vice President, National Union of Hospital of Healthcare Employees
Vice President, Federation of Physicians and Dentists
Provided oral and written testimony to House Committee on the Judiciary for Campbell Bill 1998, and written testimony for the Campbell/Conyers Bill 1999

ATTACHMENT 2

AAOS
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS
AMERICAN ASSOCIATION OF ORTHOPAEDIC SURGEONS

6300 North River Road
Rosemont, Illinois 60018

P. 847.823.7186
F. 847.823.8125

www.aaos.org

September 11, 2007

Mr. Joseph Miller
Acting Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 4000
Washington, D.C. 20530

Re: *United States v. Federation of Physicians and Dentists*, Case No.: 1:05-CV-431, In the United States District Court for the Southern District of Ohio Western Division

Dear Mr. Miller:

The following are the written comments of the American Association of Orthopaedic Surgeons (AAOS) to the proposed judgment in *United States v. Federation of Physicians and Dentists*. The AAOS is making these comments pursuant to the 60 day comment period provided under 15 U.S.C.§ 16(b).

The AAOS is a not-for-profit national medical society, engaged in health policy and advocacy activities on behalf of musculoskeletal patients and the profession of orthopaedic surgery. The 22,000 members of the AAOS are orthopaedic surgeons concerned with the diagnosis, care, and treatment of musculoskeletal disorders. A priority of the AAOS is continuing access to quality, specialty care by all patients.

The AAOS is concerned that *Federation of Physicians and Dentists* is the result of the antitrust laws not being applied equally to the insurance industry as they are to physicians or other professions. This inequality could be because the complexity of insurance industry discourages vigorous enforcement of antitrust laws. If so, this would obviously give the insurance industry an unfair advantage in reducing prices and pushing more physicians out of the practice medicine. This is particularly damaging in critical specialties facing shortages such as obstetrics-gynecology. Uneven application of the antitrust laws, therefore, would reduce competition in the insurance industry and, ultimately, harm consumers.

Specifically, in this case, the physicians appeared to be reacting to anticompetitive behaviors by Cincinnati insurers which artificially lowered prices below Medicare levels.

If you have any questions regarding these comments, please refer them to AAOS Assistant General Counsel Grant L. Nyhammer, 847.384-4050 or nyhammer@aaos.org. Thank you for your attention to this matter.

Cordially,

Richard N. Peterson

Richard N. Peterson
General Counsel

ATTACHMENT 3

Connecticut State Medical Society
FOUNDED IN 1792

160 St. Ronan Street, New Haven, CT 06511-2390 (203) 865-0587 FAX (203) 865-4997

September 12, 2007
Mr. Joseph Miller
Acting Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

Re: Comments of the Connecticut State Medical Society to the Proposed Final Judgment As To The Federation of Physicians and Dentists and Lynda Odenkirk, Case No. 1;05-cv-431

Dear Acting Chief Miller:

On June 19, 2007, the Department of Justice ("DOJ") entered its proposed Final Judgment (the "Final Judgment") as to the Federation of Physicians and Dentists (the "Federation") and Lynda Odenkirk (collectively, the "Federation defendants") in connection with the above-referenced matter. The DOJ thereafter filed its Competitive Impact Statement on July 2, 2007. Notification of the Final Judgment and Competitive Impact Statement was published in the Federal Register, Vol. 72, No. 137 on July 18, 2007. The Connecticut State Medical Society (CSMS) files these Comments in response to the terms of the Final Judgment.

I. INTRODUCTION

CSMS, chartered by the Connecticut State legislature in 1792 and believed to be one of the nation's oldest such groups in continuous operation, on behalf of its more than 7,000 physician and medical student members, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b), submits these Comments concerning the Final Judgment as to the Federation defendants that the parties have submitted to entry in the above-captioned matter.

CSMS, a federation of eight component county medical associations, is a constituent state entity of the American Medical Association (AMA). Founded by the physician-patriots of the American Revolution, CSMS operates from a heritage of democratic principles embodied in its Charter and Bylaws. CSMS has begun its third century as the voice of medicine in Connecticut with a mission to serve physicians and their patients. CSMS is therefore inherently positioned to provide its expert comment concerning the lawful representation of physicians for the betterment of patients.

As discussed more fully below, CSMS finds the Final Judgment's prohibitions unnecessarily restrictive and more onerous than final decrees typically proposed by both

the DOJ and the Federal Trade Commission (FTC) under similar circumstances in that it precludes the Federation from engaging in *lawful* conduct including, representing physicians in their dealings with payers as a messenger and from reviewing and analyzing physician contracts with any third-party payer. It is therefore CSMS' objective in submitting these Comments to request that the DOJ amend the Final Judgment to allow the Federation and its physician members to engage in generally accepted common and lawful practices.

II. ARGUMENT

(1) The Final Judgment Is Overly Stringent in that it Bars the Federation from Engaging in *Lawful* Conduct On Behalf of its Physician Members.

Recent orders issued by the DOJ and the FTC to settle charges that physician membership organizations acting on behalf of their members engaged in unlawful agreements to raise fees received from health plans, have consistently permitted these organizations to engage in lawful activity on behalf of their physician members. See *In the Matter of Memorial Hermann Health Network Providers,* Docket No. C-4104 (Decision and Order entered Jan. 8, 2004); *In the Matter of Health Care Alliance of Laredo, L.C.,* Docket No. C-4158 (Decision and Order issued Mar. 23, 2006): *In the Matter of Physician Network Consulting, L.L.C., et al.,* Docket No. C-4094 (Decision and Order issued Aug. 27, 2003); *In the Matter of Advocate Health Partners, et al.,* File No. 031 0021 (Dec. 19, 2006); *In the Matter of New Century Health Quality Alliance, Inc., et al.,* Docket No. C-4169 (Decision and Order issued Sept. 29, 2006); *United States v. Federation of Physicians and Dentists, Inc.,* CA 98-475 JJF (D. Del., judgment entered Nov. 6, 2002) (hereinafter "DOJ/FTC Decisions"). Specifically, these decrees have excluded the following lawful arrangements and activities from their prohibitions: (1) "qualified risk-sharing joint arrangements"; (2) "qualified clinically-integrated joint arrangements"; (3) messenger model arrangements and (4) lawful communication with and representation of physician members. See DOJ/FTC Decisions, supra. In this case, however, the Final Judgment bars the Federation defendants from engaging in lawful activity officially recognized in the 1996 Department of Justice/Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care ("1996 Statements") and ordinarily permitted under final decrees issued by the DOJ and FTC in comparable cases.

The nature of the Federation defendants' case is similar to that of the typical DOJ/FTC Decisions in that it concerns alleged agreements among competing physicians acting through a physician membership organization to fix fees they charge health plans and other third-party payors. See DOJ/FTC Decisions, supra. Therefore, consistent with recent orders, CSMS urges the DOJ to modify the Final Judgment to allow the Federation to continue engaging in lawful activity, on behalf of its physician members, ordinarily excluded from DOJ and FTC final decree prohibitions. CSMS' proposed modification would promote fairness while preserving the "essence of the Final Judgment" by restraining the Federation defendants from engaging in unlawful antitrust activity, and

specifically barring them "from participating in any unlawful conspiracy to increase fees for physician services." See Final Judgment.

(a). Qualified Risk-Sharing and Qualified Clinically Integrated Joint Arrangements

The DOJ should amend the Final Judgment to allow the Federation an opportunity to participate in qualified risk-sharing and clinically-integrated joint arrangements. Typical DOJ and FTC final orders concerning providers' alleged collective bargaining with health plans and other third-party payors have not precluded physician membership organizations from participating in "qualified risk-sharing" and "qualified clinically-integrated" joint arrangements. See DOJ/FTC Decisions, supra. The Final Judgment, however, is significantly more onerous and prohibitive than recent orders in that it bars the Federation from participating in these arrangements on behalf of its physician membership. CSMS therefore proposes that the DOJ modify the Final Judgment to allow the Federation the ability to participate in these same lawful arrangements on behalf of its physician members.

(b). Messenger Model

The DOJ should modify the Final Judgment to permit the Federation to engage in messenger model arrangements on behalf of its members. As outlined in the 1996 Statements, both the DOJ and the FTC have officially recognized that "[a]rrangments that are designed simply to minimize the costs associated with the contracting process, and that do not result in a collective determination by the competing network providers on prices or price-related terms, are not per se illegal price fixing." Statement 9(C), 1996 Statements. Indeed, both agencies acknowledged that legitimate messenger model arrangements "facilitate contracting between providers and payers and avoid price-fixing agreements among competing network providers". Id.

The DOJ and FTC, in its 1996 Statements, identified four ways by which physician membership organizations can lawfully operate messenger model arrangements: (1) "network providers may use an agent or third party to convey to purchasers information obtained individually from the providers about the prices or price-related terms that the providers are willing to accept"; (2) "the agent may convey to the providers all contract offers made by purchasers, and each provider then makes an independent, unilateral decision to accept or reject the contract offers"; (3) "the agent may have received from individual providers some authority to accept contract offers on their behalf"; and (4) "[t]he agent may also help providers understand the contracts offered, for example by providing objective or empirical information about the terms of an offer (such as a comparison of the offered terms to other contracts agreed to by network participants)." Statement 9(C), 1996 Statements.

DOJ and FTC orders have generally permitted physician membership organizations to enter into arrangements under which they will act as messengers or agents on behalf of their members with payors regarding contracts, subject to notification requirements. See

DOJ/FTC Decisions, supra. These organizations typically must provide sixty (60) days written notice to the agency prior to entering into any arrangement with any physicians under which the organization proposes to act as a messenger, or as an agent on behalf of any physicians, with payors regarding contracts. See DOJ/FTC Decisions. Most notably, the Delaware district court in *United States v. Federation of Defendants, Inc.* ("Delaware Decree"), supra, which the DOJ, in the present case, explicitly recognized as "similar" in nature to the present case, did not bar the Federation from *lawfully* representing physicians in their dealings with payers as a messenger. In the present matter, the Final Judgment, which lacks any explanation for this considerable inequity, stands in stark contrast to the Delaware Decree in addition to decisions rendered in other comparable cases. See DOJ/FTC Decisions, supra. CSMS therefore recommends that the DOJ modify the Final Judgment to allow the Federation to participate in all *lawful* messenger model arrangements on behalf of its physician membership.

(c) Lawful Communication With and Representation of Physician Members

The Final Judgment unnecessarily precludes the Federation defendants from other lawful conduct typically excluded from final decree prohibitions issued by the DOJ and FTC. See DOJ/FTC Decisions, supra. The Delaware Decree, for example, permitted the Federation to communicate to a physician member, at that physician's request, "accurate, factual, and objective information about a proposed payer contract offer or contract terms," and to "objectively review and analyze terms and conditions of any proposed or actual payer contract" subject to certain restrictions. See Delaware Decree, Section 5, supra. The Final Judgment, however, precludes the Federation defendants from "providing ***any*** services to ***any*** physician in private practice regarding such physician's negotiation, contracting, or other dealings with ***any*** payors" and explicitly prohibits them from "training or educating, or attempting to train or educate, any independent physician in any aspect of contracting or negotiation with any payor." See Final Judgment, pp. 4-5 (emphasis added). The prohibitions are so far-reaching and restrictive that they are excessively punitive in nature. CSMS therefore suggests that the DOJ modify the Final Judgment to authorize the Federation defendants to engage in such lawful practices.

(2) The Purpose of § 4 of the Sherman Act Is To Prevent Recurrence of *Unlawful* Conduct

Amending the Final Judgment to allow Federation defendants to engage in the type of lawful activity discussed above would be consistent with the Sherman Act's enforcement provisions. Section 4 of the Sherman Act (the "Act"), provides in relevant part: "it shall be the duty of the several district attorneys of the United States...to institute proceedings in equity to prevent and restrain such violations [of the Act]." 15 U.S.C. § 4. Absent from this provision, however, is language indicating that the purpose of such proceedings is to prohibit *lawful* activity. Moreover, the 1996 Statements explicitly recognize that multiprovider networks engaging in legitimate arrangements, including the messenger model, can offer procompetitive benefits to consumers. Accordingly, CSMS proposes that the DOJ amend the Final Judgment to remedy the alleged illegal concerted conduct, while permitting the Federation to engage in lawful

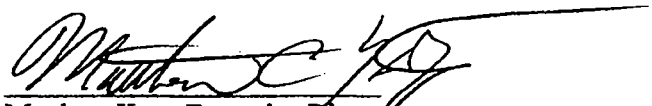
activities on behalf of its physician members consistent with past DOJ/FTC orders, rulings and final judgments.

III. CONCLUSION

The Final Judgment is so restrictive that it effectively precludes the Federation and potentially its physician members from engaging in legal activities associated with past rulings, as well as from communicating within the network regarding patient care in general. Not only does the all-encompassing nature of the prohibitions unreasonably interfere with the physician members' livelihood, but it also threatens the quality of patient care. Furthermore, the Final Judgment's impact could potentially impede the Federation's communication and activities not only on behalf of members within this particular organization, but also on behalf of the organization itself and its individual physician members.

For all the foregoing reasons, CSMS urges the DOJ to reconsider the terms of the Final Judgment to permit the Federation to engage in the type of lawful conduct, discussed in detail above, on behalf of its physician members.

Sincerely,



Matthew Katz, Executive Director

ATTACHMENT 4

Connecticut ORTHOPEDIC Society

September 18, 2007

FIRST CLASS MAIL
Certified Mail, Return Receipt Requested
Mr. Joseph Miller,
Acting Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

Re: Comments of the Connecticut Orthopedic Society to the Proposed Final Judgment As To The Federation of Physicians and Dentists and Lynda Odenkirk, Case No. 1:05-cv-431

Dear Acting Chief Miller:

This letter is in reference to the proposed Final Judgment ("Final Judgment") as to the Federation of Physicians and Dentists (the "Federation") and Lynda Odenkirk" (collectively, the "Federation defendants") in connection with the above-referenced matter.

The Connecticut Orthopedic Society (COS), a membership organization of orthopedic surgeons in Connecticut, requests that the Final Judgment, which is unnecessarily restrictive and more onerous than final decrees typically entered by both the Department of Justice (DOJ) and the Federal Trade Commission (FTC), be amended to allow the Federation and its physician members to engage in generally accepted common and lawful practices.

COS strongly supports the public comment submitted by the Connecticut State Medical Society (CSMS). As detailed below in these Comments, COS affirms its position that the Final Judgment should be amended to:

- Permit the Federation to engage in messenger model arrangements on behalf of its members, an arrangement that both the DOJ and FTC officially recognized in the 1996 Department of Justice/Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care ("1996 Statements").

- Allow the Federation an opportunity to participate in qualified risk-sharing and clinically-integrated joint arrangements. Typical decrees entered by the DOJ and

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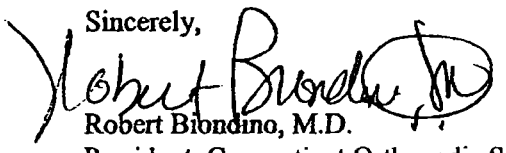
FTC have not precluded physician membership organizations from participating in qualified joint arrangements. COS therefore strongly urges the DOJ to modify the terms of the Final Judgment to allow the Federation the ability to participate in these same lawful arrangements on behalf of its physician membership.

ξ Permit the Federation to train, educate or attempt to train or educate any independent physician in any aspect of contracting or negotiating with any payor. While previous decrees have generally allowed physician membership organizations to communicate at a physician's request, these prohibitions are so far-reaching and restrictive in that they preclude the Federation from engaging in any of the foregoing practices on behalf of its physician members.

For all the foregoing reasons, COS requests that the DOJ modify the Final Judgment to permit the Federation to engage all of the lawful conduct outlined above on behalf of its members. Thank you for your attention to this critical matter.

Sincerely,



Robert Biondino, M.D.
President, Connecticut Orthopedic Society

ATTACHMENT 5

August 30, 2007

Joseph Miller
Acting Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W. Suite 4000
Washington, D.C. 20530

Dear Sir:

The purpose of this letter is to comment on the Impact Statement and Consent Decree pending from the Department of Justice toward the Federation of Physicians and Dentists (Federation) and its effects on the Cincinnati OB-GYNS that employ their services.

I believe the Utah State Orthopedic Society (USOS) has a germane example in regard to the appropriate use of the Federation and the "messenger model". While the use of the "messenger model" in the state of Utah among Orthopedist has an approximate 8 – 9 year history its presence in Utah became more formal 5 years ago when the Federation of Physicians and Dentist helped the USOS organize itself into a functioning society that supplies meaningful information and education to it members, via a representing Board of Councilors and an annual educational conference.

The history the USOS has had with the Federation of Physicians and Dentists has been nothing but professional and extremely cognizant of the legal operating parameters of the "messenger model". The USOS from the beginning was counseled and has operated under the clear understanding from the Federation that the "messenger model" is intended only to provide efficiencies in the contracting process by allowing representation from a "messenger" dedicated to such activities rather than a physician trying to practice medicine and trying to negotiate such contracts simultaneously. While a "messenger" may legally represent several competing orthopedists or their practices it is clear that the "messenger" can never negotiate or represent physicians collectively; all of the negotiations must be kept confidential on an individual decision-making level. The Federation has always operated in Utah in this fashion.

The USOS has always viewed our relationship with the Federation as educational and informational in nature but never as a tool to increase leverage or position in the Utah market. As a physician, my ability to balance a busy patient schedule and become an expert in insurance terms, conditions and contract language is extremely limited. Speaking as an individual practitioner I can only do so many things in a single day. I admittedly am disadvantaged when it comes to my negotiations with the insurance industry experts but

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through the proper use of the "messenger model" have become at least somewhat more educated in making rational decisions for my practice. I believe this education has had the effect of making the physician and insurance markets in the state of Utah more competitive, not less.

From our experience in Utah I can only presume that the activities in Cincinnati have been handled in a similar fashion by the Federation. I hope the use of the "messenger model" through out the country is managed legally by those that employ it. I also hope that where the "messenger model" is being used appropriately that it will be protected by the Department of Justice for the benefit of physicians and patients that realize such an important benefit from it.

From a Utah perspective I would judge that monopoly power is not held with the physicians but rather with the insurers and one system in particular. We trust that the Department of Justice is carefully monitoring this side of the medical industry and the powerful, potentially controlling, organizations that exist in it as well.

I hope you find this information helpful, thank you for your consideration.

Respectfully,

V. Cooley M.D.

Vernon J. Cooley, M.D.
President, Utah State Orthopedic Society

Mark Wankier
Executive Director, Utah State Orthopedic Society

[FR Doc. 08–227 Filed 1–23–08; 8:45 am]
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