

Complaint

IN THE MATTER OF
PHYSICIAN INTEGRATED SERVICES
OF DENVER, INC., ET AL.

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

Docket C-4054; File No. 0110173
Complaint, July 16, 2002--Decision, July 16, 2002

This consent order addresses practices used by Respondent Physician Integrated Services of Denver, Inc. (“PISD”) – which has 41 primary care physicians who practice in the southern part of the Denver, Colorado metropolitan area – and Respondents Michael J. Guese, M.D., and Marcia A. Brauchler, respectively the president of and an advisor to PISD. The order, among other things, prohibits the respondents from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician’s behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or not to deal with any payor through an arrangement other than PISD. The order also prohibits the respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. In addition, the order prohibits the respondents from attempting to engage in – or from inducing anyone to engage in – any action prohibited by the order. In addition, the order prohibits Respondent Brauchler, for a period of three years, from negotiating with any payor on behalf of any current or past member of PISD, and from advising any current or past member of PISD to accept or reject any term, condition, or requirement of dealing with any payor. The order also requires Respondent PISD to terminate – without penalty at any payor’s request – current contracts with payors with respect to providing physician services.

Participants

For the Commission: *Paul J. Nolan, Steven J. Osnowitz, Constance Salemi, Robert Canterman, Christi Braun, Jessica Rosen, David R. Pender, Jeffrey W. Brennan, Rendell A. Davis, Jr., Daniel P. Ducore, Fred Martin, Louis Silvia, and Thomas Iosso.*

For the Respondents: *Larry Treece, Sherman and Howard.*

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COMPLAINT

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 Physician Integrated Services of Denver, Inc. (“Respondent PISD”), Michael J. Guese, M.D. (“Respondent Guese”), and Marcia L. Brauchler (“Respondent Brauchler”) have violated and are 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:

RESPONDENTS

PARAGRAPH 1: Respondent PISD is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 850 E. Harvard Street, Suite 455, Denver, CO 80210.

PARAGRAPH 2: Respondent Guese is a physician licensed under the laws of the State of Colorado, with his office and principal place of business located at 850 E. Harvard Street, Suite 455, Denver, CO 80210. Respondent Guese is the President and the sole director of Respondent PISD. Respondent Guese is also the principal negotiator for Respondent PISD.

PARAGRAPH 3: Respondent Brauchler is a consultant to Respondent PISD. The address of her office and principal place of business is at P.O. Box 260661, Littleton, CO 80163-0171.

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PARAGRAPH 4: At all times relevant to this Complaint, all members of Respondent PISD were primary care physicians engaged in the business of providing health care services for a fee

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to patients. Except to the extent that competition has been restrained as alleged herein, members of Respondent PISD have been, and are now, in competition with each other for the provision of physician services.

PARAGRAPH 5: Respondents' general business practices, including the acts and practices alleged herein, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH 6: Respondent PISD has been organized in substantial part, and is engaged in substantial activities, for the pecuniary benefit of Respondent PISD's 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.

OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

PARAGRAPH 7: Respondent PISD has approximately 41 members, all of whom are primary care physicians, licensed to practice medicine in the State of Colorado, and engaged in the business of providing primary care physician services to patients. The membership of Respondent PISD consists of internists, pediatricians, family physicians, and general practitioners with offices in the southern part of the Denver metropolitan area ("South Denver area").

PARAGRAPH 8: Physicians often contract with health insurance firms and other third-party payors (hereinafter "payors"), such as preferred provider organizations. Such contracts typically establish the terms and conditions, including fees and other competitively significant terms, under which the physicians will render services to the payors' subscribers. Physicians entering into such contracts often agree to lower compensation, in order to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs and enable payors to lower the

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price of insurance, and thereby result in lower medical care costs for subscribers to the payors' health insurance plans.

PARAGRAPH 9: 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 payors to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

PARAGRAPH 10: Medicare's Resource Based Relative Value System ("RBRVS") is a system used by the Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. It is the practice of payors in the South Denver area to make contract offers to individual physicians at a fee level specified in the RBRVS for a particular year, plus a markup based on some percentage of that fee (*e.g.*, "110 percent of 2001 RBRVS").

PARAGRAPH 11: In order to be competitively marketable in the South Denver area, a payor's health insurance plan must include in its physician network a large number of primary care physicians who practice in the South Denver area. Many of the primary care physicians who practice in the South Denver area are members of Respondent PISD.

PARAGRAPH 12: Competing physicians sometimes use a "messenger" to facilitate the establishment of contracts between themselves and payors in ways that do not constitute or facilitate an unlawful agreement on fees and other competitively significant terms. Such a messenger may not, however, consistent with a competitive model, negotiate fees and other competitively significant terms on behalf of the participating physicians, or facilitate the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them

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based on the messenger's opinion on the appropriateness, or lack thereof, of the offer.

RESTRAINT OF TRADE

PARAGRAPH 13: Respondents PISD and Guese, acting as a combination of competing physicians, and Respondent Brauchler, in conspiracy with Respondent PISD and at least some of Respondent PISD's members, respectively, have acted to restrain competition by, among other things:

- A. facilitating, negotiating, entering into, and implementing agreements among Respondent PISD's members on fees and other competitively significant terms;
- B. refusing to deal with payors except on collectively agreed-upon terms; and
- C. negotiating uniform fees and other competitively significant terms in payor contracts for Respondent PISD's members, and refusing to submit payor offers to members that do not conform to Respondent PISD's standards for contracts.

FORMATION AND OPERATION OF RESPONDENT PISD

PARAGRAPH 14: Respondent Guese and others formed Respondent PISD in November 1999 to be a vehicle for physicians' collective contract negotiations with payors, in order to achieve contracts that contain higher fees and other, more advantageous terms than individual members could obtain by negotiating unilaterally with payors. Respondents sought to replace individual physician-payor contracts with a single PISD-payor contract that contained such higher fees and other terms for all members of Respondent PISD.

PARAGRAPH 15: In or about December 1999, Respondent PISD, at Respondent Guese's direction, retained Respondent Brauchler to help coordinate and manage Respondent PISD's

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payor contracting activities and to assist in renegotiating payor contracts previously entered into by members of Respondent PISD on a unilateral, rather than collective, basis. Thereafter, on behalf of Respondent PISD's collective membership, Respondent Guese and Respondent Brauchler negotiated with payors for higher fees and other, more economically advantageous contract terms.

PARAGRAPH 16: To join Respondent PISD, physicians sign an agreement that authorizes Respondent PISD to negotiate, on their behalf, fees and other contract terms with payors. Members authorize Respondent PISD to negotiate "non-risk" contracts, which are accepted only if first approved by a majority of Respondent PISD's members. Non-risk contracts do not involve sharing between physicians and payors of financial risk through arrangements such as capitation or fee withholds. Upon such approval, Respondent PISD executes a contract with a payor.

PARAGRAPH 17: Respondents have a practice – inconsistent with a messenger model arrangement – of refusing to convey to Respondent PISD's members the terms of payor offers that Respondents deem deficient. Respondents instead demand, and receive, from payors more favorable contract terms – terms that payors would not have offered to Respondent PISD's members had those members negotiated on a unilateral, rather than collective, basis. Only after payors accede to Respondents' demand for higher fees and other favorable terms do Respondents convey the contract in question to Respondent PISD's members for approval.

PARAGRAPH 18: Respondent PISD's members authorized Respondents Guese and Brauchler to act as their exclusive bargaining agents. Respondent Brauchler reported to Respondent PISD's members on the details of her negotiations with payors, including on the status of fee negotiations and the specific fee levels that were discussed. Respondents Guese and Brauchler also held general PISD membership meetings to discuss details of payor contract negotiations and overall contract strategy.

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PARAGRAPH 19: In negotiations with payors, Respondents Guese and Brauchler used a “contract-or-no-contract” strategy, through which the payor could either contract on PISD’s terms and likely have all of the members of PISD in the provider network, or not contract on PISD’s terms and have few or none of the PISD members in the network. Respondents Guese and Brauchler would either recommend that PISD members approve a negotiated contract, or, if respondents were unable to negotiate acceptable terms, refuse to convey the payor’s offer to members.

PARAGRAPH 20: Respondents Guese and Brauchler told payors that Respondent PISD’s members would deal with them only if the payor agreed to PISD’s collectively determined terms. This assertion was demonstrated when payors attempted unsuccessfully to deal individually with members of Respondent PISD – only to be told by the members that they would contract for services only through Respondent PISD. Respondents’ strategy of collective negotiations and concerted refusals to deal outside PISD left payors in the untenable position of having to pay higher fees to all members of Respondent PISD, or being denied such members’ inclusion in their respective health insurance plan’s provider networks – an outcome that would have substantially impaired payors’ ability to compete effectively.

NEGOTIATIONS WITH PACIFICARE

PARAGRAPH 21: PacifiCare Health Systems of Colorado, Inc. (“PacifiCare”) is a payor doing business in the South Denver area. In December 1999, Respondent Guese and other members of Respondent PISD signed and had delivered to PacifiCare letters demanding that the payor recognize Respondent PISD as its members’ negotiating agent for both the commercial and Medicare lines. In meetings with PacifiCare, Respondents Brauchler and Guese specified minimum fees, annual increases in such fees, and an “administrative” fee that PacifiCare had to pay in order to contract with Respondent PISD as an entity and thereby enlist Respondent PISD’s members into PacifiCare’s

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network of health plan physicians. Respondents Brauchler and Guese asserted that Respondent PISD's members would not accept, as part of any agreement, financial risk-sharing, including capitation or fee withholds. They also emphasized to PacifiCare that Respondent PISD's members were negotiating collectively through Brauchler and Guese, and that PacifiCare had no choice but to adopt the terms that Respondent PISD was demanding in order to have individual members of Respondent PISD under contract.

PARAGRAPH 22: PacifiCare approached Respondent PISD's members individually with independent contract proposals, but the members refused to negotiate unilaterally. Respondent PISD's members told PacifiCare that it could deal with them only on a collective basis through Respondent PISD, and in particular through Respondent PISD's negotiators, Respondents Brauchler and Guese. Respondents' employment of such tactics exerted the members' collective power to obtain higher fees in a group contract than each physician might have obtained acting individually.

PARAGRAPH 23: Concerned that it otherwise would have an unmarketable health insurance plan because of a limited primary care physician network in the South Denver area, PacifiCare entered a fee-for-service contract with Respondent PISD at the higher contract rate that the members, through Respondent PISD, collectively demanded. PacifiCare also agreed to Respondent PISD's demand for annual fee increases tied to the inflation rate, the potential for bonus incentives, administrative fees to Respondent PISD, and other miscellaneous fees, all of which were concessions that PacifiCare made in response to Respondent PISD's coercive tactics. Only after Respondent PISD's collectively determined terms were met did Respondent PISD accept the PacifiCare contract and mail it to members of Respondent PISD for their acceptance.

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NEGOTIATIONS WITH AETNA

PARAGRAPH 24: Aetna U.S. Healthcare (“Aetna”) is a payor doing business in the South Denver area. In April 2000, Aetna offered individual contracts to physicians who were members of Respondent PISD. Respondent Brauchler, upon learning that Aetna was contacting Respondent PISD’s members on an individual rather than collective basis, asked each member to write a letter to Aetna, notifying it that said physician would deal only through Respondent PISD and that Aetna should direct all further contacts to Respondent Guese. Most of the members of Respondent PISD, acting on Respondent Brauchler’s request, sent the requested letter to Aetna.

PARAGRAPH 25: Aetna refused to sign a single contract with Respondent PISD that covered all its members, but negotiated with Respondent PISD in its role as the members’ exclusive bargaining agent. To obtain contracts with PISD members, Aetna agreed to offer them a contract at the higher RBRVS level that Respondent PISD had demanded; and most if not all of PISD’s members thereafter signed contracts.

NEGOTIATIONS WITH ANTHEM

PARAGRAPH 26: Anthem Blue Cross and Blue Shield of Colorado (“Anthem”) is a payor doing business in the South Denver area. In mid-2000, Respondent Brauchler contacted Anthem to initiate negotiations on behalf of Respondent PISD’s members. At that time, all members of Respondent PISD held individual contracts with Anthem at competitive market rates. Anthem at first refused to negotiate with Respondent Brauchler because it already had contracts with Respondent PISD’s individual member physicians. Respondents, however, attempted to force Anthem into dealing with Respondent PISD for new contracts for its members.

PARAGRAPH 27: Respondents Brauchler and Guese subsequently met with Anthem representatives and told them that,

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in order to reach an agreement with Respondent PISD, Anthem had to offer fees equal to a specified percentage of RBRVS. These fees were not only well above the fees that Anthem was currently paying the individual physicians, but also well above the fees contained in Respondent PISD's contract with PacifiCare. Respondents Guese and Brauchler emphasized to Anthem that they were negotiating fees for the collective benefit of the members of Respondent PISD, that the PISD contract with PacifiCare had established new "minimum" fees, and that Respondent PISD's members would not enter contracts for fees lower than the aforementioned percentage of RBRVS.

PARAGRAPH 28: On or about April 27, 2001, Anthem submitted a fee offer to Respondents that was higher than the fees contained in Anthem's contracts with individual members of Respondent PISD, but lower than the fee levels demanded by Respondents Guese and Brauchler. Anthem's offer equaled the highest fees that it was paying to any physicians in the Denver area. Respondents refused to convey Anthem's offer to Respondent PISD's members, however, because it did not meet the fee levels that Respondents Guese and Brauchler demanded.

PARAGRAPH 29: Respondents Guese and Brauchler urged Respondent PISD's members to send contract termination notices to Anthem, and to advise Anthem that it could deal with them in the future only through Respondent PISD. At least 36 of the approximately 41 members of Respondent PISD terminated their individual contracts with Anthem in this fashion. Some of those terminating members had signed their Anthem contracts only a few months earlier.

PARAGRAPH 30: Anthem attempted to bypass Respondents by sending its contract proposal directly to individual members of Respondent PISD, but this approach failed. The members again told Anthem that they would deal only through Respondent PISD, and that Anthem must negotiate for their services exclusively with Respondents Guese and Brauchler.

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PARAGRAPH 31: In the summer of 2001, Anthem continued to attempt to reach a compromise on fees with Respondents Brauchler and Guese, but was unsuccessful. Respondents rejected Anthem's offer and negotiations ended. Most members of Respondent PISD continue to refuse to enter into individual contracts with Anthem.

NEGOTIATIONS WITH OTHER PAYORS

PARAGRAPH 32: Since the inception of Respondent PISD in 1999, Respondents Guese and Brauchler have informed other payors that Respondent PISD represented the collective interest of its members, and that Respondent PISD would negotiate and sign contracts on behalf of all its members. Respondents also informed these payors of the specific fees that Respondents demanded as a condition for signing a contract, emphasizing that Respondent PISD would likely refuse any fee lower than a specified percentage of Medicare RBRVS. To exert pressure on and coerce these payors into paying higher fees, Respondent PISD's members sent termination letters to such payors, informing the payors that they would not negotiate individually, and told the payors to deal for members' services only through Respondent PISD. Respondent PISD's coercive tactics have been successful. It has obtained contracts with at least two other payors for fees matching or exceeding Respondent PISD's desired percentage of RBRVS.

LACK OF SIGNIFICANT EFFICIENCIES

PARAGRAPH 33: In collectively negotiating and entering the contracts identified above, Respondent PISD and its members refused to consider any form of financial risk-sharing and have not integrated their practices to create sufficient potential efficiencies. Respondents' joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

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ANTICOMPETITIVE EFFECTS

PARAGRAPH 34: Respondents' actions described above in Paragraphs 13 through 33 have had, or have the tendency to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the South Denver area in the following ways, among others:

- A. fees and other forms of competition among Respondent PISD's members were unreasonably restrained;
- B. fees for physician services were increased; and
- C. competition in the purchase of physician services was restrained to the detriment of health plans, employers, and individual consumers.

PARAGRAPH 35: 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 Sixteenth day of July, 2002, issues its Complaint against Respondents PISD, Guese, and Brauchler.

By the Commission.

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondents named in the caption hereof (“Respondents”), and Respondents having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondents 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 Respondents that the law has been violated as alleged in such Complaint or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 2.34 of the Commission Rules, 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:

1. Respondent Physician Integrated Services of Denver, Inc. (“PISD”) is a professional corporation organized, existing, and

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doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 850 E. Harvard Street, Suite 455, Denver, CO 80210.

2. Respondent Marcia L. Brauchler is a consultant to PISD. Her office and principal place of business is located at P.O. Box 260661, Littleton, CO 80163-0171.
3. Respondent Michael J. Guese, M.D., is a physician licensed under the laws of the State of Colorado, with his office and principal place of business located at 850 E. Harvard Street, Suite 455, Denver, CO 80210.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Respondent PISD” means Physician Integrated Services of Denver, Inc., its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Physician Integrated Services of Denver, Inc., and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.
- B. “Respondent Brauchler” means Marcia L. Brauchler.
- C. “Respondent Guese” means Michael J. Guese, M.D.
- D. “Respondents” means Respondent PISD, Respondent Brauchler, and Respondent Guese.

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- E. “Medical group practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.
- F. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. (This definition also applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”)
- G. “Payor” means any person that pays, or arranges for payment, for all or any part of any physician services for itself or for any other person.
- H. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- I. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- J. “Preexisting Contract” means a contract that was in effect prior to the receipt, by all payors that are parties to such contract, of notice sent by Respondent PISD pursuant to Paragraph IV.B. of this Order, of each such payor’s right to terminate such contract.
- K. “Principal Address” means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.
- L. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:

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1. all physicians who participate 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 who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 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.
- M. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:
1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate 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 at a capitated rate,
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, 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

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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; and

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.

II.

IT IS FURTHER ORDERED that Respondents, 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 between or among any physicians:
 1. To negotiate on behalf of any physician with any payor,
 2. To deal, refuse to deal, or threaten to refuse to deal with any payor,
 3. Regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms, or
 4. Not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent PISD;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or

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conditions, including price terms, on which the physician is willing to deal;

- C. Attempting to engage in any action prohibited by Paragraph II.A. or II.B., above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A. through II.C. above.

PROVIDED, HOWEVER, that nothing in this Paragraph II. shall prohibit any agreement involving or conduct by:

- (i) Respondent Brauchler that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement, or that solely involves physicians in the same medical group practice;
- (ii) Respondent Guese that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement through which he provides physician services, or that solely involves physicians in Respondent Guese's own medical group practice; or
- (iii) Respondent PISD that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement, so long as the arrangement does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement.

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III.

IT IS FURTHER ORDERED that Respondent Brauchler, for a period of three (3) years from the date that this order is issued, 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. Negotiating with any payor on behalf of any physician who participates, or has participated, in Respondent PISD, notwithstanding whether such conduct also violates Paragraph II of this Order; and
- B. Advising any physician who participates, or has participated, in Respondent PISD to accept or reject any term, condition, or requirement of dealing with any payor, notwithstanding whether such conduct also violates Paragraph II of this Order.

IV.

IT IS FURTHER ORDERED that Respondent PISD shall:

- A. Within thirty (30) days after the date on which this Order is issued, send by first-class mail a copy of this Order and the Complaint to:
 - 1. each physician who participates, or has participated, in Respondent PISD, and
 - 2. each officer, director, manager, and employee of Respondent PISD;
- B. Within thirty (30) days after the date on which this Order is issued, send copies of this Order, the Complaint, and the notice specified in Appendix B to this Order, by first class mail return receipt requested, to the chief executive officer of

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each payor that is listed in Appendix A or that contracts with Respondent PISD for the provision of physician services;

- C. Terminate, without penalty or charge, any Preexisting Contract with any payor for the provision of physician services, upon receipt by Respondent PISD of a written request to terminate such contract from any payor that is a party to the contract or that pays for physician services provided through the contract;
- D. For a period of three (3) years after the date this Order is issued:
 - 1. Distribute by first-class mail a copy of this Order and the Complaint to:
 - a. each physician who begins participating in Respondent PISD, and who did not previously receive a copy of this Order and the Complaint from Respondent PISD, within thirty (30) days of the time that such participation begins,
 - b. each payor that contracts with Respondent PISD for the provision of physician services, and that did not previously receive a copy of this Order and the Complaint from Respondent PISD, within thirty (30) days of the time that such payor enters into such contract, and
 - c. each person who becomes an officer, director, manager, or employee of Respondent PISD, and who did not previously receive a copy of this Order and the Complaint from Respondent PISD, within thirty (30) days of the time that he or she assumes such responsibility with Respondent PISD; and
 - 2. Annually publish in an official annual report or newsletter sent to all physicians who participate in Respondent PISD, a

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copy of this Order and the Complaint with such prominence as is given to regularly featured articles;

- E. Notify the Commission at least thirty (30) days prior to any proposed change in Respondent PISD, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in Respondent PISD that may affect compliance obligations arising out of this Order; and
- F. File verified written reports within sixty (60) days after the date this Order is issued, annually thereafter for three (3) years on the anniversary of the date this Order is issued, and at such other times as the Commission may by written notice require, setting forth:
 - 1. in detail, the manner and form in which Respondent PISD has complied and is complying with this Order, including, but not limited to, (a) information sufficient to describe, for each qualified risk-sharing arrangement established or operated by Respondent PISD, the manner in which the physicians who participate in such arrangement share financial risk, and (b) information sufficient to describe, for each qualified clinically-integrated joint arrangement established or operated by Respondent PISD, the manner in which the physicians who participate in such arrangement have integrated their practices, and
 - 2. the name, address, and telephone number of each payor with which Respondent PISD has had any contact.

V.

IT IS FURTHER ORDERED that Respondent Brauchler shall:

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- A. For a period of three (3) years after the date this Order is issued, distribute by first-class mail a copy of this Order and the Complaint to:
 - 1. all physician groups, other than any medical group practice, that Respondent Brauchler represents for the purpose of contracting, or seeking to contract, with payors for the provision of physician services, or that Respondent Brauchler advises with regard to their dealings with payors in connection with the provision of physician services, within (30) days of the time that Respondent Brauchler begins providing such representation or advice, unless such physician group previously received a copy of this Order and the Complaint from Respondent PISD or Respondent Brauchler, and
 - 2. each payor with which Respondent Brauchler deals, or has dealt, for the purpose of contracting, or seeking to contract, while representing any physician or any group of physicians, or while advising any physician or group of physicians with regard to their dealings regarding contracting with such payor for the provision of physician services, within thirty (30) days of such dealing, unless such payor previously received a copy of this Order and the Complaint from Respondent PISD or Respondent Brauchler; and
- B. File verified written reports within sixty (60) days after the date this Order is issued, annually thereafter for three (3) years on the anniversary of the date this Order is issued, and at such other times as the Commission may by written notice require, setting forth:
 - 1. in detail, the manner and form in which Respondent Brauchler has complied and is complying with this Order,
 - 2. the name, address, and telephone number of each physician or group of physicians that Respondent Brauchler has represented or advised with respect to their dealings with

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any payor in connection with the provision of physician services, and

3. the name, address, and telephone number of each payor with which Respondent Brauchler has dealt while representing any physician or any group of physicians in connection with the provision of physician services.

VI.

IT IS FURTHER ORDERED that Respondent Guese shall file verified written reports within sixty (60) days after the date this Order is issued, annually thereafter for three (3) years on the anniversary of the date this Order is issued, and at such other times as the Commission may by written notice require, setting forth:

- A. in detail, the manner and form in which Respondent Guese has complied and is complying with this Order, including, but not limited to, any information necessary to demonstrate such compliance;
- B. the name, address, and telephone number of each group of physicians, including any medical group practice, in which Respondent Guese has participated;
- C. the name, address, and telephone number of each person, who is not a member or employee of Respondent Guese's medical group practice, that has represented or advised Respondent Guese with respect to contracting with any payor for the provision of physician services;
- D. the name, address, and telephone number of each payor, other than individual patients, that has communicated with Respondent Guese for the purpose of contracting, or seeking to contract, for physician services; and

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- E. the name, address, and telephone number of each payor, other than individual patients, with which Respondent Guese has entered into a written agreement for the provision of physician services, and the nature of such agreement.

VII.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission of any change in its Principal Address within twenty (20) days of such change in address.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondents 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 their possession, or under their control, relating to any matter contained in this Order;
- B. Upon five (5) days' notice to Respondent PISD, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent PISD; and
- C. Upon five (5) days' notice to Respondent Brauchler or to Respondent Guese, and in the presence of counsel, and without restraint or interference from such Respondent, to interview such Respondent or the employees of such Respondent.

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IX.

IT IS FURTHER ORDERED that this Order shall terminate on July 16, 2022.

Appendix A

Aetna US Healthcare of Colorado
Anthem Blue Cross Blue Shield
CIGNA HealthCare of Colorado
Humana Health Plan
Mountain Medical Affiliates, Inc.
OneHealth Plan
PacifiCare of Colorado
Patient Choice Healthcare of Colorado
United Health Care of Colorado

Decision and Order

Appendix B

[letterhead of Physician Integrated Services of Denver, Inc.]

[name of payor's CEO]
[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order issued by the Federal Trade Commission against Physician Integrated Services of Denver, Inc. ("PISD"). I call to your attention Paragraph IV.C. of the order, which gives you the right to terminate, without penalty or charge, any contracts with PISD that were in effect prior to your receipt of this letter.

Sincerely,

Analysis

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

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Physician Integrated Services of Denver, Inc. (“PISD”), Michael J. Guese, M.D., and Marcia A. Brauchler (“Respondents”). The agreement settles charges that Respondents violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating and implementing agreements among PISD’s members to fix prices and other terms of dealing with health insurance firms and other third-party payors (hereinafter, “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 their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by any Respondent that said Respondent 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.

PISD has approximately 41 primary care physicians in its membership. Dr. Guese is PISD’s president and sole director. Ms. Brauchler is a consultant and advisor to PISD. Except to the extent that competition has been restrained in the manner set forth

Analysis

in the proposed complaint, PISD's members compete with each other as internists, pediatricians, family physicians, or general practitioners, in offices located in the southern part of the Denver, Colorado, metropolitan area ("South Denver area"). To be competitively marketable to employers and other purchasers in the South Denver area, a payor's health insurance plan must include in its network of participating physicians a large number of primary care physicians who practice in the South Denver area.

The physicians formed PISD as a vehicle collectively to negotiate contracts with payors, and thereby to achieve contracts containing higher fees and other, more advantageous terms than the individual physicians could obtain unilaterally. PISD members authorized PISD to negotiate for this purpose. They also authorized PISD to negotiate "non-risk" contracts, which are contracts that do not involve sharing among physicians of financial risk, through arrangements such as capitation or fee withholds. Further, before the entire organization can accept a proposed payor contract, a majority of PISD's members must approve it.

Sometimes a network of competing physicians uses an agent to convey to payors information obtained individually from the physicians about fees or other significant contract terms that they are willing to accept. The agent may also convey to the physicians all payor contract offers, which the physicians then unilaterally decide whether to accept or reject. Such a "messenger model" arrangement, which is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice (*see* <http://www.ftc.gov/reports/hlth3s.htm>), can facilitate and minimize the costs involved in contracting between physicians and payors, without fostering an agreement among competing physicians on fees or fee-related terms.

PISD purported to operate as a messenger, but, in practice, it did not do so. Rather, from 1999 through 2001, Dr. Guese and Ms. Brauchler negotiated fees and other competitively significant

Analysis

terms collectively on behalf of PISD's members. Only if a payor offered a contract containing sufficiently high fees did Dr. Guese and Ms. Brauchler recommend to the members that they accept the contract. Dr. Guese and Ms. Brauchler refused to convey to PISD's members contract offers containing price and other terms that Dr. Guese and Ms. Brauchler deemed to be deficient. Instead, they demanded, and received, contract terms that were more economically advantageous, from the physicians' perspective, than the physicians themselves could have obtained by negotiating individually rather than collectively.

PISD functioned as its members' *de facto* exclusive representative. Respondents told payors that PISD had the authority to negotiate and sign contracts on behalf of all of its members, and members themselves sent letters to payors, asserting that they would deal with payors only through PISD, Dr. Guese, or Ms. Brauchler, and not unilaterally. Respondents also successfully applied coercive tactics. For example, they advised PISD members to terminate, or threaten to terminate, their pre-existing, individual contracts with payors. Many PISD members complied, to pressure payors into offering a new contract to PISD that paid fees at or above the level that the physicians, through PISD, collectively demanded. The terminations and threats of termination left payors in the untenable position of having to pay higher fees to PISD members, or being denied such members' inclusion in the payors' respective provider networks. As a consequence of this conduct, PISD or its members contracted with various payors for fees that were higher than the fees such payors had agreed to pay other primary care physicians in the area.

Respondents' joint negotiation of fees and other competitively significant terms has not been reasonably related to any efficiency-enhancing integration. PISD refused to consider any form of financial risk-sharing, and its members have not clinically integrated their practices to create sufficiently substantial potential efficiencies. Respondents' actions have restrained price and other forms of competition among the members, caused fees for

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physician services to rise, and harmed consumers, including health plans, employers, and individual patients.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of these illegal concerted actions, while allowing Respondents to engage in legitimate conduct that does not impair competition. The proposed order's core prohibitions are contained in Paragraphs II and III.

Paragraph II is intended to prevent the Respondents from participating in, or creating, future unlawful physician agreements.

Paragraph II.A prohibits PISD, Dr. Guese, and Ms. Brauchler from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or not to deal with any payor through an arrangement other than PISD.

Paragraph II.B prohibits these Respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C prohibits them from attempting to engage in any action prohibited by Paragraph II.A or II.B. Paragraph II.D prohibits them from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

Paragraph II also contains three provisos intended to clarify certain types of agreements that Paragraph II does not prohibit. The first proviso applies to Ms. Brauchler, the second to Dr. Guese, and the third to PISD. Each provides that nothing in Paragraph II prohibits the applicable Respondent from engaging in conduct that is reasonably necessary to form, participate in, or act in furtherance of, a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The proviso applies to PISD only if the physicians who participate in the

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arrangement are available to enter into payor contracts outside the arrangement, *i.e.*, the arrangement is not exclusive.

As defined in the proposed order, a “qualified risk-sharing joint arrangement” must satisfy two conditions. First, all physician participants must share substantial financial risk through the arrangement and thereby create incentives for the physician participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement. The definition of financial risk-sharing tracks the discussion of that term contained in the Health Care Statements.

As defined in the proposed order, a “qualified clinically-integrated joint arrangement” also must satisfy two conditions. First, all physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns, creating a high degree of interdependence and cooperation among physicians, in order to control costs and ensure the quality of services provided. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement. This definition also reflects the analysis contained in the Health Care Statements.

Paragraph II’s provisos, as they apply to Dr. Guese and Ms. Brauchler, also provide that Paragraph II does not prohibit them from facilitating an agreement solely between physicians who are part of the same medical group practice. The proposed order defines such a practice as a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.

Paragraph III prohibits Ms. Brauchler, for a period of three years, from negotiating with any payor on behalf of any current or

Analysis

past member of PISD, and from advising any current or past member of PISD to accept or reject any term, condition, or requirement of dealing with any payor.

Ms. Brauchler is not prohibited from performing legitimate “messenger” services, including with respect to PISD. As noted above, a properly constituted messenger can efficiently facilitate the establishment of physician-payor contracts and avoid fostering unlawful agreements among the participating physicians. As set forth in the proposed complaint, however, while Ms. Brauchler purported to operate as a legitimate messenger, in practice she fostered anticompetitive physician agreements by negotiating directly with payors for higher fees on behalf of PISD’s entire membership, and by advising PISD’s members collectively to reject various payor offers and to engage in concerted refusals to deal. For this reason, Paragraph III is a necessary and appropriate supplement to Paragraph II’s provisions. Under the proposed order, Ms. Brauchler may serve as PISD’s messenger, but, pursuant to Paragraph III, may not negotiate for or advise any PISD member with respect to payor contracts.

Paragraph IV.C requires PISD to terminate, without penalty at any payor’s request, current contracts with payors with respect to providing physician services. This provision is intended to eliminate the effects of Respondents’ anticompetitive concerted actions. The remaining provisions of Paragraph IV and Paragraphs V through VIII of the proposed order impose obligations on Respondents with respect to distributing the proposed complaint and order to PISD’s members and to other specified persons, and reporting information to the Commission.

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

**AURORA ASSOCIATED PRIMARY CARE PHYSICIANS,
L.L.C., ET AL.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4055; File No. 0110174
Complaint, July 16, 2002--Decision, July 16, 2002*

This consent order addresses practices used by Respondent Aurora Associated Primary Care Physicians, L.L.C. ("AAPCP") – which has approximately 45 members who are primary care physicians in the Aurora, Colorado area – Respondents Richard A. Patt, M.D. and Gary L. Gaede, M.D., respectively the chairman and an ex officio member of the board of AAPCP, and Respondent Marcia Brauchler, an advisor to AAPCP. The order, among other things, prohibits the respondents from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or not to deal with any payor through an arrangement other than AAPCP. The order also prohibits the respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. In addition, the order prohibits the respondents from attempting to engage in – or from inducing anyone to engage in – any action prohibited by the order. The order also prohibits Respondent Brauchler, for three years, from negotiating with any payor on behalf of any current or past member of AAPCP, and from advising any current or past member of AAPCP to accept or reject any term, condition, or requirement of dealing with any payor. In addition, the order requires Respondent AAPCP to terminate – without penalty at any payor's request – current contracts with payors with respect to providing physician services.

Participants

For the Commission: *Paul Nolan, Christi Braun, Jeffrey W. Brennan, Rendell A. Davis, Jr., Daniel P. Ducore, and Louis Silvia.*

For the Respondents: *Claude Wild III, Patton Boggs LLP.*