

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Mountain Health Care, P.A., Civil Action No. 1:02CV288-T (W.D.N.C.) Response to Public Comments

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that Public Comments and the Response of the United States have been filed with the United States District Court for the Western District of North Carolina in *United States v. Mountain Health Care, P.A.* Civil Action No. 1:02CV288-T (W.D.N.C., filed December 13, 2002). On December 13, 2002, the United States filed a Complaint alleging that defendant, Mountain Health Care, P.A. (“MHC”) and its physician owners and members, restrained competition in the sale of physician services to managed health care purchasers, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment, filed at the same time as the Complaint, requires MHC to dissolve.

Public comment was invited within the statutory 60-day comment period. Such Comments, and the Responses thereto, are hereby published in the **Federal Register** and have been filed with the Court. Copies of the Complaint, Stipulation, proposed Final Judgment, Competitive Impact Statement, Public Comments and the Response of the United States are available for inspection in Room 4000 of the Antitrust Division, Department of Justice, 1401 H Street, NW., Washington, DC 20530 (telephone: 202–307–0001) and at the Office of the Clerk of the United States District Court for the Western District of North Carolina, Room 212, 401 West Trade Street, Charlotte, North Carolina.

Copies of any of these materials may be obtained upon request and payment of a copying fee.

Constance K. Robinson,

Director of Operations, Antitrust Division.

United States District Court for the Western District of North Carolina

United States of America, Plaintiff, v. Mountain Health Care, P.A. Defendant; Response to Public Comments

[Civil No.: 1:02CV288-T; Filed]

Pursuant to the requirements of the Antitrust Policies and Procedures Act, 15 U.S.C. 16(b)–(h) (the “APPA” or “Tunney Act”), the United States responds to public comments received regarding the proposed Final Judgment

submitted for entry in this civil antitrust proceeding.

I. Background

On December 13, 2002, the United States filed a civil antitrust complaint alleging that defendant, Mountain Health Care, P.A., (“MHC”) and its physician owners and members, restrained competition in the sale of physician services to managed health care purchasers, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. MHC is a physician-owned network consisting of the vast majority of physicians practicing in the greater Asheville, North Carolina area. MHC was formed in 1994 to increase the bargaining power of its physicians with managed care insurance companies, self-insured employers, and third-party administrators (collectively, “managed care purchasers”). Complaint ¶ 8; Competitive Impact Statement (“CIS”) II.B. To facilitate that objective, MHC and its physicians established a uniform fee schedule that it incorporated into contracts with certain managed care purchasers. Complaint ¶ 10. The use of that fee schedule eliminated price competition among MHC’s physicians, who did not clinically or financially integrate their practices in a way that would have justified their collective price setting conduct. Complaint ¶ 11. This resulted in increased physician reimbursement fees to managed care purchasers in the greater Asheville area. Complaint ¶ 14. MHC also exclusively represented its member physicians in negotiations with certain managed care purchasers. Complaint ¶ 13.

Also on December 13, 2002, the United States filed a proposed Final Judgment and a Stipulation signed by both it and defendant MHC agreeing to entry of the Final Judgment following compliance with the Tunney Act. Pursuant to the Tunney Act, the Stipulation, proposed Final Judgment and Competitive Impact Statement (“CIS”) were published in the **Federal Register** on January 10, 2003. 68 FR 7, 1478–1482. A summary of the terms of the Complaint and the proposed Final Judgment were published for seven consecutive days in the Asheville Citizen-Times from January 24 through January 30, 2003. Pursuant to U.S.C. 16(b)–(d) the 60-day period for public comments on the Proposed Final Judgment began on January 11, 2003 and expired on March 12, 2003. During that time, nine comments and one *amicus* brief were received.

II. Response to Public Comments

A. Amicus Brief Filed by S.M. Oliva, President of Citizens for Voluntary Trade, and the Comments of Citizens for Voluntary Trade

On February 15, 2003, S.M. Oliva, president of Citizens for Voluntary Trade (CVT), filed a motion for leave to file an *amicus curiae* brief. Attached to that motion was Oliva’s 7-page *amicus* brief (attached, along with the motion, as Exhibit A). On March 7, 2003, Oliva submitted the 48-page Public Comments of Citizens for Voluntary Trade to the Proposed Final Judgment (Exhibit B), repeating the same arguments made in Oliva’s *amicus* brief and including lengthy recitations of CVT’s view of the history of the government’s intervention in health care and other “background” information. On March 19, 2003, the United States filed a response to Oliva’s *amicus* request, stating that it did not oppose the Court accepting his brief and treating it as another comment to the Proposed Final Judgment. On March 27, 2003 the Court ordered that Oliva’s *amicus* brief be treated as a supplemental comment to the proposed Final Judgment. In this Response, the United States responds to the assertions made in both Oliva’s *amicus* brief and CVT’s comments.

1. CVT’s and Oliva’s Arguments About Why This Case Should Not Have Been Brought Are Irrelevant in a Tunney Act Proceeding

The vast majority of the comments made by CVT and Oliva relate to whether this case should have been filed in the first instance, not to whether the relief in the Proposed Final Judgment is adequate to address the harm alleged in the Complaint. *E.g.*, Exh. A at 3 (“no need for the government’s proposed remedy—dissolution of MHC—because there is no illegal behavior taking place”). Oliva asks the Court to dismiss the complaint for failure to state a claim. Exh. B at 13. Because Oliva relies on factual assertions beyond the scope of the allegations in the Complaint, this request is, in effect, a motion, under Rule 56 of the Federal Rules of Civil Procedure, for summary judgment against the United States.

Comments alleging that the United States does not have sufficient evidence to support the case it has pled, and requesting dismissal of the United States’ complaint, are beyond the scope of this hearing. A Tunney Act proceeding is not an opportunity for a “*de novo*” determination of facts and issues,” but rather is intended “to determine whether the Department of