

Complaint

IN THE MATTER OF

ALASKA HEALTHCARE NETWORK, INC.

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

Docket C-4007; File No. 9910103
Complaint, April 25, 2001--Decision, April 25, 2001

This consent order addresses practices used by Respondent Alaska Healthcare Network, Inc. -- a non-profit corporation composed of more than 60 percent of the physicians with active medical staff privileges at Fairbanks Memorial Hospital in Alaska -- with respect to the prices and other terms of trade on which its members deal with payors. The order, among other things, prohibits the respondent from entering into or facilitating any agreement (1) to negotiate on behalf of any physicians with any payor or provider; (2) to deal or refuse to deal with any payor or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payor or provider; or (4) to restrict the ability of any physician to deal with any payor or provider on an individual basis or through any other arrangement. The order also prohibits the respondent from exchanging or facilitating the exchange of information among Fairbanks area physicians concerning (1) negotiation with any payor or provider regarding reimbursement terms; or (2) any physician's intentions or decisions with respect to any dealings with any payor or provider. In addition, the order prohibits the respondent from encouraging, advising, or pressuring any person, other than the government, to engage in any action prohibited by the order. The order also provides that, for five years, if the respondent offers the services of its physicians through any other arrangement, its participating physicians must constitute no more than 50 percent of Fairbanks physicians in any of those specialties.

Participants

For the Commission: *Paul J. Nolan, Judith A. Moreland, Shane Woods, David R. Pender, Richard A. Feinstein, Joseph Eckhaus, Roberta S. Baruch, Jane E. Ruseski, Louis Silvia, and Gregory Vistnes.*

For the Respondent: *Douglas Ross, Davis Wright Tremaine, LLP.*

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Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Alaska Healthcare Network, Inc. (“Respondent AHN” or “AHN”) has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, 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 ONE: Respondent AHN is a non-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Alaska, with its office and principal place of business located at 1867 Airport Way, Suite 115-A, Fairbanks, Alaska 99701.

PARAGRAPH TWO: Fairbanks is the second largest city in Alaska, with a population of over 31,000. The greater Fairbanks area has a population of over 80,000. Fairbanks is isolated in the interior of Alaska. The nearest city to Fairbanks that has a population over 2,000 is Anchorage, which is approximately 360 miles southwest of Fairbanks. Fairbanks Memorial Hospital is the only private acute care hospital in Fairbanks.

PARAGRAPH THREE: At all times relevant to this Complaint, all members of Respondent AHN were physicians (medical doctors and doctors of osteopathic medicine) engaged in the business of providing health care services for a fee, and practiced in Fairbanks and its immediate environs. Except to the extent that competition has been restrained as alleged herein, some or all of the physician members of Respondent AHN have been, and are now, in competition with each other for the provision of physician services.

PARAGRAPH FOUR: At all times relevant to this Complaint, of the physicians in full-time, year-round private practice in

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Fairbanks who have active medical privileges at Fairbanks Memorial Hospital, Respondent AHN's members included approximately 63% of all such physicians, 48% of the family and general practitioners, 72% of the internists, 100% of the pediatricians, 80% of the obstetrician-gynecologists, and 86% of the general surgeons.

PARAGRAPH FIVE: The general business practices of Respondent AHN and its members, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

PARAGRAPH SIX: Respondent AHN engages in substantial activities for the pecuniary benefit of its members. At all times relevant to this Complaint, Respondent AHN 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.

PARAGRAPH SEVEN: Physicians often contract with health insurance firms and other third-party payors, including health maintenance organizations ("HMOs") and preferred provider organizations ("PPOs"). Such contracts typically establish the terms and conditions, including price terms, under which the physicians will render services to the subscribers of the third-party payors. In many cases, physicians entering into such contracts agree to reductions in their compensation in order to obtain access to additional patients. These contracts may permit third-party payors to lower their costs and thus reduce the cost of medical care for their subscribers.

PARAGRAPH EIGHT: Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by third-party payors, competing physicians decide individually whether to enter into contracts with third-party

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payors to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

PARAGRAPH NINE: Respondent AHN, acting as a combination of its members, and in conspiracy with at least some of its members and others, has acted to restrain competition by, among other things, facilitating, entering into, and implementing agreements among its members, express or implied, to fix price and other competitively significant terms of dealing with payors, and to refuse to deal with payors except on collectively agreed-upon terms.

PARAGRAPH TEN: Respondent AHN was formed in 1996 to promote the collective economic interests of AHN's physician members. When AHN was formed, no HMO and only one PPO operated in the Fairbanks area; however, a wide range of third-party payors of physician services, including PPOs, HMOs, and government health care purchasing cooperatives, were then seeking to contract with Fairbanks physicians. AHN's founding members sought to organize Fairbanks physicians into a group that would have the power to maintain physicians' collective control over price and other terms of dealing with third-party payors.

PARAGRAPH ELEVEN: AHN described itself to members as a vehicle permitting them to bargain collectively with payors from a position of strength. It emphasized to its members that AHN, as a result of its size and its members' agreement to allow AHN to bargain on their behalf, was in a position to avert the competition that might otherwise be introduced into the Fairbanks area by managed care plans.

PARAGRAPH TWELVE: From early 1997 through 1998, AHN bargained collectively, on behalf of its physician members, about price and other terms of dealing with at least seven third-party payors. In early 1997, Respondent AHN collected fee information from its member physicians in order to develop a fee schedule that was used in contract negotiations with third-party payors. AHN

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told its members that its fee schedule represented members' usual fees, and that the fee schedule would be used to obtain a favorable level of reimbursement for area physicians. AHN's Board and Contracting Committee also adopted a "model contract" that required payors to use AHN's fee schedule and to delegate their credentialing, utilization review, and formulary management to AHN rather than operating their own programs.

PARAGRAPH THIRTEEN: AHN members authorized AHN's Executive Director to bargain on their behalf over the terms and conditions under which individual physicians would deal with third-party payors for contracts, including whether AHN members would share substantial financial risk for services delivered. With respect to PPO and other contracts where its members did not assume financial risk, AHN purported to operate as a "messenger model." Under a messenger model, an agent conveys payors' contract offers to individual physicians, who each make an independent decision whether to accept or reject each contract. In fact, AHN did not negotiate any contracts under which its physicians shared substantial financial risk, and it did not adhere to the messenger model. Instead, its Executive Director and Contracting Committee bargained with payors over payment and other terms of fee-for-service contracts. If a payor refused to agree to AHN's price and non-price terms, AHN would not transmit these payors' contract offers to AHN's physician members.

PARAGRAPH FOURTEEN: In 1998, AHN reached agreement on a contract with NYLCare, and referred it to individual members for their approval. AHN's Executive Director told the members that the Contracting Committee had revised the NYLCare contract proposal in a way that was responsive to the common economic interest of all AHN providers. Thereafter, Respondent AHN demanded that six other third-party payors use AHN's fee schedule, which represented fees actually charged by most AHN members. In addition, AHN demanded that those third-party payors use its model contract that required payors to delegate credentialing, quality assurance, and utilization review to

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AHN physicians. However, AHN had not implemented any utilization review, quality assurance, or credentialing systems, and it lacked the capacity to implement some or all of those services. AHN engaged payors in protracted negotiations over price and non-price terms that often extended for more than a year, with no resolution. AHN did not refer contract offers from any of these payors to its members.

PARAGRAPH FIFTEEN: Respondent AHN functioned de facto as the exclusive representative of its members. Through statements in its newsletters, documents, and other media, AHN encouraged its members to deal with payors only through AHN in order to obtain better price and other terms. Some payors who were seeking to enter the Fairbanks area attempted unsuccessfully to contract with individual physicians instead of AHN; physicians told the payors that AHN handled contracting for them and for other Fairbanks physicians. Payors believed that they could not go around AHN to contract individually with physicians in Fairbanks, and thus that they had no alternative but to reach agreement with AHN or to give up their planned entry into Fairbanks.

PARAGRAPH SIXTEEN: As a result of Respondent AHN's conduct, a wide range of third-party payors of physician services, including PPOs, HMOs, and employer health care purchasing cooperatives, were unable to secure contracts with physicians and thus were unable to do business in the Fairbanks area.

PARAGRAPH SEVENTEEN: The physician members of Respondent AHN have not integrated their practices to create efficiencies sufficient to justify their acts and practices described in Paragraphs 9 through 16.

PARAGRAPH EIGHTEEN: The purpose, effects, tendency, or capacity of the conduct described in Paragraphs 9 through 16 are and have been to restrain trade unreasonably and hinder competition in the provision of physician services in the Fairbanks area in the following ways, among others:

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- A. Price and other forms of competition among Respondent AHN's member physicians were unreasonably restrained;
- B. Prices for physician services were increased;
- C. The development of alternative health care financing and delivery systems was hindered;
- D. Health plans, employers, and individual consumers were deprived of the benefits of competition in the purchase of physician services; and
- E. Employers and individual consumers were deprived of the benefits of competition among health plans.

PARAGRAPH NINETEEN: The combination, conspiracy, 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. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fifth day of April, 2001, issues its Complaint against AHN.

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DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Alaska Healthcare Network, Inc. ("AHN"), hereinafter sometimes referred to as "Respondent," and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing 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 Consent 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 accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, and having determined to modify Attachment A of the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

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1. Respondent is a nonprofit corporation organized, existing, and doing business under and by virtue of the laws of the State of Alaska, with its office and principal place of business at 1867 Airport Way, Suite 115-A, Fairbanks, Alaska 99701.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, 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. "Respondent" or "AHN" means Alaska Healthcare Network, Inc., its officers, directors, employees, agents and representatives, successors, and assigns, its subsidiaries, divisions, groups and affiliates controlled by AHN, and the respective officers, directors, employees, agents and representatives, successors, and assigns of each.

B. "Payor" means any person that purchases, reimburses for, otherwise pays for, or arranges for the payment of, all or any part of any health care services for itself or for any other person. Payor 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.

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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 AHN; (2) who has agreed to provide services through AHN; or (3) whose services have been offered to any payor through AHN.

F. “Pre-existing practice group” means an individual physician practice or a physician practice group existing as of the date of signing of the Consent Agreement. A pre-existing practice group may add any physician to the practice group after that date, without losing the status of “pre-existing” under this definition, so long as each additional physician added to the practice group is not a Fairbanks area physician at the time of the addition to the practice group.

G. “Provider” means any person that supplies health care services to any other person, including, but not limited to, hospitals, clinics, and physicians (except members or prospective members of AHN).

H. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which (1) all participating physicians share substantial financial risk from their participation in the arrangement and thereby create incentives for the participating physicians to jointly control costs and improve quality by managing the provision of physician services, such as risk-sharing involving: (a) the provision of physician services to payors or providers at a capitated rate, (b) the provision of physician services for a predetermined percentage of premium or revenue from payors or providers, (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

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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 concerning reimbursement or other terms or conditions of dealing entered into by or within 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 payors or providers on an individual basis or through any other arrangement.

I. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which (1) all participating physicians 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 the quality of services provided through the arrangement; (2) any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within 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 payors or providers on an individual basis or through any other arrangement.

J. "Fairbanks area physician" means any physician who has active staff privileges at Fairbanks Memorial Hospital.

K. "Relevant physician market" means each of the following types of Fairbanks area physicians who are board-certified, board eligible, or actually practicing in: (1) family practice and general internal medicine; (2) obstetrics and/or gynecology; (3) pediatrics; (4) general surgery; and (5) orthopedic surgery.

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

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II.

IT IS FURTHER ORDERED that AHN, 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, do forthwith cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding among any Fairbanks area physicians:
 - 1. To negotiate on behalf of any physician with any payor or provider;
 - 2. To deal, refuse to deal, or threaten to refuse to deal, with any payor or provider;
 - 3. Regarding any terms, conditions, or requirements upon which any physician deals, or is willing to deal, with any payor or provider, including, but not limited to, terms of reimbursement; or
 - 4. To restrict the ability of any physician to deal with any payor or provider individually or through any arrangement outside AHN.
- B. Exchanging, transferring, or facilitating in any manner the exchange or transfer of information (including, but not limited to, any views, intentions, positions, terms, proposals, or decisions) among any Fairbanks area physicians who are not in the same practice group concerning:
 - 1. Negotiation of actual or proposed terms of reimbursement with any payor or provider; or

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2. Any physician's actual or contemplated intention or decision with respect to:
 - a. Entering into, refusing to enter into, threatening to refuse to enter into, withdrawing from, or threatening to withdraw from any actual or proposed agreement with any payor or provider; or
 - b. Agreeing to, refusing to agree to, or willingness to agree to any actual or proposed term, condition, or requirement of dealing with any payor or provider.
- C. Encouraging, suggesting, 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 prohibit conduct that is approved and supervised by the State of Alaska insofar as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine.

PROVIDED FURTHER that nothing in this Paragraph shall prohibit any agreement involving, or conduct by, Respondent that is reasonably necessary to form, participate in, or take any other action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, so long as the formation or operation of the arrangement is consistent with Paragraph III below, and the notification provisions contained in Paragraph VI of this Order have been satisfied.

III.

IT IS FURTHER ORDERED that within five (5) days after the date the Consent Agreement in this matter is signed by Respondent, and for a period of five (5) years after the date this Order becomes final, AHN shall cease and desist from offering the services of its physicians to any payor or provider:

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- A. Through a qualified risk-sharing joint arrangement or a qualified clinically- integrated joint arrangement, unless AHN's participating physicians constitute no more than thirty (30) percent of physicians in any relevant physician market, or
- B. Through any other arrangement, unless AHN's participating physicians constitute no more than fifty (50) percent of physicians in any relevant physician market.

PROVIDED THAT nothing in this Paragraph shall be construed to prohibit AHN from including as a participating physician in any arrangement, for each relevant physician market, any single physician, or any one pre-existing practice group.

PROVIDED FURTHER that AHN may at any time exceed the 30 percent or 50 percent limitations as a result of (a) any physician's exiting any relevant physician market or (b) the addition by new entry of a non-Fairbanks area physician to a pre-existing practice group; however, AHN may not exceed the 30 percent or 50 percent limitations by any greater degree than is directly caused by such exit or entry.

IV.

IT IS FURTHER ORDERED that AHN shall:

- A. 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 Complaint to each participating physician, officer, director, manager, and employee of AHN, and to each payor enumerated in Attachment A to this order; and
- B. 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 of AHN within thirty

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(30) days of his or her admission, election, appointment, or employment;

2. Annually publish in an official annual report or newsletter sent to all participating AHN 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 AHN 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, AHN shall include in such reports: (1) information identifying each payor that has contacted AHN for the purpose of contracting for physician services; (2) information sufficient to describe the manner in which participating physicians share financial risk in each qualified risk-sharing joint arrangement in which they participate; and (3) copies of the minutes of AHN's annual meetings.

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years after the date this Order is entered:

- A. Respondent shall notify the Commission in writing at least forty-five (45) days prior to forming, participating in, or taking any action, other than planning, in furtherance of any:
 1. Qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement involving two (2)

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or more Fairbanks area physicians who are not in the same physician practice group; or

2. Other arrangement that, in dealing or negotiating with any payor or provider, is using, or intends to use, AHN or an agent that represents two (2) or more Fairbanks area physicians who are not in the same physician practice group.

- B. If a representative of the Commission makes a written request for information within thirty (30) days after receipt of a notice pursuant to Paragraph VI.A of this Order, Respondent shall not form, participate in, or take any action, other than planning, in furtherance of the arrangement until thirty (30) days after substantially complying with such request for information or such shorter waiting period as may be granted by letter from the Bureau of Competition.

VII.

IT IS FURTHER ORDERED that AHN shall notify the Commission at least thirty (30) days prior to any proposed change in AHN such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in AHN that may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, AHN shall permit any duly authorized representative of the Commission:

- B. 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 its possession or under its control relating to any matter contained in this Order; and

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- C. Upon five (5) days' notice to AHN, and without restraint or interference from it, to interview officers, directors, or employees of AHN.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on April 25, 2021.

By the Commission, with the five Commissioners voting in the affirmative, but with Commissioner Swindle and Commissioner Leary dissenting as to a structural component of the relief prescribed by the Decision and Order.

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ATTACHMENT A

Admar Corporation
Aetna U.S. Healthcare
Premera Blue Cross
First Health
Government Employees Hospital Association, Inc. (“GEHA”)
Private Health Care Systems
TRICARE

Analysis

**Analysis of Agreement Containing Consent Order to Aid
Public Comment**

Issued when the Commission tentatively approved a proposed consent order on September 6, 2000

The Federal Trade Commission has accepted, subject to final approval, an agreement with the Alaska Healthcare Network, Inc. ("AHN") containing a proposed consent order. The agreement settles charges that AHN violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating or implementing agreements among its members to fix prices and other terms of dealing with payors, and to refuse to deal with payors except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by AHN that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations in the Commission's proposed complaint are summarized below.

Respondent AHN is a non-profit corporation composed of more than 60 percent of the physicians with active medical staff privileges at Fairbanks Memorial Hospital (the only private general acute care hospital in the Fairbanks area). AHN's members include almost half of the family and general practitioners, and from 70 to 100 percent of the internists,

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pediatricians, obstetrician-gynecologists, and general surgeons in full-time, year-round private practice in Fairbanks.

AHN has served as a vehicle for its physician members to negotiate collectively with health plans. When AHN was formed, a wide range of health plans, including PPOs, HMOs, and government health care purchasing cooperatives, were seeking to contract with Fairbanks physicians. AHN members authorized AHN's Executive Director to bargain on their behalf over the terms and conditions under which individual physicians would deal with third-party payors. AHN emphasized to its members that – as a result of its size and its members' agreement to allow AHN to bargain on their behalf – AHN would be able to bargain from a position of strength and thus avert the competition among physicians that might otherwise be introduced into the Fairbanks area by managed care plans.

From early 1997 through 1998, AHN negotiated price and other contract terms on behalf of its physician members with at least seven third-party payors. It used fee information collected from its member physicians to develop a fee schedule to use in contract negotiations. AHN told its members that its fee schedule represented members' usual fees, and that the fee schedule would be used to obtain a favorable level of reimbursement for area physicians. AHN's Board of Directors and Contracting Committee also adopted a model contract that required payors to use AHN's fee schedule and to delegate their credentialing, utilization review, and formulary management to AHN rather than operating their own programs.

AHN purported to operate as a "messenger model," under which an agent conveys payors' contract offers to individual physicians, who each make an independent decision whether to accept or reject each contract. In practice, however, AHN's Executive Director and Contracting Committee bargained with payors over payment and other terms, and refused to transmit contract offers to AHN members unless the payors agreed to AHN's terms.

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AHN functioned de facto as the exclusive representative of its members. Through statements in its newsletters, documents, and other media, AHN repeatedly advised members to deal with payors only through AHN in order to obtain better prices and other terms. Some payors who were seeking to enter the Fairbanks area attempted unsuccessfully to contract with individual physicians instead of dealing with AHN: physicians told the payors that AHN handled contracting for them and for other Fairbanks physicians. Payors believed that they could not go around AHN to contract individually with physicians in Fairbanks, and thus that they had no alternative but to reach agreement with AHN or give up their planned entry into Fairbanks. In several instances, payors approached individual physicians in mass mailings, requests for proposals, or phone calls, and received no responses. This was completely unprecedented and contradicted by payors' favorable responses to RFPs in other markets, including Anchorage, Alaska, and demonstrated the unwillingness of AHN and its members to deal with an entire category of payors.

AHN reached agreement with one payor – NYLCare – in 1998, and transmitted a contract to individual AHN members for their approval. AHN's Executive Director told the members that the Contracting Committee had revised the NYLCare contract proposal in a way that was responsive to the common economic interest of all AHN members. AHN engaged six other third-party payors in protracted negotiations over price and non-price terms that often extended for more than a year with no resolution. AHN demanded that the payors use AHN's fee schedule and its model contract that required payors to delegate credentialing, quality assurance, and utilization review to AHN physicians. However, AHN had not implemented any utilization review, quality assurance, or credentialing systems, and it lacked the capacity to implement some or all of those services. AHN did not refer contract offers from any of these payors to its members. As a result of AHN's conduct, a wide range of third-party payors of physician services, including PPOs, HMOs, and employer health care purchasing cooperatives, were unable to secure physician

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contracts and thus were unable to do business in the Fairbanks area.

AHN did not engage in any activity that might justify collective agreements on the prices its members would accept for their services. Its actions have restrained price and other competition among physicians in the Fairbanks area and thereby harmed consumers (including third-party payors, subscribers, and their employers) by increasing the prices for physician services, delaying the development of alternative health care financing and delivery systems, and limiting competition among health plans.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint, while allowing AHN and its members to engage in legitimate joint conduct. The core prohibitions of the proposed order are contained in Paragraph II. Paragraph II.A prohibits AHN from entering into or facilitating any agreement: (1) to negotiate on behalf of any physicians with any payor or provider; (2) to deal or refuse to deal with any payor or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payor or provider; or (4) to restrict the ability of any physician to deal with any payor or provider on an individual basis or through any other arrangement.

Paragraph II.B prohibits AHN from exchanging or facilitating the exchange of information among Fairbanks area physicians concerning: (1) negotiation with any payor or provider regarding reimbursement terms; or (2) any physician's intentions or decisions with respect to any dealings with any payor or provider. Paragraph II.C prohibits AHN from encouraging, advising, or pressuring any person, other than the government, to engage in any action that would be prohibited if the person were subject to the order.

Paragraph II contains two provisos. The first proviso permits respondent to engage in conduct that is approved and supervised

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by the State of Alaska, so long as that conduct is exempt from liability under the federal antitrust laws under the state action doctrine. That doctrine protects private conduct that is both: (1) in accordance with a clearly articulated and affirmatively expressed state policy to supplant competition; and (2) actively supervised by the state itself. *See, e.g., FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The second proviso in Paragraph II allows AHN to engage in conduct (including collectively determining reimbursement and other terms of contracts) that is reasonably necessary to operate any "qualified risk-sharing joint arrangement" or "qualified clinically-integrated joint arrangement," provided respondent complies with the prior notification requirements set forth in Paragraph VI of the order. The prior notification mechanism will allow the Commission to evaluate a specific proposed arrangement and assess its likely competitive impact.

As defined in the order, a "qualified risk-sharing joint arrangement" must satisfy three conditions. First, all physician participants must share substantial financial risk through the arrangement. The definition of financial risk-sharing tracks the discussion of that term contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. Second, any agreement on prices or terms of reimbursement must be reasonably necessary to obtain significant efficiencies through the joint arrangement. Third, the arrangement must be non-exclusive – that is, it must not restrict the ability, or facilitate the refusal, of participating physicians to deal with payors individually or through any other network or venture.

A "qualified clinically-integrated joint arrangement" is one in which the physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services, without necessarily sharing substantial financial risk. This definition also reflects the analysis contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. Participating physicians must

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establish a high degree of interdependence and cooperation through their use of programs to evaluate and modify their clinical practice patterns, in order to control costs and assure the quality of physician services provided. In addition, the arrangement must be non-exclusive, and any agreement on prices or terms of reimbursement must be reasonably necessary to obtaining significant efficiencies through the arrangement.

The proposed order also imposes a structural remedy for a period of five years. Although the Commission has not routinely imposed structural relief on physician groups in previous cases, such relief is not unprecedented. *See, e.g., Home Oxygen and Medical Equipment Co.*, 118 F.T.C. 661 (1994) (pulmonologists prohibited for ten years from acquiring ownership interest in any entity that provides home oxygen delivery services if more than 25 percent of the pulmonologists in the area would be affiliated with the entity), and *Physicians Group, Inc.*, 120 F.T.C. 567 (1995) (physician organization ordered to dissolve). The Commission will continue to consider the option of structural remedies in these cases when necessary to achieve effective relief.

Paragraph III.A requires that if AHN operates a qualified risk-sharing or clinically-integrated joint arrangement, its participating physicians must constitute no more than 30 percent of Fairbanks physicians in any of the key medical specialties of family practice and general internal medicine, obstetrics and/or gynecology, pediatrics, general surgery, and orthopedic surgery. Paragraph III.B of the proposed order further requires that, when offering the services of its physicians through any other arrangement, AHN's participating physicians constitute no more than 50 percent of Fairbanks physicians in any of those specialties.

Paragraph III.B permits participation by a greater percentage of physicians because it is intended to apply to arrangements in which there is no agreement among AHN participating physicians on price or other competitively significant terms, including messenger model arrangements.

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Paragraph III contains two provisos. The first proviso permits AHN to include as a participating physician any single physician or any one pre-existing physician practice group, without regard to the percentage limitations. The single physician exception allows AHN to exceed the percentage limitations in instances where there may be only a few physicians in a designated medical speciality; and the one pre-existing practice group exception allows AHN to exceed the percentage limitations where the alternative would be to require an integrated practice group to downsize. The second proviso permits AHN to exceed the percentage limitations to the extent that the excess arises from certain changes in the marketplace. As a result of these provisos, once AHN is operating in conformity with percentage limitations contained in the order, it will not be required to reduce its physician membership because of (1) the addition of a physician (who was not already in practice in Fairbanks) to a member practice group, or (2) a reduction in the total number of physicians in a particular specialty (and thus in the denominator used in calculating the percentage of physicians in a specialty who can be AHN members) as a result of physician exit from the market.

The structural relief in this case is necessary to prevent continuing tacit collusion among AHN members. Fairbanks is an isolated community with a relatively small number of physicians, a high proportion of whom are AHN members. According to the allegations of the complaint, these doctors have demonstrated an unwillingness to participate in health plans independently of AHN. In these circumstances, there is a significant risk of continuing tacit collusion among AHN members that cannot adequately be addressed by an order limited to prohibiting certain specified conduct (i.e., AHN members might be able to coordinate their refusals to deal with payors without engaging in overt acts of collusion). Moreover, since AHN purported to operate as a messenger model, but in fact actively negotiated price and nonprice terms on behalf of its physician members, an order limited to conduct remedies would have required detailed provisions governing AHN's future operation as a messenger. The structural relief, by contrast, will permit AHN, subject to the

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five-year size limits, to carry on its activities as it finds most effective without detailed oversight by the Commission, so long as the core prohibitions of Paragraph II are respected.

The structural relief contained in the order responds to the particular facts of this case, and is intended to interrupt the chain of effects flowing from the conduct alleged in the complaint and to permit time for new market structures and relationships to develop among Fairbanks physicians and between the physicians and health plans. The presence of this provision in the proposed order does not suggest that other physician networks whose membership exceeds the percentage limitations are likely to have anticompetitive effects. The provision is limited to five years in order to give AHN the greatest possible freedom to respond to changing market conditions thereafter, once the effects of the challenged conduct have dissipated.

The remaining provisions of the proposed order impose obligations on AHN with respect to distributing the order and complaint to its members and other specified persons and reporting information to the Commission. The order terminates twenty years after the date it issues.

Statement

**Statement of Chairman Robert Pitofsky and Commissioners
Sheila F. Anthony and Mozelle W. Thompson**

The Commission today issued a final consent order settling charges that a group of approximately 90 physicians in Fairbanks, Alaska, acting through an organization known as the Alaska Healthcare Network (AHN), unlawfully fixed prices and refused to deal with health plans except on collectively-determined terms. Commissioners Swindle and Leary have voted to issue the complaint and accept the consent order, but they dissent from the part of the order that limits AHN's membership if it engages in contracting activities with health plans. Commissioners Swindle and Leary recognize that structural relief can, in certain markets for physician services, "be appropriate fencing-in relief for the type of conduct involved in this case." We issue this statement to discuss why we believe that this order's modest structural provisions – which will last for a period of only five years, and which are subject to certain exceptions – are appropriate under the factual circumstances in this case.

The structural relief is based on our conclusion that, in this particular market, consumers would not be adequately protected by an order that only barred similar unlawful conduct in the future, without seeking to prevent continued anticompetitive harm from tacit collusion among AHN members. Part III of the order limits membership in AHN to 50 percent of the physicians in each of the five medical specialties if AHN acts as a "messenger" to facilitate health plan contracting with physicians. Membership is limited to 30 percent of physicians in these specialties in the event that AHN elects to form an integrated joint venture that would actually negotiate contracts on behalf of its physicians. We believe that this approach, rather than the more drastic remedy of dissolution, represents an appropriate supplement to the conduct remedy.¹

¹ In some prior cases involving physician collective bargaining with health plans, the Commission has ordered that the organization be entirely disbanded. *See Physicians Group, Inc.*,

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Commissioners Swindle and Leary raise specific concerns about the effectiveness of a structural remedy in a market the size of the Fairbanks, Alaska market, the order's "grandfather" provision (which allows AHN to have a single pre-existing group practice in the organization even when that group's members cause AHN to exceed the cap), and the "entry" exception (which allows doctors new to the market to join existing practices without regard to the limits). Our view of the evidence differs. We believe that the structural relief will be effective at preventing future anticompetitive conduct, while the specific exceptions will preserve efficiencies.

The structural remedy will operate to reduce significantly AHN's "market share" in the various physician specialties, and thus its likely market power. Notably, the order will ensure that if AHN undertakes contracting activities, at least one of the two existing multi-specialty physician practice groups that previously have participated in AHN will henceforth remain outside of AHN, and thus will be available to serve as the nucleus for an alternative physician network. The order recognizes that while the present level of consolidation in particular specialties may confer market power on certain Fairbanks practice groups, that market power exists apart from, and has not been caused by, AHN's prior conduct.

We are also unpersuaded by our colleagues' suggestion that the structural remedy might discourage efficiency-enhancing mergers of physician practice groups in the specialties subject to the percentage limits. It is theoretically possible that physicians could so value AHN membership that they would refrain from a procompetitive merger because the merger would require forfeiting AHN membership. However, neither the Commission's investigation nor the public comments provide any evidence to support such a theory. To date, AHN appears to have had little function other than to facilitate the anticompetitive agreements

120 F.T.C. 567 (1995) (consent order); *Southbank IPA*, 114 F.T.C. 783 (1991) (consent order).

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challenged in this case. If AHN undertakes significant procompetitive activities in the future, the opportunities for establishing networks outside of AHN, along with the temporary nature of the structural remedy, make it highly unlikely that any competitive advantages of AHN membership would deter efficient consolidation of physician practices.

The evidence that we have seen persuades us that the structural remedy included in the order – limited in scope as well as duration – is necessary to prevent the perpetuation of AHN’s unlawful conduct and its effects. Moreover, the risk that procompetitive integration will be deterred seems speculative at most. We therefore believe that limited structural relief is appropriate under the circumstances of this case.

Statement

**Statement of Commissioners Orson Swindle and
Thomas B. Leary, Dissenting in Part**

Although we have voted to issue the consent order in this matter because we believe the conduct remedy is justified, we dissent from one component of the relief prescribed by the proposed order -- namely, the inclusion of a form of “structural” remedy to help cure the effects of the respondent AHN’s allegedly unlawful conduct. For five years, the structural provision of the order (Paragraph III) imposes a 30 percent or a 50 percent “cap” on the number of Fairbanks physicians in each of five “relevant physician markets” who may participate in AHN, depending on whether AHN elects to function as a negotiator or merely as a “messenger.”

When the Commission accepted this consent for public comment last year, we issued a separate statement inviting comments on (1) whether structural measures are generally appropriate in “conduct” cases and (2) whether such measures make sense in a thinly populated market like Fairbanks. We said, “Although we believe that limits on a physician group’s ‘market shares’ in particular specialties can be appropriate fencing-in relief for the type of conduct involved in this case, we are not persuaded that this provision will operate in a rational and predictable way in a market as small as Fairbanks.” We particularly noted the first proviso to Paragraph III, which allows respondent to “grandfather” in “any one pre-existing practice group” -- no matter how large -- and thus to perpetuate a structure inconsistent with the goals of that paragraph.

We also explained how the imposition of such structural relief in a setting like Fairbanks results in anomalies that would not arise in a larger urban area. For example (and assuming that things have not changed dramatically since the Commission accepted the consent agreement), one of the five “relevant physician markets” affected by the order (pediatrics) has only seven practitioners, and five are in a grandfathered group; another “market” (ob/gyn) has only ten practitioners, six of whom are in a grandfathered group. We can certainly understand the desire to

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refrain from forcing the breakup of a presumably efficient practice group, but this proviso makes the percentage caps ineffective for these specialties. On the other hand, the order itself potentially inhibits the formation of similarly efficient practice groups in the specialties where the caps are effective.

The public comments received indicate considerable concern about the structural portion of the remedy. Although some of those concerns may stem from a misunderstanding about the structural portions of the decree or about the overall operation of the order, the public comments at least indicate that there is a lively controversy and confusion over the impact of the structural relief in a market like Fairbanks. We continue to believe that the structural provision is unlikely to have the intended impact because of the grandfather exception mentioned above as well as a provision in Paragraph III that allows AHN to exceed the 30 percent or 50 percent limitation when it results from the entry of a physician from outside the Fairbanks area to a pre-existing practice group. The “entry” exception does address concerns over the possibility that the order will chill the ability of Fairbanks to attract new doctors, but it also undercuts the basic rationale for structural relief.

In these circumstances, we dissent from the structural relief in the order. We are uncomfortable with its impact in the present situation and with the likelihood that it will be cited hereafter as precedent for structural relief in other minuscule markets. As we said before, some form of structural relief might well be warranted in future cases in which the efficacy of a purely “conduct” (*i.e.*, “cease-and-desist”) order is in doubt. A formerly collusive group’s compliance with a conduct order (through the cessation of overtly conspiratorial behavior) does not necessarily spell the end of tacit coordination in the future. In a market with different characteristics from those involved here, some type of percentage cap on network membership could bolster competition through the creation of one or more competing networks. We simply do not see how this model can be applied rationally to Fairbanks.

Complaint

IN THE MATTER OF

HOECHST MARION ROUSSEL, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9293; File No. 9810368**Complaint, March 16, 2000--Decision, May 8, 2001*

This consent order settles an administrative complaint addressing an agreement among Respondent Hoechst Marion Roussel, Inc. ("HMR"), Respondent Carderm Capital, L.P., and Respondent Andrx Corporation concerning competition between Cardizem CD – a prescription drug manufactured and sold by HMR that is used to treat hypertension (high blood pressure) and angina pectoris (chest pain) – and a generic version developed by Andrx. The order, among other things, prohibits the respondents (except in certain licensing arrangements) from entering into agreements (1) in which the first company to file an Abbreviated New Drug Application agrees with the New Drug Application Holder not to relinquish its right to a 180-day exclusivity period (as interpreted by the courts at the time of the agreement), or (2) in which the Abbreviated New Drug Application First Filer agrees not to develop or market a generic drug product that is not the subject of a claim of patent infringement. The order also prohibits certain interim settlements of patent litigation by a respondent – involving payments to the generic company, and in which the generic company temporarily refrains from bringing its generic product to market – unless they are approved by the court, and the respondent gives notice to the Commission to allow it time to present its views to the court. In addition, the order requires the respondents to give the Commission written notice 30 days before entering into such agreements in other contexts.

Participants

For the Commission: *Markus H. Meier, Bradley S. Albert, Seth C. Silber, Daniel A. Kotchen, Robin Moore, Elizabeth R. Hilder, Suzanne Michel, Jon M. Steiger, Patricia Allen, David R. Pender, Richard A. Feinstein, Kenneth M. Davidson, Daniel P. Ducore, Elizabeth A. Schneirov, Leslie Farber, and Daniel P. O'Brien.*

For the Respondents: *James M. Spears and Michael Koon, Shook, Hardy & Bacon LLP, Peter O. Safir and Stacy L. Ehrlich,*