

IN THE MATTER OF

NORTH LAKE TAHOE MEDICAL GROUP, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3885. Complaint, July 21, 1999--Decision, July 21, 1999*

This consent order, among other things, prohibits North Lake Tahoe Medical Group, Inc., a California corporation, from entering into, maintaining, or enforcing any conspiracy or agreement to negotiate, to deal, or refuse to deal with any payer or provider for physician services. It also requires the respondent to terminate the membership of physician members who refused to deal with Blue Shield, unless the physicians make a good faith effort to reestablish participation in Blue Shield.

Participants

For the Commission: *Paul Nolan, Kerry O'Brien, Matthew Gold, Richard Feinstein, William Baer, Jeremy Bulow, Roy Levy and Alan Fisher.*

For the respondent: *Joel Goldman, Hanson, Bridgett, Marcus, Valhos & Rudy, San Francisco, CA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the North Lake Tahoe Medical Group, Inc., a corporation ("Tahoe IPA") has violated Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Tahoe IPA is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at P.O. Box 2466, Truckee, California. North Lake Tahoe Medical Group, Inc., also has traded and done business as North Lake Tahoe IPA, North Lake IPA, and Tahoe IPA.

PAR. 2. Tahoe IPA physician members compete in the Lake Tahoe Basin, a basin comprised of the North Lake Tahoe area and the

South Lake Tahoe area. For physician services, the North and South Lake Tahoe areas each represent a separate geographic market. The North Lake Tahoe area has about 30,000 year-round residents as well as about 150,000 tourists, part-time residents and day users. The North Lake Tahoe area includes the communities of Truckee, Tahoe City, Kings Beach, Carnelian Bay, Homewood, Tahoma and Meeks Bay, California, and Incline Village, Nevada. The South Lake Tahoe area has about 35,000 year-round residents. The South Lake Tahoe area includes the towns of South Lake Tahoe, California, and Stateline, Nevada. The largest cities near the Lake Tahoe Basin are Sacramento, California (about 100 miles and two hours and twenty minutes southwest) and Reno, Nevada (about 31 miles and 45 minutes northeast).

PAR. 3. Respondent Tahoe IPA's physician membership consists of the majority of the physicians in both the North and South Lake Tahoe markets. Tahoe IPA's members include at least 78% of the physicians (medical doctors and doctors of osteopathic medicine) in the North Lake Tahoe area and at least 70% of the physicians in the South Lake Tahoe area. In the North Lake Tahoe area, the IPA's members include at least 67% of the primary care physicians in private practice and at least 89% of the specialty physicians in private practice. In the South Lake Tahoe area, Tahoe IPA's members include at least 70% of the primary care physicians in private practice and at least 72% of the specialty physicians in private practice. All of respondent Tahoe IPA's physician members are engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as alleged herein, some or all of the physician members of respondent Tahoe IPA have been, and are now, in competition with each other for the provision of physician services.

PAR. 4. The general business practices of respondent Tahoe IPA and its members, including the acts and practices herein alleged, are in or affect "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR.5. Respondent Tahoe IPA is a for-profit corporation that also engages in substantial activities for the pecuniary benefit of its physician members. At all times relevant to this complaint, Tahoe IPA is and has been organized in substantial part for the profit of its members, and is therefore a corporation within the meaning of

Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. Respondent Tahoe IPA was formed in 1994 to promote the collective economic interests of the Lake Tahoe Basin physicians. Respondent, acting as a combination of its members, and in a continuing conspiracy with at least some of its members, and other parties, has acted to restrain competition by, among other things, facilitating, entering into, and implementing agreements among its members, express or implied, to (i) act concertedly to delay the market entry of managed care, including health maintenance organizations ("HMOs") and preferred provider organizations ("PPOs"); (ii) engage in collective negotiations over terms and conditions of dealing with third-party payers; and (iii) refuse to deal with Blue Shield of California ("Blue Shield") when Blue Shield did not comply with the IPA's contractual demands.

PAR. 7. In furtherance of its unlawful agreements, beginning in 1994 and until the present, Tahoe IPA has acted to restrain and delay the market entry of managed care plans. Physicians practicing in the North Lake Tahoe area concluded that such plans would attempt to contract with physicians in the Lake Tahoe Basin, and that competitive pressure could force physicians to lower their fees or to contract on other than standard fee-for-service terms. Accordingly, they formed the Tahoe IPA to combine physicians into a united bargaining front that would prevent managed care from gaining access -- on competitive terms -- to North and South Lake Tahoe physicians. Since the IPA's formation in 1994, a number of third-party payers, including Blue Shield, Hometown Health Plan, St. Mary's Health Network, and Foundation Health, have attempted to develop and market managed care products in the North Lake Tahoe area. However, there are still no HMOs and only a few PPOs operating in the Lake Tahoe Basin.

PAR. 8. Typically, managed care plans reimburse for, purchase, or pay for all or part of the health care services provided to their enrollees or subscribers. Managed care plans may contract with integrated physician associations or groups to establish the terms and conditions of the relationship between a participating physician and a managed care plan, including the fees to be paid to the physician for treating managed care subscribers or enrollees. Through such contracts, managed care plans may obtain capitated payments or

significant discounts from physicians' usual fees, and physicians may obtain access to additional patients. As a result, managed care plans often are able to offer health care coverage to their enrollees or subscribers at an attractive price.

PAR. 9. From the time it was formed in 1994, Tahoe IPA's Board developed and implemented an anticompetitive strategy: It required its members to contract only through the Tahoe IPA to resist fee discounting and financial risk-sharing. Tahoe IPA accomplished these goals by including a clause in its Provider Participation Agreement that required members to contract with payors only through the Tahoe IPA and not to contract individually with any PPO, EPO or HMO. In its newsletter and other informal communications with members, the IPA further encouraged physicians to use the IPA as their sole contracting agent. Through these means, the Tahoe IPA resisted competitive pressures from managed care plans to accept financial risk or reimbursement on other than a standard fee-for-service basis.

PAR. 10. In October 1996, Blue Shield sought to enter into agreements with Tahoe IPA members to participate in an HMO product. Initially, Tahoe IPA urged Blue Shield not to introduce an HMO product in the Tahoe Basin. Tahoe IPA's Board then demanded that Blue Shield raise its reimbursement levels to area physicians, and told Blue Shield that the IPA would not contract with its HMO. Subsequently, the IPA's Board decided that the IPA should contract only on a fee-for-service basis with all payers, including managed care plans. Also at various times in 1996 and through the present, the IPA has informed payers, including Foundation Health Plan, Hometown Health Plan, St. Mary's PPO Network, and others, that Tahoe IPA was not willing to accept capitation or any other form of financial risk. The IPA's representatives have stated that the IPA would negotiate only fee-for-service contracts on behalf of its members, and they have communicated to these payers the minimum rates that the IPA would accept.

PAR. 11. In furtherance of its anticompetitive agreements, from 1996 to the present, Tahoe IPA has engaged in collective negotiations to fix price terms and other competitively significant terms with all payers seeking to enter the North and South Lake Tahoe areas. Tahoe IPA utilized the members' collective bargaining power as a united negotiating front to seek more favorable prices than each member could obtain by contracting as an individual in a competitive market.

By early 1996, the IPA developed its own minimum reimbursement rates, and sought to negotiate on behalf of its members the highest possible fees without the members sharing a substantial risk of loss from their participation in the IPA. From 1996 to the present, the IPA's leaders have clearly communicated to payers that the IPA is the exclusive representative of physicians in the North and South Lake Tahoe areas. Tahoe IPA has sought to coerce payers into accepting the IPA fee schedules and minimum reimbursement rates. Tahoe IPA leaders have stated that payers, including Blue Cross, St. Mary's Health Network, Hometown Health Plan, CCN, and Interplan, must accept the IPA's price terms if they want to contract with IPA members.

PAR. 12. After negotiating with Tahoe IPA for extended periods of time, several payers offered contracts to individual Lake Tahoe Basin physicians, but most individual physicians told these payers that they would contract only through Tahoe IPA. Consequently, payers were forced either to accept the IPA's reimbursement rates or to decide not to contract with physicians in the Lake Tahoe Basin. Payers were concerned that Tahoe IPA's minimum rates were much higher than rates that these plans paid physicians in other parts of California or Nevada. Payers also were concerned that they would not be able to do business in the Lake Tahoe Basin because the rates Tahoe IPA demanded would prevent the payers from developing a PPO product that would offer consumers a significant discount from full physician charges.

PAR. 13. Since at least February 1998, Tahoe IPA has represented to Blue Cross, CCN, Interplan and other payers that its physician members will not enter into any contract unless the payer reimburses the IPA's members their usual fees with no more than a ten percent discount. The IPA's negotiators ignored objections that their charge-based reimbursement proposal was inefficient, and informed these payers that this was the minimum reimbursement that the IPA's Board would accept in any contract. The IPA's negotiators also told payers that they would not be disadvantaged relative to other payers competing in the market, because all payers would get the same deal. Tahoe IPA entered contracts with Health Net, CCN PPO Network, and Admar PPO Network, in which the reimbursement was calculated at ten percent off of each physician's charges.

PAR. 14. In furtherance of its unlawful agreements, since 1996 and continuing to the present, Tahoe IPA attempted to coerce Blue Shield of California to raise its level of fee-for-service reimbursement to IPA physicians. Beginning as early as 1996, Tahoe IPA obtained information from its members as to their prevailing fee levels, which it used to develop a fee schedule that represented the minimum levels that it would accept from payers. The IPA demanded that Blue Shield allow the IPA to collectively enter into a contract with higher reimbursement and without any financial risk-sharing among the member physicians. The IPA not only demanded higher reimbursement, but solicited Blue Shield to raise its premiums and redirect the increased revenue to physicians. To pressure Blue Shield into accepting the IPA's demands, Tahoe IPA officials informed Blue Shield that the IPA's members would cease their participation in Blue Shield's PPO if Blue Shield did not agree to negotiate with the IPA.

PAR. 15. Since November 1997, when it became clear that Blue Shield would not negotiate on the Tahoe IPA's terms, the IPA encouraged its physician members to departicipate from Blue Shield's PPO. In private and public statements, the IPA reminded its members that it was acting as their agent with Blue Shield, and that the IPA would ultimately be successful in its negotiations with Blue Shield if the members continued to contract on a united front. The IPA also threatened area employers that few of its members would continue to participate with Blue Shield, and that these employers should contract with payers that have agreed to contract with the IPA.

PAR. 16. Beginning as early as January 1998, many of the physician members of Tahoe IPA submitted letters of termination to Blue Shield. Some members no longer contract with Blue Shield, and other members have terminated their contracts as of January 1, 1999.

PAR. 17. The physician members of Tahoe IPA have not integrated the IPA in any economically significant way, nor have they created efficiencies sufficient to justify their acts or practices described in paragraphs six through sixteen.

PAR. 18. By engaging in the acts or practices described above, Tahoe IPA has combined or conspired with its respective physician members to fix and/or increase the fees received from third-party payers for the provision of physician services, to boycott third-party payers, or otherwise to restrain competition among physicians in the Lake Tahoe Basin.

PAR. 19. The actions of the respondent described in this complaint have had, and continue to have, the purpose, tendency, and capacity to result in the following effects, among others, in the Lake Tahoe Basin, including the North Lake Tahoe area and the South Lake Tahoe area:

- A. Restraining competition among physicians;
- B. Fixing or increasing the prices that are paid for physician services; and
- C. Depriving third-party payers, their subscribers, and patients of the benefits of competition among physicians.

PAR. 20. The combinations or conspiracies and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of North Lake Tahoe Medical Group, Inc. ("Tahoe IPA"), hereinafter sometimes referred to as "respondent," and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 respondent 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 respondent has 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. Respondent North Lake Tahoe Medical Group, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at P.O. Box 2466, Truckee, California. North Lake Tahoe Medical Group, Inc., also has traded and done business as North Lake Tahoe IPA, North Lake IPA, and Tahoe IPA.

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

ORDER

I.

It is ordered, That, for the purposes of this order, the following definitions shall apply:

A. "*Tahoe IPA*" means North Lake Tahoe Medical Group, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its subsidiaries, divisions, groups, affiliates controlled by Tahoe IPA, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

C. "*Person*" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

D. "*Physician*" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

E. "*Participating physician*" means any physician: (1) who is a stockholder, owner, or member of Tahoe IPA; (2) who has agreed to provide services through Tahoe IPA; or (3) whose services have been offered to any payer through Tahoe IPA.

F. "*Provider*" means any person that supplies health care services to any other person, including, but not limited to, physicians, hospitals, and clinics.

G. "*Qualified risk-sharing joint arrangement*" means an arrangement to provide physician services in which: (1) all physicians participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of physician services to payers at a capitated rate, (b) the provision of physician services for a predetermined percentage of premium or revenue from payers, (c) the use of significant financial incentives (e.g., substantial withholds) for its participating physicians, as a group, to achieve specified cost-containment goals, or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; (2) any agreement on prices or terms of reimbursement entered into by the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement.

H. "*Qualified clinically integrated joint arrangement*" means an arrangement to provide physician services in which: (1) all physicians participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement; (2) any agreement on prices or terms of reimbursement entered into by the arrangement is reasonably

necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement.

I. "*Reimbursement*" means any payment, whether cash or non-cash, or other benefit received for the provision of physician services.

II.

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

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding to:

1. Negotiate on behalf of any physicians with any payer or provider for physician services;
2. Deal, or refuse to deal, with any payer or provider;
3. Determine or influence any terms, conditions, or requirements upon which any physician deals, or is willing to deal, with any payer or provider, including, but not limited to, terms of reimbursement; or
4. Restrict the ability of any physician to deal with any payer or provider individually or through any arrangement outside Tahoe IPA.

B. Exchanging, or facilitating the exchange of, information among physicians concerning the terms or conditions, including reimbursement, on which any physician is willing to deal with payers.

C. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this order.

Provided that nothing in this order shall be construed to prohibit any agreement or conduct by Tahoe IPA that is reasonably necessary to form, facilitate, manage, operate, or participate in:

- a. A qualified risk-sharing joint arrangement; or
- b. A qualified clinically integrated joint arrangement, if Tahoe IPA has provided the prior notification(s) as required by this paragraph (b). Such prior notification must be filed with the Secretary

of the Commission at least thirty (30) days prior to forming, facilitating, managing, operating, participating in, or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the identity of each participant; the location or area of operation; a copy of the agreement and any supporting organizational documents; a description of its purpose or function; a description of the nature and extent of the integration expected to be achieved, and the anticipated resulting efficiencies; an explanation of the relationship of any agreement on prices, or terms of reimbursement, to furthering the integration and achieving the expected efficiencies; and a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from such agreement(s). If, within the first waiting period, a representative of the Commission makes a written request for additional information, Tahoe IPA shall not form, facilitate, manage, operate, participate in, or take any action, other than planning, in furtherance of such joint arrangement until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition.

Provided further, that nothing in this order shall prevent the Tahoe IPA from refusing to transmit any information to less than all of its participating physicians. Notwithstanding this proviso, the IPA shall not require, as a condition of transmitting information to participating physicians or for any other reason, that any offer by a payer or provider be made to all participating physicians or to any particular physician.

III.

It is further ordered, That Tahoe IPA shall:

A. Within five (5) days after the date this agreement is signed by Tahoe IPA, provide to Blue Shield of California the names and addresses of all participating physicians, and request from Blue Shield of California the names of all participating physicians who either have terminated participation, or have given notice of intent to terminate future participation, in any Blue Shield of California health

plan at any time between January 1, 1998, and the date this agreement is signed by Tahoe IPA.

B. Within ten (10) days after Tahoe IPA has received from Blue Shield of California the names and addresses requested in accordance with paragraph III.A. of this agreement, give notice of the requirements of paragraph III.C. of this agreement to any participating physician who either has terminated participation, or has given notice of future intent to terminate participation, in any Blue Shield of California health plan at any time between January 1, 1998, and the date this agreement is signed by Tahoe IPA.

C. Within twenty (20) days after Tahoe IPA has received from Blue Shield of California the names and addresses requested in accordance with paragraph III.A. of this agreement, terminate the participation in Tahoe IPA of any physician who either has terminated participation, or has given notice of intent to terminate future participation, in any Blue Shield of California health plan at any time between January 1, 1998, and the date this agreement is signed by Tahoe IPA, unless any such physician:

1. Who has terminated participation in any Blue Shield of California health plan, attempts in good faith to reestablish such participation for a period of at least six (6) months thereafter, or

2. Who has given notice of intent to terminate future participation in any Blue Shield of California health plan, rescinds in writing such notice and continues such participation for a period of at least six (6) months thereafter.

IV.

It is further ordered, That Tahoe IPA shall:

- A. Within thirty (30) days after the date on which this order becomes final:

1. Distribute by first-class mail a copy of this order and the complaint to each participating physician, officer, director, manager, and employee, and to each payer enumerated in Attachment A to this order; and

2. Revise the Provider Services Agreement so that it is in conformance with the provisions of this order.

B. Terminate any agreement or contract with any payer for the provision of physician services that does not comply with paragraph II. of this order at the earlier of: (1) the termination or renewal date (including any automatic renewal date) of such agreement or contract; or (2) receipt of a written request from a payer to terminate such agreement or contract.

C. For a period of five (5) years after the date this order becomes final:

1. Distribute by first-class mail a copy of this order and the complaint to each new participating physician, officer, director, manager, and employee within thirty (30) days of his or her admission, election, appointment, or employment; and

2. Annually publish in an official annual report or newsletter sent to all participating physicians, a copy of this order and the complaint with such prominence as is given to regularly featured articles.

V.

It is further ordered, That Tahoe IPA shall file verified written reports within sixty (60) days after the date this order becomes final, annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which it has complied and is complying with the order. In addition to any other information that may be necessary to demonstrate compliance, Tahoe IPA shall include in such reports: (1) information identifying each payer that has contacted Tahoe IPA for the purpose of contracting for physician services, the terms of any contract the payer was seeking with Tahoe IPA, and Tahoe IPA's response to the payer; (2) information sufficient to describe the manner in which participating physicians share financial risk in each qualified non-exclusive risk-sharing arrangement in which they participate; and (3) copies of the minutes of Tahoe IPA's annual meetings.

VI.

It is further ordered, That Tahoe IPA shall notify the Commission at least thirty (30) days prior to any proposed change in Tahoe IPA, such as dissolution, assignment, sale resulting in the emergence of a

successor corporation, the creation or dissolution of subsidiaries, or any other change in Tahoe IPA that may affect compliance obligations arising out of this order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, Tahoe IPA shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of Tahoe IPA relating to any matter contained in this order; and

B. Upon five (5) days' notice to Tahoe IPA, and without restraint or interference from it, to interview officers, directors, or employees of Tahoe IPA.

VIII.

It is further ordered, That this order shall terminate on July 21, 2019.

ATTACHMENT A

Admar Corporation	Multiplan
Barton Memorial Hospital	MMC/Cigna
Blue Shield of California	Mutual of Omaha
Blue Cross of California	PacifiCare
CCN	School Insurance Group
First Health (Affordable Healthcare)	St. Mary's Health Network
Health Net	Tahoe Forest Hospital
Hometown Health Plan	USA MCO
Interplan Corporation	

STATEMENT OF COMMISSIONER ORSON SWINDLE
CONCURRING IN PART AND DISSENTING IN PART

The Commission's order in this matter includes a novel provision that I do not support. North Lake Tahoe Medical Group, Inc. ("Tahoe IPA"), the respondent, engaged in negotiations on behalf of its member physicians to obtain from third-party payers prices that were discounted no more than 10 percent below their usual fees. Blue Shield, a third-party payer, refused to accede to Tahoe IPA's demands, leading Tahoe IPA to successfully encourage many of its members no longer to participate as physicians for Blue Shield. Other third-party payers that were considering offering HMO products in the Lake Tahoe area responded to Tahoe IPA's demands by deciding not to enter.

I agree that there is reason to believe that Tahoe IPA's conduct violated Section 5 of the FTC Act. To remedy these violations, paragraph II of the order contains typical provisions that prohibit Tahoe IPA from entering into any agreement to (1) negotiate on behalf of physicians with any payer or provider for physician services, or (2) refuse to deal with any payer or provider. I support the relief in paragraph II because it is necessary to prevent Tahoe IPA from engaging in unlawful conduct that is identical or similar to that alleged in the proposed complaint. Both the Commission's complaint and the relief prescribed by paragraph II make it clear to Tahoe IPA's members that they must make unilateral decisions as to whether to deal with Blue Shield.

The order, however, also contains a novel provision that I do not support. Paragraph III requires that Tahoe IPA terminate the membership of all physicians who refused to deal (or who gave notice of their intent to refuse to deal) with Blue Shield as a result of Tahoe IPA's encouragement. Tahoe IPA, however, does not have to terminate: (1) physicians who refused to deal but attempt in good faith to reparticipate in Blue Shield for six months, and (2) physicians who rescind their notices of refusal to deal and continue to participate in Blue Shield for at least six months.

I do not believe that paragraph III is needed. Prior to the refusal to deal with Blue Shield alleged in the complaint, the Tahoe IPA physicians who participated in Blue Shield had their own sufficient market incentives to participate. With the cessation of the refusal to deal and the prohibition in paragraph II on future refusals to deal,

these market incentives were revived. With the return of these incentives, the Tahoe IPA physicians who refused to deal presumably would have chosen once again to participate in Blue Shield even without the burdens imposed by paragraph III.¹

The majority believes that government action beyond these market incentives is needed to make this market work better in the future. I disagree. Because Tahoe IPA physicians on their own have sufficient incentives to return to Blue Shield, there is no reason to add a layer of government intervention intended to achieve the same result.

I dissent as to paragraph III of the order.

¹ Many physicians have agreed to reparticipate in Blue Shield, while some have not. All this demonstrates is that physicians have reparticipated in Blue Shield while paragraph III is in effect. It does not establish that paragraph III was a cause of this reparticipation, or that market incentives would not have caused the physicians to reparticipate in the absence of paragraph III.

IN THE MATTER OF
FITNESS QUEST, INC., ET AL.

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

Docket C-3886. Complaint, July 26, 1999--Decision, July 26, 1999

This consent order, among other things, prohibits the Ohio-based corporation and its officer from disseminating advertisements concerning the benefits, performance, or efficacy of exercise equipment and weight-loss products unless they possess and rely upon competent and reliable evidence to substantiate the claims. The consent order also requires the respondents to disclose, in close proximity to any endorsement or testimonial involving a user's experience that is not typical or ordinary, either what the generally expected results would be or the limited applicability of the endorser's experience to what consumers may generally expect to achieve.

Participants

For the Commission: *Robert Frisby, Robin Spector, Mary Engle, Elaine Kolish, and Carolyn Cox.*

For the respondents: *Eric Rubin and Walter Diercks, Rubin, Winston, Diercks, Harris & Cooke, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Fitness Quest, Inc., a corporation, and Robert R. Schnabel, Jr., individually and as an officer of the corporation, ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Fitness Quest, Inc. is a Delaware corporation with its principal office or place of business at 1400 Raff Road, SW, Canton, Ohio.

2. Respondent Robert R. Schnabel, Jr. is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Fitness Quest, Inc.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed exercise equipment and weight-loss products to the public, including the "Airofit," "SkyTrek" and