

Justice's explanations were reasonable under the circumstances" because "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (citations omitted). Courts consistently have refused to consider "contentions going to the merits of the underlying claims and defenses." *United States v. Bechtel*, 648 F.2d 660, 666 (9th Cir. 1981.) CVT contends that the legislative history of the Tunney Act authorizes a review of the merits of the underlying case, and not just the adequacy of the proposed relief. Exh. B at 44–45. This is incorrect. During the Senate hearings on the Act, one witness specifically urged that "as a condition precedent to * * * the entry of a consent decree in a civil case * * * the Department of Justice be required to file and make a matter of public record a detailed statement of the evidentiary facts on which the complaint * * * was predicated."¹ That recommendation, however, was rejected. Congress did not intend to turn every Tunney Act proceeding into a full-blown trial on the merits of the United States' complaint.

For this reason, assertions that the United States lacks jurisdiction, that MHC was a non-exclusive physician network, that it was really operating under a "messenger model" of contracting that has been approved by the United States, and that MHC's conduct did not cause anti-competitive effects—all of which pertain to the merits of the underlying case, but not the proposed remedy—are irrelevant to this proceeding, and should not be considered by this Court.² Nonetheless, the United States responds to those assertions below.

2. The Complaint States a Claim Upon Which Relief Can Be Granted

Even if CVT or Oliva had the right to file a motion to dismiss the Complaint under Rule 56, that motion would fail because the Complaint states a claim upon which relief can be granted. *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (A horizontal agreement by health care providers, causing an anticompetitive impact on third party payors, is an unreasonable restraint of trade). CVT and Oliva have not provided any evidence to dispute the allegations made in the Complaint. Nor do CVT or Oliva appear to have any independent knowledge of the health care market in Western North Carolina. Rather, it appears they reach their conclusions on the basis of what Oliva says he learned during a telephone interview with Ellen Wells, President of defendant MHC, and from reading newspaper articles found on the defendant's Web site.³ The interest of CVT and Oliva appear to stem less from their knowledge of the Western North Carolina physician market and more from their ideology that the antitrust laws in general are unconstitutional, and that antitrust enforcement against physicians promotes socialism.⁴

The information already disclosed in the Complaint provides sufficient basis for this Court to make a public interest determination. The request of CVT and Oliva for highly detailed market information—for example, data to "assess the state of the affected marketplace" and "empirical evidence demonstrating how the proposed remedy is likely to restore competition" (Exh. A at 5)—is not justified. As noted above, this request is not relevant in this Tunney Act proceeding to the extent it relates to whether the United States had a good faith basis for concluding that MHC's conduct was anticompetitive and violated the antitrust laws. *See supra*, Section II.A.1. The United States is not required in its Complaint or in a Tunney Act proceeding to specify in detail all of the evidence upon which it based its decision to file a case here. Indeed, Congress specifically rejected such a requirement when the Act was being considered in the Senate. *See supra*

Section II.A.1. Requiring the disclosure of this kind of evidence—that akin to the kind of information that would have to be disclosed during litigation in expert reports and other filings—would substantially undermine the benefits of settling government antitrust cases. One of the major benefits of antitrust consent judgments is that they enable the government "to reallocate necessarily limited [enforcement] resources," *Microsoft Corp.*, 56 F.3d at 1459, and that benefit would be lost if the United States were forced to compile and disclose during a Tunney Act proceeding the same kind of information it is required to disclose during litigation.

a. The United States has jurisdiction to challenge Mountain Health Care's conduct in this case. CVT questions whether the United States has jurisdiction to bring this case because at least some of MHC's contracts were with businesses organized and doing business solely in North Carolina. Exh. B at 6–9. As alleged in the Complaint, MHC has contracts with out-of-state employers and those businesses "remit substantial payments to MHC physicians in North Carolina." Complaint ¶ 5. This is more than sufficient to meet the Sherman Act's expansive reach. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991) (interstate commerce nexus found where hospital and medical staff conspired to exclude single physician from Los Angeles market); *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980) (price fixing by local real estate brokers); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976) (conspiracy to block relocation and expansion of rival hospital).

CVT further claims that, beyond the question of jurisdiction, this case raises the question of whether it is in the "public interest" for the United States to bring the charges because such an action infringes upon the "regulation of private health care networks" by the State of North Carolina. Exh. B at 8. Nothing about this case, or any of the relief in the Proposed Final Judgment, undermines the state's regulation of health care providers.

b. Mountain Health Care was an exclusive network with substantial market power. Based solely on hearsay, CVT and Oliva claim that MHC is not really an exclusive network, that its providers contract freely with other networks and plans, and that those patients covered by MHC contracts make up only 8% of the patients seen by MHC's providers. *E.g.*, Exh. B at 10. Whether a physician network is "exclusive" or "non-exclusive" is

¹ The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Cong., 1st Sess. 26, 57 (1973) (prepared statement of Maxwell M. Blecher, attorney).

² Even farther afield are the lengthy and wide-ranging attacks in CVT's comments on various other subjects: The Medicaid and Medicare statutes (Exh. B at 14); the HMO Act of 1973 (*id.* at 15); settled Supreme Court precedent, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), holding that price fixing by physicians is unlawful (*id.* at 19–20); the Health Care Policy Statements issued by the Department of Justice and Federal Trade Commission (*id.* at 20–23); the "morality" of this case and others like it, which in CVT's view are not designed to protect consumers but to "deny wealth to its rightful owners" (*id.* at 23–25); and several cases against physician groups brought not by the United States Department of Justice, the plaintiff in this case, but by the Federal Trade Commission (*id.* at 26–36).

³ Exh. A at 3 n.5 and accompanying text (citing Jan. 23, 2003 telephone interview); Exh. B at 46 (relying on information "Mountain president Ellen Wells told CVT"); Exh. B Appendix A (attaching several documents from Mountain Health Care website).

⁴ *See* CVT Comment at 36 ("the Sherman Act is unconstitutional in CVT's judgment"); at 48 (government's enforcement efforts moving country "closer towards the complete socialization of health care under central control").