

Complaint

119 F.T.C.

IN THE MATTER OF

LA ASOCIACIÓN MÉDICA DE PUERTO RICO, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3583. Complaint, June 2, 1995--Decision, June 2, 1995*

This consent order prohibits, among other things, the Medical Association, the Psychiatry Section, and the two doctors from encouraging, organizing or entering into: any boycott or refusal to deal with any third-party payer; or any agreement to refuse to provide services to patients covered by any third-party payer. In addition, the consent order prohibits, for five years, the respondents from soliciting information from psychiatrists regarding their decisions whether to participate in agreements with insurers and provide service; from passing such information along to other doctors; and from giving psychiatrists advice about making those decisions.

Appearances

For the Commission: *Alan B. Loughman* and *Alice Au*.

For the respondents: *Demitrio Fernandez*, Rio Piedras, Puerto Rico. *Roberto Boneta*, *Muno*, *Boneta*, *Gonzalez*, *Arbona*, *Benitez & Peral*, Hato Rey, Puerto Rico.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by the Act, the Federal Trade Commission, having reason to believe that La Asociación Médica de Puerto Rico; La Sección de Fisiatría de la Asociación Médica de Puerto Rico; Rafael L. Oms, individually and as an officer of La Sección de Fisiatría de la Asociación Médica de Puerto Rico; and Rafael E. Seín, individually and as an officer of La Sección de Fisiatría de la Asociación Médica de Puerto Rico, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent La Asociación Médica de Puerto Rico ("La Asociación Médica") and respondent La Sección de Fisiatría de la Asociación Médica de Puerto Rico ("La Sección de Fisiatría") are unincorporated associations organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico. Both respondents have their offices and principal places of business at Ave. Fernández Juncos Num. 1305, Apartado 9387, Santurce, Puerto Rico. Respondents are professional associations of physicians who practice or reside in Puerto Rico.

PAR. 2. Respondent Rafael L. Oms is a physiatrist licensed to practice medicine in Puerto Rico and is engaged in the business of providing health-care services to patients for a fee in Puerto Rico. Dr. Oms served as president of La Sección de Fisiatría in 1991-1992. Dr. Oms' business address is Palmas Mail Station, Box 879, Suite 170, Humacao, Puerto Rico.

PAR. 3. Respondent Rafael E. Seín physiatrist licensed to practice medicine in Puerto Rico and is engaged in the business of providing health-care services to patients for a fee in Puerto Rico. Dr. Seín has at all relevant times served as the president of the Comité de Planes Médicos ("Medical Plans Committee") of La Sección de Fisiatría. Dr. Seín's business address is 11746 Fernandez Juncos Station, San Juan, Puerto Rico.

PAR. 4. The members of La Asociación Médica are physicians engaged in the practice of medicine in Puerto Rico. The members of La Sección de Fisiatría are physicians engaged in the practice of physiatry (physical medicine and rehabilitation) in Puerto Rico. Except to the extent that competition has been restrained as alleged herein, the members of La Sección de Fisiatría have been and now are in competition among themselves and with other physiatrists in Puerto Rico.

PAR. 5. The acts and practices of the respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. Respondent associations are and have been, at all times relevant to this complaint, organized for the profit of their members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 7. La Administración de Compensaciones por Accidentes de Automóviles ("Administration for Compensation of Automobile

Accidents" or "ACAA") is a third-party payer that provides health care coverage to automobile accident victims in Puerto Rico. Absent agreements among physiatrists, competing physiatrists decide individually whether to enter into contracts with third-party payers, including ACAA, to treat their subscribers or enrollees. As of January 1991, 108 physiatrists had contracts with ACAA, under which they agreed to accept designated reimbursement rates for services provided by them to persons covered by the ACAA insurance program.

PAR. 8. Before 1988 a subcommittee of La Sección de Fisiatría was established to organize and coordinate Physiatry Section efforts to approach third-party payers and attempt to obtain higher reimbursement rates and adoption of "exclusive referral" rules under which patients would be reimbursed for physical therapy services only if referred for treatment by a physiatrist. ACAA did not make such changes because it regarded them as expensive and unnecessary, since ACAA was having no difficulty finding physiatrists who were willing to serve its clients even at existing fee levels.

PAR. 9. After La Sección de Fisiatría failed to persuade ACAA that ACAA's clients would be better served by adopting higher reimbursement rates and exclusive referral rules, it sought to use economic coercion to compel ACAA to adopt these changes. In October 1990, members of La Sección de Fisiatría met at the Annual Convention of Physiatrists and voted to stop accepting new ACAA patients as of February 1, 1991. La Sección de Fisiatría and numerous physiatrists signed a letter to ACAA dated October 13, 1990, demanding, among other things, an increase in reimbursement rates for physical therapy services and adoption of an exclusive referral rule. The letter informed ACAA that the signatories would suspend services to new ACAA patients if their demands were not met.

PAR. 10. In subsequent meetings of La Sección de Fisiatría and of physiatrists in various local geographic areas, the participating physiatrists reaffirmed their agreement to no longer accept the ACAA medical plan after February 1, 1991.

PAR. 11. In February 1991, groups of physiatrists from the regions of Mayagüez, Caguas, Bayamon, and Carolina signed and sent similar letters to ACAA. Each of these letters informed ACAA that the signatories would not accept new ACAA patients until their demands, as outlined in La Sección de Fisiatría's October 13, 1990

letter, were met. The sending of these letters and the implementation of the boycott of ACAAA was coordinated by respondent La Sección de Fisiatría and by respondent Dr. Oms and respondent Dr. Seín. La Asociación Médica, though opposing the demand for exclusive referral powers, endorsed and supported La Sección de Fisiatría's decision to boycott ACAAA.

PAR. 12. By late February approximately forty-seven (47) of the 108 physiatrists who had contracts with ACAAA were refusing to treat new ACAAA patients. The concerted refusal to treat new patients continued at least until September 1991.

PAR. 13. Although ACAAA continued to refuse to change its practices or reimbursement rates, the actions of the physiatrists who participated in the boycott required ACAAA patients to forgo treatment from physiatrists or to seek services from physiatrists not participating in the boycott. These actions caused delays in receipt of medically-necessary treatment for some patients and subjected ACAAA and its patients to other costs and inconveniences.

PAR. 14. During the time when the respondents were planning and implementing this concerted refusal to deal with ACAAA or to treat ACAAA patients, the respondents solicited professional associations of physical therapists in Puerto Rico to join in the boycott. The physical therapy associations refused to do so. The invitation to the physical therapists to join in the boycott, if accepted, would have constituted an agreement in restraint of trade.

PAR. 15. The respondents have restrained competition among physiatrists by conspiring to engage in a concerted refusal to deal with ACAAA or treat ACAAA patients. The acts and practices of respondents, as herein alleged, have had the purpose or effect, or the tendency and capacity, to restrain competition and to injure consumers in the following ways, among others:

- A. By restraining competition among physiatrists in Puerto Rico;
- B. By restraining competition between physiatrists and other physicians in Puerto Rico;
- C. By restraining competition between physiatrist-employed physical therapists and independent physical therapists;
- D. By fixing or increasing the reimbursement rates that physiatrists in Puerto Rico receive from third-party payers; and
- E. By increasing the rates that physiatrists or physical therapists receive from consumers and third-party payers.

PAR. 16. The combination or conspiracy and the acts and practices described in paragraphs nine to fifteen above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The violation or effects thereof, as herein alleged, may continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondents La Asociación Médica and La Sección de Fisiatría are unincorporated associations organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with their offices and principal place of business at

Ave. Fernandez Juncos Num. 1305, Apartado 9387, Santurce, Puerto Rico.

Respondents Dr. Oms and Dr. Seín are psychiatrists, licensed to practice medicine in the Commonwealth of Puerto Rico. Drs. Oms and Seín, have at relevant times been officers of La Sección de Fisiatría. Dr. Oms' business address is Palmas Mail Station, Box 879, Suite 170, Humacao, Puerto Rico, and Dr. Seín's business address is 11746 Fernandez Juncos Station, San Juan, Puerto Rico.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*La Asociación Médica*" means La Asociación Médica de Puerto Rico, the Medical Association of Puerto Rico, its predecessors, sections, committees, subsidiaries, divisions, groups, and affiliates, and their respective directors, officers, employees, agents, consultants, and any other persons working for or on behalf of the foregoing, and their respective successors and assigns;

B. "*La Sección de Fisiatría*" means La Sección de Fisiatría de la Asociación Médica de Puerto Rico, the Psychiatry Section of the Medical Association of Puerto Rico, its predecessors, sections, committees, subsidiaries, divisions, groups, and affiliates and their respective directors, officers, employees, agents, consultants, and any other persons working for or on behalf of the foregoing, and their respective successors and assigns;

C. "*Rafael Oms*" means Rafael L. Oms, M.D., his agents, and employees;

D. "*Rafael Seín*" means Rafael E. Seín, M.D., his agents, and employees;

E. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such person or entity agrees to pay for treatment by physicians or therapists to individuals described in the plan or program as eligible for such coverage ("Covered

Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, whether operated by a private or governmental entity; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; health benefits programs for government employees, retirees, and dependents; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs; and

F. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a physician or therapist for the provision of medical, physical therapy, or other health-care services to Covered Persons, and the physician or therapist agrees to accept such payment from the third-party payer for such provision of medical, physical therapy, or other health-care services during the term of the agreement.

II.

It is further ordered, That respondents, directly or indirectly, or through any corporate or other device, in or in connection with their activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing or attempting to organize, encouraging, continuing, cooperating in or carrying out any agreement, either express or implied, between or among any psychiatrists, to boycott or refuse to deal with any third-party payer, or to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into any proposed or existing participation agreement;

B. Entering into, threatening or attempting to enter into, organizing or attempting to organize, encouraging, continuing, cooperating in or carrying out any agreement, either express or implied, between or among any psychiatrists, to refuse to provide services to patients covered by any third-party payer in any proposed or existing participation agreement, or to threaten to refuse to provide services to such patients;

C. For a period of five (5) years after the date this order becomes final, continuing a formal or informal meeting of physiatrists after

1. Any person makes any statement concerning one or more physiatrists, intentions or decisions with respect to

a. Entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; or

b. Refusing or threatening to refuse to provide services to patients covered by any third-party payer in any existing or proposed participation Agreement;

and respondents La Asociación Médica and La Sección de Fisiatría fail to eject such person from the meeting; or

2. Two persons make statements prohibited in order paragraphs II.C.1.a. or II.C.1.b.;

provided, however, that respondent Oms or Seín, shall not be in violation of the order if, immediately following a violation of this paragraph of the order, he leaves a meeting continued in violation of this paragraph, and within thirty (30) days after such meeting, reports to the Commission the circumstances of such meeting, the substance and source of the prohibited statements, and the respondents' actions in response thereto;

D. For a period of five (5) years after the date this order becomes final, providing advice to any physiatrist regarding

1. The desirability or appropriateness of participating in any existing or proposed participation agreement; or

2. Refusing or threatening to refuse to provide services to patients covered by any third-party payer in any existing or proposed participation agreement;

provided, however, that nothing contained in this paragraph II.D. shall prohibit respondents from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payer;

E. For a period of five (5) years after the date this order becomes final, communicating in any way to any physiatrist any information concerning any physiatrist's intentions or decisions with respect to

1. Entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; or

2. Refusing or threatening to refuse to provide services to patients covered by any third-party payer in any existing or proposed participation agreement; or

F. For a period of five (5) years after the date this order becomes final, soliciting from any physiatrist any information concerning that physiatrist's or any other physiatrist's intentions or decisions with respect to

1. Entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; or

2. Refusing or threatening to refuse to provide services to patients covered by any third-party payer in any existing or proposed participation agreement.

Provided, however, that nothing in this order shall be construed to prevent respondents from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal, state, or commonwealth government executive agency or legislative body concerning legislation, rules, programs, or procedures, or to participate in any federal, state or commonwealth administrative or judicial proceeding;

Provided further that this order shall not be construed to prohibit any respondent or any member of respondent associations from entering into an agreement or combination with any other physician or health care practitioner with whom the individual physician practices in partnership or in a professional corporation, or who is employed by the same person.

III.

It is further ordered, That this order shall not be construed to prohibit respondents Drs. Oms or Seín from communicating Médical conditions or personal assessments of individual patients, where such communication neither constitutes nor is part of (1) an agreement, proposed agreement, or attempt to enter into an agreement among physiatrists to boycott or refuse to deal with any third-party payer, or (2) any other agreement, combination, or conspiracy the purpose, effect, or likely effect of which is to impede competition unreasonably.

IV.

It is further ordered, That:

A. La Sección de Fisiatría, within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each of its current members, and to the last known address of any other person who was a member of La Sección de Fisiatría in 1990 or 1991;

B. La Asociación Médica, within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each of its current members who is not also a member of La Sección de Fisiatría;

C. La Sección de Fisiatría, within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each third-party payer with whom La Sección de Fisiatría has entered into negotiations concerning the provision of physiatry services;

D. La Asociación Médica, within sixty (60) days after the date on which this order becomes final, publish in Spanish this order and the accompanying complaint in an issue of Prensa Médica or in any successor publication, in the same type size normally used for articles that are published in Prensa Médica or successor publication;

E. La Sección de Fisiatría and La Asociación Médica, for a period of five (5) years after the date on which this order becomes final, provide each new member of La Sección de Fisiatría and new member of La Asociación Médica with a copy of this order at the

time the member is accepted into membership of La Sección de Fisiatría or La Asociación Médica;

F. La Sección de Fisiatría and La Asociación Médica each file a verified, written report with the Commission within ninety (90) days after the date on which this order becomes final, and annually thereafter for five (5) years on the anniversary of the date on which this order becomes final, and at such other times as the Commission may require, by written notice to La Sección de Fisiatría or La Asociación Médica, setting forth in detail the manner and form in which it has complied and is complying with this order;

G. La Sección de Fisiatría and La Asociación Médica for a period of five (5) years after the date on which this order becomes final, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records sufficient to describe in detail any action taken in connection with the activities covered by Parts II and IV of this order;

H. For a period of five (5) years after the date on which this order becomes final, La Sección de Fisiatría and La Asociación Médica notify the Commission at least thirty (30) days prior to any proposed change in La Sección de Fisiatría or La Asociación Médica, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, a change of name, a change of address, or any other change that may affect compliance obligations with this order.

V.

It is further ordered, That this order shall terminate on June 2, 2015.

IN THE MATTER OF

SCHWEGMANN GIANT SUPER MARKETS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3584. Complaint, June 2, 1995--Decision, June 2, 1995

This consent order requires, among other things, the Louisiana-based corporation to divest, within twelve months, seven stores in the New Orleans area to Commission-approved purchasers, and requires the respondent, for ten years, to obtain Commission approval before acquiring an interest in a supermarket, or another entity that operates a supermarket, in the relevant area.

Appearances

For the Commission: *Ronald B. Rowe, Arthur Nolan and William Baer.*

For the respondent: *Scott Whittaker and Nelea Absher, Stone, Pigman, Walther, Wittman & Hutchinson, New Orleans, LA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent Schwegmann Giant Super Markets, Inc. ("Schwegmann"), a corporation subject to the jurisdiction of the Commission, has acquired certain assets of National Holdings, Inc. and certain affiliates ("National"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITIONS

1. For the purposes of this complaint: