- Sonoma Valley Regional Library, 755 West Napa St., Sonoma, CA 95476.
- Sonoma County Central Library, 211 E Street, Santa Rosa, CA 95404.
- Marin County—Novato Branch Library, 1720 Novato Blvd., Novato, CA 94947.
- Napa City—County Library, 580 Coombs Street, Napa, CA 94559.
- Marin County—Central Branch Library, 3501 Civic Center Drive #427, San Rafael, CA 94903.

Before including your name, address, phone number, e-mail address, or other personal identifying information in any correspondence, you should be aware that your entire correspondence, including your personal identifying information, may be made publicly available at any time. While you can request in your correspondence that Reclamation withhold your personal identifying information from public review, we cannot guarantee Reclamation is able to do so.

Dated: October 30, 2009.

Pablo R. Arroyave,

Deputy Regional Director, Mid-Pacific Region.

Editorial Note: This document was received in the Office of the Federal Register on June 2, 2010.

[FR Doc. 2010–13512 Filed 6–4–10; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on May 28, 2010, a proposed Consent Decree ("Decree") in *United States* v. *The Scrap Yard, LLC, d/b/a/Cleveland Scrap,* Civil Action No. 1:10–cv–01206, was lodged with the United States District Court for the Northern District of Ohio.

In this action the United States, on behalf of the U.S. Environmental Protection Agency ("U.S. EPA"), sought penalties and injunctive relief under the Clean Air Act ("CAA") against The Scrap Yard, LLC, d/b/a/Cleveland Scrap ("Defendant") relating to Defendant's Cleveland, Ohio facility ("Facility"). The Complaint alleges that Cleveland Scrap has violated Section 608(b)(1) of the CAA, 42 U.S.C. 7671g(b)(1) (National Recycling and Emission Reduction Program), and the regulations promulgated thereunder, 40 CFR part 82, subpart F, by failing to follow the requirement to recover or verify recovery of refrigerant from appliances it accepts for disposal. The Consent Decree provides for a civil penalty of $5,000 based upon ability to pay. The Decree also requires Defendant to (1) purchase equipment to recover refrigerant or contract for such services and provide such service at no additional cost; (2) no longer accept appliances with cut lines unless the supplier can provide appropriate verification that such appliances have not leaked; (3) require its suppliers to use the verification statement provided in appendix A; and (4) keep a refrigerant recovery log regarding refrigerant that it has recovered.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *The Scrap Yard, LLC, d/b/a/ Cleveland Scrap,* D.J. Ref. 90–5–2–1–09613. The Decree may be examined at U.S. EPA, Region 5, 77 West Jackson Blvd., Chicago, IL 60604. During the public comment period, the Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $6.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–13501 Filed 6–4–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Idaho Orthopaedic Society, Timothy Doerr, Jeffrey Hessing, Idaho Sports Medicine Institute, John Kloss, David Lamey, and Troy Watkins; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Idaho in *United States of America* v. *Idaho Orthopaedic Society, Timothy Doerr, Jeffrey Hessing, Idaho Sports Medicine Institute, John Kloss, David Lamey, and Troy Watkins,* Civil Case No. 10–268. On May 28, 2010, the United States filed a Complaint alleging that each of the Defendants, and other competing orthopedists and orthopedic practices in Idaho, formed and participated in one or more conspiracies to gain more favorable fees and other contractual terms by agreeing to coordinate their actions, including denying medical care to injured workers and to threaten to terminate their contracts with Blue Cross of Idaho, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Idaho Code Section 48–101 *et seq.* of the Idaho Competition Act. The proposed Final Judgment, filed the same time as the Complaint, enjoins the Defendants from jointly agreeing with competing physicians regarding the amount of pay to accept from any payer or groups of payers or jointly boycotting any payer or group of payers.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Idaho. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Joshua H. Soven, Chief, Litigation I Section, Antitrust

Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 4100, Washington, DC 20530 (telephone: 202–307–0827).

J. Robert Kramer II,

Director of Operations and Civil Enforcement.

Christine A. Varney, Assistant Attorney General; Peter J. Mucchetti, Trial Attorney (DCB No. 463202); U.S. Department of Justice Antitrust Division, 450 Fifth Street, NW., Suite 4100, Washington, DC 20530, *peter.j.mucchetti@usdoj.gov*. Telephone: (202) 353–4211. Facsimile: (202) 307–5802. Attorneys for the United States.

Lawrence Wasden, Attorney General; Brett T. DeLange, Deputy Attorney General (ISB No. 3628); Consumer Protection Division, Office of the Attorney General, 954 W. Jefferson St., 2nd Floor, P.O. Box 83720, Boise, Idaho 83720–0010, *brett.delange@ag.idaho.gov*. Telephone: (208) 334–4114. Facsimile: (208) 334–4151. Attorneys for the State of Idaho.

(See signature page for the complete list of plaintiffs' attorneys).

United States District Court for the District of Idaho

Civil Case No. 10–268

United States of America and the State of Idaho, Plaintiffs, vs. Idaho Orthopaedic Society, Timothy Doerr, Jeffrey Hessing, Idaho Sports Medicine Institute, John Kloss, David Lamey, and Troy Watkins, Defendants; Complaint

The United States of America, acting under the direction of the Attorney General of the United States, and the State of Idaho, acting under the direction of the Attorney General of the State of Idaho, bring this action for equitable and other appropriate relief against Defendants Idaho Orthopaedic Society, Dr. Timothy Doerr, Dr. Jeffrey Hessing, Idaho Sports Medicine Institute, Dr. John Kloss, Dr. David Lamey, and Dr. Troy Watkins, to restrain Defendants' violations of Section 1 of the Sherman Act and Idaho Code Section 48–101 *et seq.* of the Idaho Competition Act. Plaintiffs allege as follows:

I. Nature of the Action

1. Defendants and other competing orthopedists and orthopedic practices in the Boise, Idaho area formed two conspiracies to deny, or to threaten to deny, medical care to patients to force those patients' insurers to increase fees for orthopedic services.

2. In the first conspiracy, Defendants and their co-conspirators agreed, through a series of meetings and other communications, not to treat most patients covered by workers' compensation insurance. Defendants entered into this group boycott to force the Idaho Industrial Commission to increase the rates at which orthopedists are reimbursed for treating injured workers. Defendants' group boycott, which resulted in a shortage of orthopedists willing to treat workers' compensation patients, caused the Idaho Industrial Commission to increase rates for orthopedic services substantially above levels set just a year earlier.

3. In the second conspiracy, Defendants (except for Defendant Lamey) and other conspirators agreed, through a series of meetings and other communications, to threaten to terminate their contracts with Blue Cross of Idaho ("BCI") to force it to offer better contract terms to orthopedists. Their collusion caused BCI to offer orthopedists more favorable contract terms than BCI would have offered but for Defendants' group boycott of BCI.

4. The United States and the State of Idaho, through this suit, ask this Court to declare Defendants' conduct illegal and to enter injunctive relief to prevent further injury to the State of Idaho and other purchasers of orthopedic services, including self-insured employers and health and workers' compensation insurers in the Boise, Idaho area and elsewhere.

II. Defendants

5. The Idaho Orthopaedic Society ("IOS") is a non-profit corporation organized and doing business under the laws of the State of Idaho, with its principal place of business in Boise. The IOS is a membership organization that, from 2006 to 2008, consisted of approximately 75 economically independent, competing orthopedists in solo and group practices in Idaho.

6. Timothy Doerr, MD is an orthopedic surgeon practicing in Boise. He was at all relevant times a member of the IOS.

7. Jeffrey Hessing, MD is an orthopedic surgeon practicing in Boise. He was at all relevant times a member of the IOS.

8. Idaho Sports Medicine Institute, P.A. ("ISMI"), an orthopedic practice group consisting of four physicians, is a corporation organized and doing business under the laws of the State of Idaho, with its principal place of business in Boise.

9. John Kloss, MD is an orthopedic surgeon practicing in Boise who formerly practiced with Orthopedic Centers of Idaho, P.A., d.b.a. Boise Orthopedic Clinic ("BOC"). He was at all relevant times a member of the IOS.

10. David Lamey, MD is an orthopedic surgeon practicing in Boise who formerly practiced with BOC. He was at all relevant times a member of the IOS.

11. Troy Watkins, MD is an orthopedic surgeon practicing in Boise, and was from 2006 through 2008 the President of the IOS. He was at all relevant times a member of the IOS.

III. Jurisdiction and Venue

12. The Court has subject-matter jurisdiction over this action under 15 U.S.C. 4 and 15 U.S.C. 26, which authorize the United States and the State of Idaho, respectively, to bring actions in district courts to prevent and restrain violations of Section 1 of the Sherman Act, 15 U.S.C. 1. Subject-matter jurisdiction also exists pursuant to 28 U.S.C. 1331, 1337 and 1345.

13. The Court has jurisdiction over the State of Idaho's claim under Idaho Code Section 48–101 *et seq.,* under the doctrine of pendent jurisdiction, 28 U.S.C. 1367.

14. The IOS and ISMI are both found, have transacted business, and committed acts in furtherance of the alleged violations in the District of Idaho. Defendants Doerr, Hessing, Kloss, Lamey, and Watkins all provide orthopedic services and reside in Idaho. Consequently, this Court has personal jurisdiction over Defendants, and venue is proper in this District pursuant to 28 U.S.C. 1391(b).

IV. Conspirators

15. Various persons not named as defendants in this action have participated as conspirators with Defendants in the offenses alleged and have performed acts and made statements in furtherance of the alleged conspiracies.

V. Effects on Interstate and Idaho Commerce

16. The activities of Defendants that are the subject of this Complaint are within the flow of, and have substantially affected, interstate trade and commerce.

17. Defendants have treated patients who are not residents of Idaho. Defendants have also purchased equipment and supplies that were shipped across state lines.

18. Most Idaho employers provide workers' compensation and health insurance for their employees. The rates that Idaho employers pay for providing workers' compensation and health insurance are based in part on the cost of orthopedic services. Anticompetitive conduct that increases the cost of

orthopedic services increases the cost of producing goods and services, which many Idaho employers sell in interstate commerce.

VI. Idaho Workers' Compensation System Conspiracy

19. The Idaho Workers' Compensation Act, Idaho Code Section 72–101 *et seq.,* requires that most public and private employers in Idaho carry workers' compensation insurance for their employees.

20. The Idaho Industrial Commission is the state agency responsible for regulating workers' compensation insurance in Idaho. Since 2006, the Idaho Industrial Commission has set the fee schedule that determines the amount that orthopedists and other healthcare providers usually receive for treating patients covered by workers' compensation insurance. The fee schedule uses a methodology for determining physician payments called a Resource-Based Relative Value System or RBRVS.

21. The RBRVS methodology uses a "relative value unit" and a "conversion factor" to determine physician payment. The relative value unit measures the resources necessary to perform a medical service. For example, a complicated surgical procedure has a higher relative value unit than a simple office visit. The conversion factor is a set dollar amount, for example, $100.

22. A physician's payment for any medical service is generally calculated by multiplying the relative value unit by the conversion factor. For example, a physician would receive $500 for a medical service with a relative value unit of 5 and a conversion factor of $100.

23. In February 2006, the Idaho Industrial Commission announced a new fee schedule using the RBRVS methodology and setting a conversion factor of $88 for many orthopedic procedures. The new fee schedule had an effective date of April 1, 2006. Many orthopedists believed this conversion factor would result in lower payments to orthopedists. In response, Defendants and their co-conspirators agreed, through the actions discussed below, not to treat most patients covered by workers' compensation insurance.

24. Shortly after the Idaho Industrial Commission announced the February 2006 fee schedule, many Boise-area orthopedists from competing practices discussed with one another whether to accept the proposed rates or, alternatively, to stop treating workers' compensation patients. For example, at Defendant Doerr's invitation, orthopedists from several competing practices met on March 2, 2006 to talk about "the physician response to the new fee schedule." Also on March 2, 2006, an orthopedist specializing in hand surgery sent an e-mail to several competing orthopedic hand surgeons saying that the new conversion factors represented a severe cut in workers' compensation payments and that, at Defendant Doerr's meeting that night, orthopedists would examine their options. On the same day, Defendant Lamey wrote to a competing orthopedist that he did "not have much problem dropping out of work comp."

25. The day after the March 2, 2006 meeting, orthopedists from two competing practices sent letters to the Idaho Industrial Commission announcing their intention to stop treating workers' compensation patients.

26. Many of the orthopedists who initially boycotted the workers' compensation system were orthopedists who specialized in hand surgery. For example, on April 12, 2006, seven hand surgeons met "to discuss the various docs' interest in continuing to participate" in Idaho's workers' compensation system. An e-mail describing this meeting noted that Defendant Lamey and a competing orthopedist favored "ditching" workers' compensation and that Defendant Kloss agreed but wanted to negotiate a rate increase with the Idaho Industrial Commission. The day after that meeting, Defendants Kloss and Lamey stopped treating workers' compensation patients, with the exception of emergency room patients.

27. A June 6, 2006 letter from the IOS leadership, including Defendants Watkins and Kloss, to members instructed them that they " 'must, indeed, all hang together or, most assuredly, we shall all hang separately.' " The letter noted that orthopedists "must act together" concerning the workers' compensation fee schedule and "collectively join our efforts for our practices" to negotiate a more favorable fee schedule.

28. Minutes from a BOC board of directors meeting on June 12, 2006, state that BOC's president told the board that Boise-area orthopedists specializing in hand surgery "have stopped taking new work comp patients." The minutes continue, saying, "Dr. Kloss confirmed this, except for [emergency room] call patients. [Defendant Kloss] said there has been an appeal for orthopedists to support the hand surgeons in their effort to demonstrate the inadequacy of payment for some orthopedic procedures."

29. On September 12, 2006, orthopedists from competing practices attended a meeting organized by Defendants Doerr and Hessing to discuss workers' compensation fees. Within ten days of the meeting, ISMI and two other large orthopedic practices in the Boise area stopped treating workers' compensation patients.

30. By October 2006, most of the approximately 65 orthopedists in the Boise area had stopped seeing most workers' compensation patients.

31. Five of the few remaining Boise orthopedists who continued to care for workers' compensation patients worked at BOC. Other orthopedists encouraged and pressured those BOC orthopedists to join the boycott and stop seeing workers' compensation patients. In an October 24, 2006 e-mail, BOC's president also encouraged these five BOC orthopedists to join the boycott. He explained that if the doctors were to stop treating new workers' compensation patients, the workers' compensation system would "be brought to a virtual standstill," increasing the doctors' negotiating leverage.

32. Over the following months, orthopedists and practice administrators regularly monitored adherence with the group boycott and pressured doctors to maintain a disciplined front. For example, on November 27, 2006, an ISMI administrator assured a competing practice that although ISMI had recently accepted one workers' compensation patient to offer a second opinion, it would not do so again, lest it "risk the rath [*sic*] of all the orthopedic surgeons because we're doing this." The ISMI administrator assured the competing practice group that ISMI was "turning away all other worker's comp cases," and asked the recipient to "[p]lease tell your docs what we did so it doesn't come back and sound worse than it already is!"

33. Defendants and their co-conspirators refused to treat most workers' compensation patients because they believed that if injured workers were unable to find orthopedists willing to treat them, the Idaho Industrial Commission would be forced to increase the orthopedist fee schedule. An ISMI employee explained that her practice's "lack of participation, along with others in the area, may cause them [*i.e.,* the Idaho Industrial Commission] to review their current Proposed Rule, which also includes the fee schedule." A January 2007 IOS newsletter notes that "lack of access [to orthopedists] is the key" to increased workers' compensation rates.

34. According to the February 5, 2007 minutes of the Idaho House of Representatives Commerce & Human Resources Committee, Defendant Watkins openly discussed that

physicians had agreed not to treat most workers' compensation patients. The minutes describe Defendant Watkins as stating that "[a] group of physicians met and decided that the [fee] table was not satisfactory. They decided to stop seeing workers' compensation patients [except] in the emergency room, and stop seeing and giving second opinions until discussion happened about [the] conversion factor chart."

35. In the face of an effective and widely adhered to group boycott, in February 2007, the Idaho Industrial Commission announced workers' compensation rates that were up to 61% higher than the rates that the Commission had announced a year earlier.

36. After the new rates were announced, Defendants and their co-conspirators agreed to end their boycott and accept the new rates. In a February 13, 2007 letter to IOS membership, Defendant Watkins wrote, "We * * * all think this [the higher fee schedule] represents a major accomplishment, and that we should accept it now." Shortly thereafter, Defendants and almost all of the orthopedists who had participated in the conspiracy resumed participation in the workers' compensation system.

VII. Blue Cross of Idaho Conspiracy

37. BCI is a not-for-profit mutual insurance company that offers a wide range of healthcare plans to employers and other groups in Boise and other areas of Idaho.

38. To offer these plans, BCI contracts with orthopedists and other physicians to provide medical services. BCI's contracts with orthopedists set the reimbursement amounts that BCI pays orthopedists for providing covered health care to BCI's enrollees.

39. In December 2007, BCI informed its network of orthopedists and other physicians of new rates that would take effect on April 1, 2008. Some of the Defendants and other orthopedists were concerned that the new rates were lower than BCI's previous rates.

40. Before the rates became effective, several of the Defendants and other competing orthopedists communicated with each other their dissatisfaction with BCI's proposed rates. In addition, on February 22, 2008, Defendant Watkins sent a letter to BCI saying that "[m]any of our members are worried that they may not be able to sustain some of the reductions they are facing with the proposed 2008 rates."

41. On April 9, 2008—eight days after the new BCI rates took effect—the IOS sponsored an "Orthopedic Open House" at Defendants Hessing and Doerr's office. At this meeting, the orthopedists discussed how to respond to BCI's adoption of new rates and encouraged others to send termination notices to BCI. Defendants Doerr and Hessing encouraged the orthopedists in attendance to put an ad in the newspaper to alert their patients and to assure other orthopedists that they were joining the boycott.

42. Shortly after the Orthopedic Open House, orthopedists began issuing termination notices to BCI and advertising their intended withdrawals in local newspapers. Between April and June 2008, twelve practice groups—representing approximately 31 of 67 orthopedists in the Boise area at the time—gave BCI notice that they would withdraw from BCI's network. This group included many IOS practice groups, including the practice group of Defendants Hessing and Doerr, and ISMI.

43. From April to June 2008, while orthopedic groups were sending termination notices to BCI, orthopedists communicated with each other to encourage others to withdraw from the BCI network. As part of this communication, many practices placed newspaper advertisements announcing their withdrawal from the BCI network. In addition, orthopedists discussed how the successful boycott of workers' compensation patients provided the model for collectively standing up to BCI and negotiating higher rates.

44. In June 2008, Defendant Watkins attempted to negotiate with BCI on behalf of competing orthopedists. He asked that BCI representatives meet with himself, Defendant Hessing, and Defendant Kloss (all of whom were in competing practices). In a separate June 2008 meeting, Defendant Watkins told BCI representatives that Idaho's orthopedists were a "very cohesive group" that had been successful in their efforts related to workers' compensation payments the previous year. Defendant Watkins also encouraged BCI to negotiate with practices that had already sent termination notices to BCI because otherwise BCI would experience a severe shortage of orthopedists in its network.

45. In response to the orthopedists' group boycott, on June 18, 2008, BCI offered orthopedists an additional contracting option to encourage orthopedists to continue to participate in BCI's provider network. The new option allowed orthopedists to choose between continuing to participate in BCI's network at current rates for one year with the possibility for higher rates the next year or to lock in existing rates for a three-year period. The new offer from BCI divided Boise's orthopedists, as several orthopedic practices accepted the new BCI offer.

46. In July 2008, when the conspirators failed to convince a large Boise orthopedic practice to join the boycott of BCI and that practice decided to continue its participation with BCI, BCI was able to contract with a sufficient number of orthopedists to maintain a viable physician network. Realizing that no further concessions beyond BCI's new offer would be forthcoming, practice groups began rescinding their termination notices. By the end of August 2008, most orthopedic practices had rescinded their termination notices and remained in the BCI network.

VIII. No Integration

47. Other than in their separate practices, IOS members do not share any financial risk in providing physician services, do not collaborate in a program to monitor and modify their clinical practice patterns to control costs or ensure quality, and do not otherwise integrate their delivery of care to patients.

IX. Violations Alleged

A. Claim 1: Conspiracy To Boycott Workers' Compensation Patients

48. Plaintiffs reiterate the allegations contained in paragraphs 1 through 36 and 47.

49. Beginning at least as early as February 2006 and continuing until at least February 2007, Defendants and their co-conspirators engaged in a combination or conspiracy in restraint of trade or commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 48–104 of the Idaho Competition Act, by collectively refusing to treat workers' compensation patients. The Defendants' group boycott to refuse to treat workers' compensation patients led to Defendants' obtaining higher reimbursement rates from the Idaho Industrial Commission.

B. Claim 2: Conspiracy To Boycott Participation in BCI

50. Plaintiffs reiterate the allegations contained in paragraphs 1 through 47.

51. Beginning in or about January 2008, and continuing through at least August 2008, the participating Defendants and their co-conspirators engaged in a combination or conspiracy in restraint of interstate trade or commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 48–104 of the Idaho Competition Act, by collectively threatening to terminate their contracts with BCI. The participating Defendants'

group boycott to terminate their contracts with BCI led to Defendants' obtaining more favorable contract terms from BCI.

X. Request for Relief

52. To remedy these illegal acts, the United States of America and the State of Idaho request that the Court:

a. Adjudge and decree that Defendants entered into two unlawful contracts, combinations, or conspiracies in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Idaho Code Section 48–104 of the Idaho Competition Act;

b. Enjoin the Defendant IOS and its members, officers, agents, employees and attorneys and their successors; Defendant ISMI; the individual physician Defendants; and all other persons acting or claiming to act in active concert or participation with one or more of them, from continuing, maintaining, or renewing in any manner, directly or indirectly, the conduct alleged herein or from engaging in any other conduct, combination, conspiracy, agreement, understanding, plan, program, or other arrangement to fix health care services prices, collectively negotiate on behalf of competing independent physicians or physician groups, or collectively boycott patients or health care insurers or other payors of health care services; and

c. Award to plaintiffs their costs of this action and such other and further relief as may be appropriate and as the Court may deem just and proper.

DATE: May 28, 2010.

FOR PLAINTIFFS
UNITED STATES OF AMERICA:

CHRISTINE A. VARNEY,

Assistant Attorney General, Antitrust Division.

MOLLY S. BOAST,

Deputy Assistant Attorney General, Antitrust Division.

WILLIAM F. CAVANAUGH, Jr.,

Deputy Assistant Attorney General, Antitrust Division.

J. ROBERT KRAMER II,

Director of Enforcement, Antitrust Division.

JOSHUA H. SOVEN,

Chief, Litigation I, Antitrust Division.

PETER J. MUCCHETTI,
ADAM GITLIN,
BARRY J. JOYCE,
MICHAEL T. KOENIG,
STEVEN KRAMER,
JULIE A. TENNEY,
PAUL J. TORZILLI.

Attorneys, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 4100, Washington, DC 20530, Telephone: (202) 353–4211, Facsimile: (202) 307–5802, peter.j.mucchetti@usdoj.gov.

THOMAS E. MOSS,

United States Attorney.

NICHOLAS J. WOYCHICK,

Civil Chief, United States Attorney's Office, 800 Park Boulevard, Suite 600, Boise, ID 83712–9903, (208) 334–1211.

STATE OF IDAHO:

LAWRENCE WASDEN,

Attorney General.

BRETT DELANGE,

Deputy Attorney General (ISB No. 3628).

Office of the Attorney General, Consumer Protection Division, 954 W. Jefferson St., 2nd Floor, P.O. Box 83720, Boise, Idaho 83720–0010, Telephone: (208) 334–4114, Facsimile: (208) 334–4151, brett.delange@ag.idaho.gov.

United States District Court for the District of Idaho

Civil Case No. 10–268–S.EJL

United States of America and the State of Idaho, *Plaintiffs*, v. Idaho Orthopaedic Society, Timothy Doerr, Jeffrey Hessing, Idaho Sports Medicine Institute, John Kloss, David Lamey, and Troy Watkins, *Defendants*; Final Judgment.

Whereas, Plaintiffs, the United States of America and the State of Idaho, filed their joint Complaint on May 28, 2010, alleging that the defendants, the Idaho Orthopaedic Society, Dr. Timothy Doerr, Dr. Jeffrey Hessing, Idaho Sports Medicine Institute, Dr. John Kloss, Dr. David Lamey, and Dr. Troy Watkins, participated in agreements in violation of Section 1 of the Sherman Act, and the State of Idaho has also alleged in the Complaint that the defendants violated Idaho Code Section 48–104 of the Idaho Competition Act; and the Plaintiffs and the defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

And whereas this Final Judgment does not constitute any admission by the defendants that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

And whereas the defendants agree to be bound by the provisions of this Final Judgment, pending its approval by this Court;

And whereas, the United States requires the defendants to agree to certain procedures and prohibitions for the purposes of preventing recurrence of the alleged violation and restoring the loss of competition alleged in the Complaint;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of plaintiffs and the defendants, it is *ordered, adjudged and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Sherman Act, 15 U.S.C. 1, and Idaho Code Section 48–101 *et seq.* of the Idaho Competition Act.

II. Definitions

As used in this Final Judgment:

(A) "Communicate" means to discuss, disclose, transfer, disseminate, or exchange information or opinion, formally or informally, directly or indirectly, in any manner;

(B) "Competing physician" means any orthopedist and orthopedic practice other than the defendant's practice, physicians in that practice, or that practice's employees or agents, in any of the following counties: Ada, Boise, Canyon, Gem, and Owyhee, Idaho;

(C) "Defendants" means the Idaho Orthopaedic Society, Dr. Timothy Doerr, Dr. Jeffrey Hessing, Idaho Sports Medicine Institute, Dr. John Kloss, Dr. David Lamey, and Dr. Troy Watkins, who have consented to entry of this Final Judgment, and all persons acting as agents on behalf of any of them;

(D) "On-call coverage" means any arrangement between a hospital and physicians whereby the physicians agree to provide medical services on an as needed basis to the hospital's emergency department;

(E) "Payer" means any person that purchases or pays for all or part of a physician's services for itself or any other person and includes but is not limited to independent practice associations, individuals, health insurance companies, health maintenance organizations, preferred provider organizations, employers, and governmental or private workers' compensation insurers;

(F) "Payer contract" means a contract between a payer and a physician or physician practice by which that physician or physician practice agrees to provide physician services to persons designated by the payer; and

(G) "Person" means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institute, governmental unit, organization, or other legal entity.

III. Applicability

This Final Judgment applies to the defendants and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. Prohibited Conduct

The defendants each are enjoined from, in any manner, directly or indirectly:

(A) Encouraging, facilitating, entering into, participating in, or attempting to engage in any actual or potential agreement or understanding with, between, or among competing physicians about:

(1) Any fee, or other payer contract term or condition, with any payer or group of payers, including the acceptability or negotiation of any fee or other payer contract term with any payer or group of payers;

(2) The manner in which the defendant or any competing physician will negotiate with, contract with, or otherwise deal with any payer or group of payers, including participating in or terminating any payer contract; or

(3) Any refusal to deal or threatened refusal to deal with any payer; or

(B) Communicating with any competing physician or facilitating the exchange of information between or among competing physicians about:

(1) The actual or possible view, intention, or position of any defendant or his or her medical practice group, or any competing physician concerning the negotiation or acceptability of any proposed or existing payer contract or contract term, including the negotiating or contracting status of the defendant, his or her medical group, or any competing physician with any payer or group of payers, or

(2) Any proposed or existing term of any payer contract that affects:

(a) The amount of fees or payment, however determined, that the defendant, his or her medical practice group, or any competing physician charges, contracts for, or accepts from or considers charging, contracting for, or accepting from any payer or group of payers for providing physician services;

(b) The duration, amendment, or termination of any payer contract; or

(c) The manner of resolving disputes between any parties to any payer contract.

V. Permitted Conduct

(A) Subject to the prohibitions of Section IV of this Final Judgment, the defendants:

(1) May discuss with any competing physician any medical topic or medical issue relating to patient care; and

(2) May participate in activities of any medical society.

(B) Nothing in this Final Judgment shall prohibit the defendants from:

(1) Advocating or discussing, in accordance with the *Noerr-Pennington* doctrine, legislative, judicial, or regulatory actions, or other governmental policies or actions;

(2) Participating, or engaging in communications necessary to participate, in lawful surveys or activities by clinically or financially integrated physician network joint ventures and multi-provider networks as those terms are used in Statements 5, 6, 8, and 9 of the 1996 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153; or

(3) Engaging in conduct solely related to the administrative, clinical, financial, or other terms of providing on-call coverage at a hospital or hospital system. Section V(B)(3) of this Final Judgment is not a determination that such conduct does not violate any law enforced by the United States Department of Justice or the Office of the Idaho Attorney General.

VI. Required Conduct

(A) Within 60 days from the entry of this Final Judgment, each defendant shall distribute a copy of this Final Judgment and the Competitive Impact Statement in the following manner:

(1) In the case of individual defendants Drs. Doerr, Hessing, Kloss, Lamey, and Watkins, to their respective practices' chief administrative employee and to all physicians that practice or have practiced in the same practice group as that defendant since January 1, 2006;

(2) In the case of Idaho Sports Medicine Institute, to its practice's chief administrative employee and physicians that practice or have practiced with that practice group since January 1, 2006; and

(3) In the case of the Idaho Orthopaedic Society, to all members of that organization since January 1, 2006.

(B) For a period of ten years following the date of entry of this Final Judgment, each defendant shall certify to the United States annually on the anniversary date of the entry of this Final Judgment whether the defendant has complied with the provisions of this Final Judgment.

VII. Compliance Inspection

(A) For the purposes of determining or securing compliance with this Final Judgment or whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, authorized representatives of the United States Department of Justice or the Office of the Idaho Attorney General (including their consultants and other retained persons) shall, upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or the Office of the Idaho Attorney General and on reasonable notice to each defendant, be permitted:

(1) Access during each defendant's office hours to inspect and copy, or, at the United States' or the State of Idaho's option, to require that each defendant provide hard or electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, defendants and their officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee without restraint or interference by defendants.

(B) Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or the Office of the Idaho Attorney General, each defendant shall submit written reports or a response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

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

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

(E) If at the time information or documents are furnished by defendants to the United States or the State of Idaho, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of

protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States and the State of Idaho shall give defendants ten calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VIII. Retention of Jurisdiction

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

IX. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

X. Public Interest Determination

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

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16, and pursuant to Idaho Code § 48–108(3) of the Idaho Competition Act

Dated: ____________________

United States District Judge

Peter J. Mucchetti (DCB No. 463202);

U.S. Department of Justice Antitrust Division, 450 Fifth Street, NW, Suite 4100, Washington, DC 20530, peter.j.mucchetti@usdoj.gov, Telephone: (202) 353–4211, Facsimile: (202) 307–5802, Attorneys for the United States.

United States District Court for the District of Idaho

Civil Case No. 10–268–S.EJL

United States of America and the State of Idaho, *Plaintiffs,* vs. Idaho Orthopaedic Society, Timothy Doerr, Jeffrey Hessing, Idaho Sports Medicine Institute, John Kloss, David Lamey, and Troy Watkins, *Defendants;* Competitive Impact Statement.

Plaintiff United States of America ("United States"), 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 May 28, 2010, the United States and the State of Idaho filed a civil antitrust Complaint, alleging that the Defendants Idaho Orthopedic Society ("IOS"), Dr. Timothy Doerr, Dr. Jeffrey Hessing, Idaho Sports Medicine Institute ("ISMI"), Dr. John Kloss, Dr. David Lamey, and Dr. Troy Watkins violated Section 1 of the Sherman Act and Idaho Code Section 48–101 *et seq.* of the Idaho Competition Act. The Defendants and other competing orthopedists in the Boise, Idaho, area formed two conspiracies to gain more favorable fees and other contractual terms by agreeing to coordinate their actions, including denying medical care to injured workers.

The Complaint alleges that, in the first conspiracy, Defendants and their co-conspirators agreed, through a series of meetings and other communications, not to treat most patients covered by workers' compensation insurance. Defendants entered into this group boycott to force the Idaho Industrial Commission to increase the rates at which orthopedists are reimbursed for treating injured workers. Defendants' group boycott, which resulted in a shortage of orthopedists willing to treat workers' compensation patients, caused the Idaho Industrial Commission to increase rates for orthopedic services substantially above levels set just a year earlier.

In a second conspiracy, the Complaint alleges that Defendants (except for Defendant Lamey) and other conspirators agreed, through a series of meetings and other communications, to threaten to terminate their contracts with Blue Cross of Idaho ("BCI") to force it to offer better contract terms to orthopedists. Their collusion caused BCI to offer orthopedists more favorable contract terms than BCI would have offered but for the participating Defendants' group boycott of BCI.

With the Complaint, the United States and the State of Idaho filed a proposed Final Judgment that enjoins the Defendants from agreeing with competing physicians to threaten to terminate contracts with payers or deny medical care to patients, as more fully explained below. The United States, the State of Idaho, and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violations of the Antitrust Laws

A. The Defendants

The IOS is a membership organization that, from 2006 to 2008, consisted of approximately 75 orthopedists, each of whom practiced in a solo or group practice. These solo and group practices were economically independent of, and competed with, each other. Defendants Doerr, Hessing, Kloss, Lamey, and Watkins are physicians who provide orthopedic services in the Boise, Idaho, area and who were members of the IOS. Defendants Kloss and Lamey formerly practiced with Orthopedic Centers of Idaho, P.A., d.b.a. Boise Orthopedic Clinic ("BOC"). ISMI is an orthopedic practice group in Boise. Most of the orthopedists that practice with ISMI were members of the IOS. The Defendants were the principal actors in the boycotts of Idaho's workers' compensation system and BCI.

B. The Alleged Violations

1. Idaho Workers' Compensation System Conspiracy

The Idaho Workers' Compensation Act, Idaho Code Section 72–101 *et seq.,* requires that most public and private employers in Idaho carry workers' compensation insurance for their employees. The Idaho Industrial Commission is the state agency responsible for regulating workers' compensation insurance in Idaho.

Since 2006, the Idaho Industrial Commission has set the fee schedule that determines the amount that orthopedists and other healthcare providers usually receive for treating patients covered by workers' compensation insurance. The fee schedule uses a methodology for determining physician payments called a Resource-Based Relative Value System or RBRVS. The RBRVS methodology uses a "relative value unit" and a "conversion factor" to determine physician payment. The relative value unit measures the resources necessary to perform a medical service. For example, a complicated surgical procedure has a higher relative value unit than a simple office visit. The conversion factor is a set dollar amount, for example, $100. A physician's payment for any medical

service is generally calculated by multiplying the relative value unit by the conversion factor. For example, a physician would receive $500 for a medical service with a relative value unit of 5 and a conversion factor of $100.

In February 2006, the Idaho Industrial Commission announced a new fee schedule using the RBRVS methodology and setting a conversion factor of $88 for many orthopedic procedures. The new fee schedule had an effective date of April 1, 2006. Many orthopedists believed this conversion factor would result in lower payments to orthopedists. In response to the Idaho Industrial Commission's new fee schedule, Defendants and their co-conspirators agreed, through a series of meetings and other communications that took place over a year-long period, not to treat most patients covered by workers' compensation insurance.

Shortly after the Idaho Industrial Commission announced the February 2006 fee schedule, many Boise-area orthopedists from competing practices discussed with one another whether to accept the proposed rates or, alternatively, to stop treating workers' compensation patients. For example, at Defendant Doerr's invitation, orthopedists from several competing practices met on March 2, 2006, to talk about "the physician response to the new fee schedule." Also on March 2, 2006, an orthopedist specializing in hand surgery sent an e-mail to several competing orthopedic hand surgeons saying that the new conversion factors represented a severe cut in workers' compensation payments and that, at Defendant Doerr's meeting that night, orthopedists would examine their options. On the same day, Defendant Lamey wrote to a competing orthopedist that he did "not have much problem dropping out of work comp." The day after the March 2, 2006 meeting, orthopedists from two competing practices sent letters to the Idaho Industrial Commission announcing their intention to stop treating workers' compensation patients.

Many of the orthopedists that initially boycotted the workers' compensation system were orthopedists who specialized in hand surgery. For example, on April 12, 2006, seven hand surgeons met "to discuss the various docs' interest in continuing to participate" in Idaho's workers' compensation system. An e-mail describing this meeting noted that Defendant Lamey and a competing orthopedist favored "ditching" workers' compensation and that Defendant Kloss agreed but wanted to negotiate a rate increase with the Idaho Industrial Commission. The day after that meeting, Defendants Kloss and Lamey stopped treating workers' compensation patients, with the exception of emergency room patients.

A June 6, 2006 letter from the IOS leadership, including Defendants Watkins and Kloss, to members instructed them that they " 'must, indeed, all hang together or, most assuredly, we shall all hang separately.' " The letter noted that orthopedists "must act together" concerning the workers' compensation fee schedule and "collectively join our efforts for our practices" to negotiate a more favorable fee schedule.

Minutes from a BOC board of directors meeting on June 12, 2006, state that BOC's president told the board that Boise-area orthopedists specializing in hand surgery "have stopped taking new work comp patients." The minutes continue, saying, "Dr. Kloss confirmed this, except for [emergency room] call patients. [Defendant Kloss] said there has been an appeal for orthopedists to support the hand surgeons in their effort to demonstrate the inadequacy of payment for some orthopedic procedures."

On September 12, 2006, orthopedists from competing practices attended a meeting organized by Defendants Doerr and Hessing to discuss workers' compensation fees. Within ten days of the meeting, ISMI and two other large orthopedic practices in the Boise area stopped treating workers' compensation patients.

By October 2006, most of the approximately 65 orthopedists in the Boise area had stopped seeing most workers' compensation patients. Five of the few remaining Boise orthopedists who continued to care for workers' compensation patients worked at BOC. Other orthopedists encouraged and pressured those BOC orthopedists to join the boycott and stop seeing workers' compensation patients. The October 9, 2006 BOC board of directors meeting minutes report that BOC's president also encouraged these five BOC orthopedists to join the boycott. He explained that if the doctors were to stop treating new workers' compensation patients, the workers' compensation system would "be brought to a virtual standstill," increasing the doctors' negotiating leverage.

Over the following months, orthopedists and practice administrators regularly monitored adherence with the group boycott and pressured doctors to maintain a disciplined front. For example, on November 27, 2006, an ISMI administrator assured a competing practice that although ISMI had recently accepted one workers' compensation patient to offer a second opinion, it would not do so again, lest it "risk the rath [*sic*] of all the orthopedic surgeons because we're doing this." The ISMI administrator assured the competing practice group that ISMI was "turning away all other worker's comp cases," and asked the recipient to "[p]lease tell your docs what we did so it doesn't come back and sound worse than it already is!"

Defendants and their co-conspirators refused to treat most workers' compensation patients because they believed that if injured workers were unable to find orthopedists willing to treat them, the Idaho Industrial Commission would be forced to increase the orthopedist fee schedule. An ISMI employee explained that her practice's "lack of participation, along with others in the area, may cause them [*i.e.,* the Idaho Industrial Committee] to review their current Proposed Rule, which also includes the fee schedule." A January 2007 IOS newsletter notes that "lack of access [to orthopedists] is the key" to increased workers' compensation rates.

According to the February 5, 2007 minutes of the Idaho House of Representatives Commerce & Human Resources Committee, Defendant Watkins openly discussed that physicians had agreed not to treat most workers' compensation patients. The minutes describe Dr. Watkins as stating that "[a] group of physicians met and decided that the [fee] table was not satisfactory. They decided to stop seeing workers' compensation patients [except] in the emergency room, and stop seeing and giving second opinions until discussion happened about [the] conversion factor chart."

In the face of an effective and widely adhered to group boycott, in February 2007, the Idaho Industrial Commission announced workers' compensation rates that were up to 61% higher than the rates that the Commission had announced a year earlier. After the new rates were announced, the Defendants and their co-conspirators agreed to end their boycott and accept the new rates. In a February 13, 2007 letter to IOS membership, Defendant Watkins wrote, "We * * * all think this [the higher fee schedule] represents a major accomplishment, and that we should accept it now." Shortly thereafter, Defendants and almost all of the orthopedists who had participated in the conspiracy resumed participation in the workers' compensation system.

2. Blue Cross of Idaho Conspiracy

BCI is a not-for-profit mutual insurance company that offers a wide range of healthcare plans to employers and other groups in Boise and other areas of Idaho. To offer these plans, BCI contracts with orthopedists and other physicians to provide medical services. BCI's contracts with orthopedists set the reimbursement amounts that BCI pays orthopedists for providing covered health care to BCI's enrollees.

In December 2007, BCI informed its network of orthopedists and other physicians of new rates that would take effect on April 1, 2008. Some of the Defendants and other orthopedists were concerned that the new rates were lower than BCI's previous rates. Before the rates became effective, several of the Defendants and other competing orthopedists communicated with each other their dissatisfaction with BCI's proposed rates. In addition, on February 22, 2008, Defendant Watkins sent a letter to BCI saying that "[m]any of our members are worried that they may not be able to sustain some of the reductions they are facing with the proposed 2008 rates."

On April 9, 2008—eight days after the new BCI rates took effect—the IOS sponsored an "Orthopedic Open House" at Defendants Hessing and Doerr's office. At this meeting, the orthopedists discussed how to respond to BCI's adoption of new rates and encouraged others to send termination notices to BCI. Defendants Doerr and Hessing encouraged the orthopedists in attendance to put an ad in the newspaper to alert their patients and to assure other orthopedists that they were joining the boycott. Shortly after the Orthopedic Open House, orthopedists began issuing termination notices to BCI and advertising their intended withdrawals in local newspapers. Between April and June 2008, twelve practice groups—representing approximately 31 of 67 orthopedists in the Boise area at the time—gave BCI notice that they would withdraw from BCI's network. This group included many IOS practice groups, including the practice group of Defendants Hessing and Doerr, and ISMI.

From April to June 2008, while orthopedic groups were sending termination notices to BCI, orthopedists communicated with each other to encourage others to withdraw from the BCI network. As part of this communication, many practices placed newspaper advertisements announcing their withdrawal from the BCI network. In addition, orthopedists discussed how the successful boycott of workers' compensation patients provided the model for collectively standing up to BCI and negotiating higher rates.

In June 2008, Defendant Watkins attempted to negotiate with BCI on behalf of competing orthopedists. He asked that BCI representatives meet with himself, Defendant Hessing and Defendant Kloss (all of whom were in competing practices). In a separate June 2008 meeting, Defendant Watkins told BCI representatives that Idaho's orthopedists were a "very cohesive group" that had been successful in their efforts related to workers' compensation payments the previous year. Defendant Watkins also encouraged BCI to negotiate with practices that had already sent termination notices to BCI because otherwise BCI would experience a severe shortage of orthopedists in its network.

In response to the orthopedists' group boycott, on June 18, 2008, BCI offered orthopedists an additional contracting option to encourage orthopedists to continue to participate in BCI's provider network. The new option allowed orthopedists to choose between continuing to participate in BCI's network at current rates for one year with the possibility for higher rates the next year or to lock in existing rates for a three-year period.

The new offer from BCI divided Boise's orthopedists. In July 2008, when the conspirators failed to convince a large Boise orthopedic practice to join the boycott of BCI and that practice decided to continue its participation with BCI, BCI was able to contract with a sufficient number of orthopedists to maintain a viable physician network. Realizing that no further concessions beyond BCI's new offer would be forthcoming, practice groups began rescinding their termination notices. By the end of August 2008, most orthopedic practices had rescinded their termination notices and remained in the BCI network.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment will prevent the recurrence of the violations alleged in the Complaint and preserve competition for patients and other purchasers of orthopedic services, including self-insured employers and health and workers' compensation insurers in the Boise, Idaho area and elsewhere.

Under the proposed Final Judgment, the Defendants each are enjoined from, in any manner, directly or indirectly:

(A) Encouraging, facilitating, entering into, participating, or attempting to engage in any actual or potential agreement or understanding with, between or among competing physicians about:

(1) Any fee, or other payer contract term or condition, with any payer or group of payers, including the acceptability or negotiation of any fee or other payer contract term with any payer or group of payers;

(2) The manner in which the defendant or any competing physician will negotiate with, contract with, or otherwise deal with any payer or group of payers, including participating in or terminating any payer contract; or

(3) Any refusal to deal or threatened refusal to deal with any payer; or

(B) Communicating with any competing physician or facilitating the exchange of information between or among competing physicians about:

(1) The actual or possible view, intention, or position of any defendant or his or her medical practice group, or any competing physician concerning the negotiation or acceptability of any proposed or existing payer contract or contract term, including the negotiating or contracting status of the defendant, his or her medical group, or any competing physician with any payer or group of payers, or

(2) Any proposed or existing term of any payer contract that affects:

(a) The amount of fees or payment, however determined, that the defendant, his or her medical practice group or any competing physician charges, contracts for, or accepts from or considers charging, contracting for, or accepting from any payer or group of payers for providing physician services;

(b) The duration, amendment, or termination of any payer contract; or

(c) The manner of resolving disputes between any parties to any payer contract.

Subject to these restrictions, Section V of the proposed Final Judgment permits Defendants to discuss with any competing physician any medical topic or medical issue relating to patient care and participate in activities of any medical society. Moreover, nothing in the proposed Final Judgment prohibits Defendants from advocating or discussing, in accordance with the *Noerr-Pennington* doctrine, legislative, judicial, or regulatory actions, or other governmental policies or actions; participating, or engaging in communications necessary to participate, in lawful surveys or activities by clinically or financially integrated physician network joint ventures and multi-provider networks as those terms are used in Statements 5, 6, 8 and 9 of the 1996 Department of Justice and Federal Trade Commission

Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153.

Finally, Section V(B)(3) of the proposed Final Judgment does not prohibit Defendants from engaging in conduct solely related to the administrative, clinical, financial, or other terms of providing on-call coverage at a hospital or hospital system. Such conduct might not violate the antitrust laws if it creates significant efficiencies and, on balance, is not anticompetitive.[1] However, the proposed Final Judgment makes clear that Section V(B)(3) of the proposed Final Judgment is not a determination that such conduct does not violate any law enforced by the United States Department of Justice or the Office of the Idaho Attorney General. Rather, the United States has made no determination with respect to the legality of any such conduct. The United States retains its ability to challenge any conduct related to providing on-call coverage if it later determines that such a challenge is warranted under the law.

To promote compliance with the decree, the proposed Final Judgment also requires that the Defendants provide to their respective practices' chief administrative employee, other physicians in their practices, and/or members, copies of the Final Judgment and this Competitive Impact Statement. For a period of ten years following the date of entry of the Final Judgment, the Defendants separately must certify annually to the United States whether they have complied with the provisions of the Final Judgment.

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 Defendants.

[1] *See* Dep't of Justice and Federal Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care § 8(B) (1996).

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and 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 (60) 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 (60) 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 United States 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 and published in the **Federal Register**.

Written comments should be submitted to: Joshua H. Soven, Chief, Litigation I Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 4100, Washington, DC 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 Defendants. The United States is satisfied, however, that the relief in the proposed Final Judgment will prevent the recurrence of the violations alleged in the Complaint and preserve competition for patients and other purchasers of orthopedic services in Idaho. 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 of the Complaint.

VII. Standard of Review Under the APPA 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 as 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 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), 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 mechanism to enforce the final judgment are clear and manageable.")[2]

[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court 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);

Continued

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) (citing *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. Courts have held that:

> [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 insuring 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.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] 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 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) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also 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 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 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 the United States District Court for the District of Columbia recently 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 utilizing 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). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he 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 Senator 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.[4]

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: May 28, 2010

Respectfully submitted,

Peter J. Mucchetti,
Julie A. Tenney,
United States Department of Justice, Antitrust Division, Litigation I Section, 450 Fifth Street, NW., Suite 4100, Washington, DC 20530, Telephone: (202) 353–4211, Facsimile: (202) 307–5802, peter.j.mucchetti@usdoj.gov.

Certificate of Service

I hereby certify that on May 28, 2010, I filed the foregoing Complaint, Explanation of Consent Decree Procedures, Stipulation, proposed Final Judgment, and Competitive Impact Statement electronically through the CM/ECF system and that on this date, I served the following non-CM/ECF Registered Participants in the manner indicated:

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see also SBC Commc'ns, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[3] *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' ").

[4] *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.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (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, 93d Cong., 1st Sess., 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.").

Via first class mail, postage prepaid and e-mail addressed as follows:

For Defendants Idaho Orthopaedic Society, Timothy Doerr, Jeffrey Hessing, Idaho Sports Medicine Institute, John Kloss, and Troy Watkins:

Mark J. Botti, Akin Gump Strauss Hauer & Feld, LLP, 1333 New Hampshire Ave., NW., Washington, DC 20036–1564, *mbotti@akingump.com.*

For Defendant David Lamey:

Steven J. Hippler, Givens Pursley LLP, 601 W. Bannock St., Boise, Idaho 83702, *sjh@givenspursley.com.*

Peter J. Mucchetti,

United States Department of Justice, Antitrust Division, Litigation I Section, 450 Fifth Street, NW., Suite 4100, Washington, D.C. 20530, Telephone: (202) 353–4211, Facsimile: (202) 307–5802, peter.j.mucchetti@usdoj.gov.

[FR Doc. 2010–13610 Filed 6–4–10; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–73,420A]

Alticor, Inc., Including Access Business Group International, LLC, and Amway Corporation, Including On-Site Leased Workers from Otterbase, Manpower, Kforce and Robert Half, Ada, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (“Act”), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on April 12, 2010, applicable to workers of Alticor, Inc., including Access Business Group International, LLC and Amway Corporation. The notice was published in the **Federal Register** on May 12, 2010 (75 FR 26794–26795).

At the request of the Company, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to financial and procurement.

The company reports that workers leased from Otterbase, Manpower, Kforce and Robert Half were employed on-site at the Ada, Michigan location of Alticor, Inc., including Access Business Group International, LLC and Amway Corporation. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Otterbase, Manpower, Kforce and Robert Half working on-site at the Ada, Michigan location of Alticor, Inc., including Access Business Group International, LLC and Amway Corporation.

The amended notice applicable to TA–W–73,420A is hereby issued as follows:

All workers of Alticor, Inc., including Access Business Group International, LLC and Amway Corporation, Buena Park, California, (TA–W–73–420) and Alticor, Inc., including Access Business Group International, LLC and Amway Corporation, including on-site leased workers from Otterbase, Manpower, Kforce and Robert Half, Ada, Michigan, (TA–W–73–420A), who became totally or partially separated from employment on or after February 1, 2009, through April 28, 2012, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC this 24th day of May 2010.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2010–13505 Filed 6–4–10; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–72,585]

Whirlpool Corporation, Evansville Division, Including On-Site Leased Workers from Andrews International, Inc., Evansville, IN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (“Act”), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to apply for Worker Adjustment Assistance on January 19, 2010, applicable to workers of Whirlpool Corporation, Evansville Division, Evansville, Indiana. The notice was published in the **Federal Register** on March 5, 2010 (75 FR 10321).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to the production of top freezer refrigerators and residential ice makers.

The company reports that workers leased from Andrews International, Inc. were employed on-site at the Evansville, Indiana location of Whirlpool Corporation, Evansville Division. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include leased workers from Andrews International, Inc. working on-site at the Evansville, Indiana location of Whirlpool Corporation, Evansville Division.

The amended notice applicable to TA–W–72,585 is hereby issued as follows:

All workers of Whirlpool Corporation, Evansville Division, including on-site leased workers from Andrews International, Inc., Evansville, Indiana, who became totally or partially separated from employment on or after December 6, 2008, through January 19, 2012, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2010–13510 Filed 6–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of May 17, 2010 through May 21, 2010.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially