

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.*

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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 Aurora Associated Primary Care Physicians, L.L.C. (“Respondent AAPCP”), Richard A. Patt, M.D. (“Respondent Patt”), Gary L. Gaede, M.D. (“Respondent Gaede”), 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 AAPCP is a for-profit limited liability company, 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 P. O. Box 5183, Englewood, CO 80155.

PARAGRAPH 2: Respondent Patt is a physician licensed under the laws of the State of Colorado, with his office and principal place of business located at 1421 S. Potomac Street, Suite 320, Aurora, CO 80012. Respondent Patt is the Chairman of the Board of Managers (“Board”) of, and one of the principal negotiators for, Respondent AAPCP. The Board controls the operations of Respondent AAPCP.

PARAGRAPH 3: Respondent Gaede is a physician licensed under the laws of the State of Colorado, with his office and principal place of business located at 14991 E. Hampden Avenue, Suite 210, Aurora, CO 80014. Respondent Gaede was a member, and is now an *ex officio* member, of the Board. Respondent Gaede is also one of the principal negotiators for Respondent AAPCP.

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PARAGRAPH 4: Respondent Brauchler is a consultant to Respondent AAPCP. The address of her office and principal place of business is P.O. Box 260661, Littleton, CO 80163-0171.

JURISDICTION

PARAGRAPH 5: At all times relevant to this Complaint, all members of Respondent AAPCP were primary care physicians engaged in the business of providing health care services for a fee to patients. Except to the extent that competition has been restrained as alleged herein, members of Respondent AAPCP have been, and are now, in competition with each other for the provision of physician services.

PARAGRAPH 6: 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 7: Respondent AAPCP has been organized in substantial part, and is engaged in substantial activities, for the pecuniary benefit of Respondent AAPCP'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 8: Respondent AAPCP has approximately 45 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 AAPCP consists of internists, pediatricians, family physicians, and general practitioners with offices in the Aurora, Colorado area. Aurora is an eastern suburb of Denver, Colorado.

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PARAGRAPH 9: 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 price of insurance, and thereby result in lower medical care cost for subscribers to the payors’ health insurance plans.

PARAGRAPH 10: 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 11: 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 Aurora 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 12: In order to be competitively marketable in the Aurora area, a payor’s health insurance plan must include in its physician network a large number of primary care physicians who practice in the Aurora area. Many of the primary care physicians who practice in the Aurora area are members of Respondent AAPCP.

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PARAGRAPH 13: 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 based on the messenger’s opinion on the appropriateness, or lack thereof, of the offer.

RESTRAINT OF TRADE

PARAGRAPH 14: Respondents AAPCP, Patt, and Gaede, acting as a combination of competing physicians, and Respondent Brauchler, in conspiracy with Respondent AAPCP and at least some of Respondent AAPCP’s members, respectively, have acted to restrain competition by, among other things:

- A. facilitating, negotiating, entering into, or implementing agreements among Respondent AAPCP’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 AAPCP’s members, and refusing to submit payor offers to members that do not conform to Respondent AAPCP’s standards for contracts.

**FORMATION AND OPERATION OF RESPONDENT
AAPCP**

PARAGRAPH 15: According to its Operating Agreement, Respondent AAPCP was formed in approximately March 2000 to

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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 AAPCP-payor contract that contained such higher fees and other terms for all members of Respondent AAPCP.

PARAGRAPH 16: In or about May 2000, Respondent AAPCP retained Respondent Brauchler as a consultant after she made a presentation to its Board on how AAPCP could collect fee information from members and use that information to reach a consensus on an initial fee level to demand from payors on the collective membership's behalf. The Board directed Respondent Brauchler to participate in Board meetings and to advise the Board, its committees, and Respondent AAPCP's members regarding terms of payor contracts and negotiations with payors. Thereafter, on behalf of Respondent AAPCP's collective membership, designated members of Respondent AAPCP and Respondent Brauchler negotiated with payors for higher fees and other, more economically advantageous contract terms.

PARAGRAPH 17: To join Respondent AAPCP, physicians sign an agreement that authorizes Respondent AAPCP to negotiate, on their behalf, fees and other contract terms with payors. Members authorize Respondent AAPCP to negotiate "non-risk" contracts, which are accepted only if first approved by a AAPCP's Board. 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 AAPCP executes a contract with a payor.

PARAGRAPH 18: Respondents have a practice – inconsistent with a messenger model arrangement – of refusing to convey to Respondent AAPCP'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 AAPCP's members

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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 AAPCP's members for acceptance.

PARAGRAPH 19: Respondents Patt, Gaede, and Brauchler reported to Respondent AAPCP's members on the details of AAPCP's negotiations with payors, including on the status of fee negotiations and the specific fee levels that were discussed. Respondents Patt and Gaede also held general AAPCP membership meetings to discuss details of payor contract negotiations and overall contract strategy.

PARAGRAPH 20: In negotiations with payors, Respondent AAPCP's designated physician negotiators and Respondents Patt, Gaede and Brauchler used a "contract-or-no-contract" strategy, through which the payor could either contract on AAPCP's terms and likely have all of the members of AAPCP in the provider network, or not contract on AAPCP's terms and have few or none of the AAPCP members in the network. Respondents Patt, Gaede and Brauchler would either recommend that the AAPCP Board approve a negotiated contract and recommend that individual AAPCP members accept it, or, if Respondents were unable to negotiate acceptable terms, refuse to convey the payor's offer to members.

PARAGRAPH 21: Drawing from her experiences in negotiating several Respondent AAPCP contracts, Respondent Brauchler compiled a "Confidential AAPCP Play Book." In the "Play Book," she advised Respondent AAPCP's designated physician negotiators on how they could leverage the collective strength of Respondent AAPCP's members to negotiate higher fees from payors. The "Play Book" encouraged Respondent AAPCP's designated physician negotiators to threaten payors with terminations by Respondent AAPCP's members who had individual contracts with them, unless the payors agreed to the fees that Respondent AAPCP demanded. The "Play Book" also

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encouraged Respondent AAPCP's designated physician negotiators to take an aggressive and hostile stance when meeting with payors, and to reject their initial fee offers as too low. The "Play Book" cited several instances in which Respondents and other members of Respondent AAPCP used such tactics to pressure and coerce payors into making more economically favorable contract proposals to Respondent AAPCP's members.

PARAGRAPH 22: Respondents Patt, Gaede, and Brauchler and AAPCP's designated physician negotiators told payors that Respondent AAPCP's members would deal with them only if the payor agreed to terms that the Board recommended. This assertion was demonstrated when payors attempted unsuccessfully to deal individually with members of Respondent AAPCP – only to be told by the members that they would contract for services only through Respondent AAPCP. Respondents' strategy of collective negotiations and concerted refusals to deal outside AAPCP left payors in the untenable position of having to pay higher fees to all members of Respondent AAPCP, 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 23: PacifiCare Health Systems of Colorado, Inc. ("PacifiCare"), is a payor doing business in the Aurora area. In February 2000, Respondents Patt and Brauchler started contract negotiations with PacifiCare on behalf of Respondent AAPCP's members. They negotiated fees and other competitively significant terms with PacifiCare that would benefit Respondent AAPCP's members as a group. As part of their collective demands, Respondents requested a fee-for-service contract at a specified percentage of RBRVS, and an automatic annual fee increase. They also told PacifiCare that any agreement with Respondent AAPCP's members must not include any financial risk through capitation or a fee withhold.

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PARAGRAPH 24: Later in 2000, PacifiCare attempted to reach agreement with individual members of Respondent AAPCP on fee-for-service contracts. Upon learning that PacifiCare was contacting Respondent AAPCP's members on an individual rather than collective basis for contracting, Respondent Brauchler requested that all members of Respondent AAPCP not negotiate individually with PacifiCare, and allow Respondent AAPCP to continue to negotiate all agreements with PacifiCare on their collective behalf. Respondent AAPCP's members complied with this request. As a result, PacifiCare was forced to negotiate only through Respondent AAPCP.

PARAGRAPH 25: Concerned that it otherwise would have an unmarketable health insurance plan because of a limited primary care physician network in the Aurora area, PacifiCare entered a fee-for-service contract with Respondent AAPCP at the higher contract rate that the members, through Respondent AAPCP, collectively demanded. PacifiCare also agreed to Respondent AAPCP's demand for annual fee increases tied to the inflation rate, the potential for bonus incentives, administrative fees to Respondent AAPCP, and other miscellaneous fees, all of which were concessions that PacifiCare made in response to Respondent AAPCP's coercive tactics. Only after Respondent AAPCP's collectively determined terms were met did the Board accept the PacifiCare contract and mail it to members of Respondent AAPCP for their acceptance.

NEGOTIATIONS WITH CIGNA

PARAGRAPH 26: CIGNA Healthcare of Colorado, Inc. ("CIGNA"), is a payor doing business in the Aurora area. In March 2000, on behalf of Respondent AAPCP's members, Respondent Gaede and others started contract negotiations with CIGNA. When those negotiations reached an impasse, many of Respondent AAPCP's members attempted to coerce CIGNA into agreeing to Respondent AAPCP's terms by notifying CIGNA that they were terminating their individual contracts with CIGNA unless the payor dealt with Respondent AAPCP. Respondent

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Brauchler told CIGNA that Respondent AAPCP's members would agree to continue their participation with CIGNA only if it offered a contract that was acceptable to Respondents.

PARAGRAPH 27: Respondent Brauchler also told CIGNA that it would gain access to all Respondent AAPCP's members only if the Board endorsed the contract, and that the Board would not endorse a contract that did not meet Respondent AAPCP's collectively determined minimum fee levels. Respondents Brauchler and Gaede threatened that unless CIGNA agreed to contract on terms demanded by Respondent AAPCP, members would continue to terminate their individual contracts.

PARAGRAPH 28: Respondent AAPCP successfully forced CIGNA into agreeing to offer a contract that paid higher fees to Respondent AAPCP's members than it had previously agreed to pay individual primary care physicians in the Aurora area. Respondents also succeeded in forcing CIGNA to agree that fees in the future would not fall below the level established in the contract. The Board approved the CIGNA contract and mailed it to members, most of whom accepted it.

NEGOTIATIONS WITH ANTHEM

PARAGRAPH 29: Anthem Blue Cross and Blue Shield of Colorado ("Anthem") is a payor doing business in the Aurora area. Commencing in February 2000 and for many months thereafter, Anthem attempted to contract with Respondent AAPCP's members by providing Respondent AAPCP with a proposed contract to be transmitted to the individual members of Respondent AAPCP. In late 2000, the Board authorized Respondents Gaede and Brauchler to act as agents in contract negotiations with Anthem.

PARAGRAPH 30: At various times, Respondents Gaede and Brauchler met with Anthem's representatives. Respondent AAPCP, however, repeatedly refused to transmit Anthem's proposal to the members of Respondent AAPCP. Respondent

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Gaede told Anthem that its fee offer was too low and that the Board would not act on it. Respondent Gaede also told Anthem that the Board had voted to accept only a contract that contained a minimum level of fees, no requirement of financial risk to Respondent AAPCP's members, and a management fee for Respondent AAPCP. Respondent Gaede informed Anthem that Respondent AAPCP had obtained these contract terms from other payors in the market, and that only if Anthem met Respondent AAPCP's contract requirements would Respondent AAPCP's members sign a contract. Respondent Gaede further informed Anthem that Respondent AAPCP limited the number of contracts that it would accept to the four payors that offered Respondent AAPCP's members the highest fees. He threatened Anthem that it would not have a contract with any members of Respondent AAPCP unless Anthem promptly made an acceptable offer.

PARAGRAPH 31: Anthem increased its offer, but to a level that was still below Respondent AAPCP's minimum fee requirements. Because the Anthem offer did not meet Respondent AAPCP's requirements, Respondent AAPCP did not enter into a contract with Anthem.

NEGOTIATIONS WITH OTHER PAYORS

PARAGRAPH 32: Since the inception of Respondent AAPCP in 2000, Respondents Patt, Gaede, and Brauchler have informed other payors that Respondent AAPCP represented the collective interest of its members, and that Respondent AAPCP 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 AAPCP 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 AAPCP'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 AAPCP. Respondent AAPCP's

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coercive tactics have been successful. It has obtained contracts with at least two other payors for fees matching or exceeding Respondent AAPCP's desired percentage of RBRVS.

LACK OF SIGNIFICANT EFFICIENCIES

PARAGRAPH 33: In collectively negotiating and entering the contracts identified above, Respondent AAPCP and its members have not assumed any significant 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.

ANTICOMPETITIVE EFFECTS

PARAGRAPH 34: Respondents' actions described above in Paragraphs 14 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 Aurora area in the following ways, among others:

- A. fees and other forms of competition among Respondent AAPCP'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.

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this Sixteenth day of July, 2002, issues its Complaint against Respondents AAPCP, Patt, Gaede, and Brauchler.

By the Commission.

Decision and Order

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 Respondents have 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, and having duly considered the comments filed thereafter by interested persons pursuant to § 2.34 of its 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 Aurora Associated Primary Care Physicians, L.L.C. (“AAPCP”), is a for-profit limited liability company, organized, existing, and doing business under and by virtue of

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the laws of the State of Colorado, with its office and principal place of business located at P. O. Box 5183, Englewood, CO 80155.

2. Respondent Marcia L. Brauchler is a consultant to AAPCP. Her office and principal place of business is located at P.O. Box 260661, Littleton, CO 80163-0171.
3. Respondent Richard A. Patt, M.D., is a physician licensed under the laws of the State of Colorado, with his office and principal place of business located at 1421 S. Potomac Street, Suite 320, Aurora, CO 80012.
4. Respondent Gary L. Gaede, M.D., is a physician licensed under the laws of the State of Colorado, with his office and principal place of business located at 14991 E. Hampden Avenue, Suite 210, Aurora, CO 80014.
5. 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 AAPCP” means Aurora Associated Primary Care Physicians, L.L.C., its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Aurora Associated Primary Care Physicians, L.L.C., and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.
- B. “Respondent Brauchler” means Marcia L. Brauchler.

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- C. “Physician Respondents” means Respondent Richard A. Patt, M.D. and Respondent Gary L. Gaede, M.D.
- D. “Respondents” means Respondent AAPCP, Respondent Brauchler, and the Physician Respondents.
- 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 AAPCP pursuant to Paragraph IV.B. of this Order, of each such payor’s right to terminate such contract.

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- 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:
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,

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- 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 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,

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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 AAPCP;
- 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 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) any Physician Respondent 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 such Physician Respondent's own medical group practice; or

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- (iii) Respondent AAPCP 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.

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 AAPCP, notwithstanding whether such conduct also violates Paragraph II. of this Order; and
- B. Advising any physician who participates, or has participated, in Respondent AAPCP 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 AAPCP 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:

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1. each physician who participates, or has participated, in Respondent AAPCP, and
 2. each officer, director, manager, and employee of Respondent AAPCP;
- 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 each payor that is listed in Appendix A or that contracts with Respondent AAPCP 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 AAPCP 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 AAPCP, and who did not previously receive a copy of this Order and the Complaint from Respondent AAPCP, within thirty (30) days of the time that such participation begins,
 - b. each payor that contracts with Respondent AAPCP for the provision of physician services, and that did not previously receive a copy of this Order and the Complaint from Respondent AAPCP, within thirty (30) days of the time that such payor enters into such contract, and

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- c. each person who becomes an officer, director, manager, or employee of Respondent AAPCP, and who did not previously receive a copy of this Order and the Complaint from Respondent AAPCP, within thirty (30) days of the time that he or she assumes such responsibility with Respondent AAPCP; and
- 2. Annually publish in an official annual report or newsletter sent to all physicians who participate in Respondent AAPCP, a 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 AAPCP, such as dissolution, assignment, sale resulting in the emergence of a successor company or corporation, the creation or dissolution of subsidiaries, or any other change in Respondent AAPCP 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 AAPCP 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 AAPCP, 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 AAPCP, the manner in which the physicians who participate in such arrangement have integrated their practices, and

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2. the name, address, and telephone number of each payor with which Respondent AAPCP has had any contact.

V.

IT IS FURTHER ORDERED that Respondent Brauchler shall:

- 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 AAPCP 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 AAPCP 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

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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 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 each Physician Respondent 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 the Physician Respondent 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 physician group, including any medical group practice, in which the Physician Respondent has participated;
- C. the name, address, and telephone number of each person, who is not a member or employee of the Physician Respondent's medical group practice, that has represented or

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advised the Physician Respondent 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 the Physician Respondent for the purpose of contracting, or seeking to contract, for physician services; and
- E. the name, address, and telephone number of each payor, other than individual patients, with which the Physician Respondent 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 AAPCP, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent AAPCP; and

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- C. Upon five (5) days' notice to Respondent Brauchler or to any Physician Respondent, and in the presence of counsel, and without restraint or interference from such Respondent, to interview such Respondent or the employees of such Respondent.

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

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Appendix B

[letterhead of Aurora Associated Primary Care Physicians,
L.L.C.]

[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 Aurora Associated Primary Care Physicians, L.L.C. ("AAPCP"). 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 AAPCP 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 Aurora Associated Primary Care Physicians, L.L.C. (“AAPCP”), Richard A. Patt, M.D., Gary L. Gaede, M.D., and Marcia L. 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 AAPCP’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.

AAPCP has approximately 45 primary care physicians in its membership. A board of managers operates AAPCP, and Dr. Patt is the board’s chairman. Except to the extent that competition has

Analysis

been restrained as alleged in the proposed complaint, AAPCP's members compete with each other as internists, pediatricians, family physicians, or general practitioners, in offices located in the Aurora, Colorado, area. To be competitively marketable to employers and other purchasers in the Aurora 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 Aurora area.

The physicians formed AAPCP 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. AAPCP members authorized AAPCP to negotiate for this purpose. Members also agreed to accept "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 could accept a proposed payor contract, AAPCP's board had to approve it.

In or about May 2000, AAPCP retained Ms. Brauchler, a non-physician consultant, after she had made a board presentation showing how AAPCP could collect fee information from members and use that information to reach a consensus on an initial fee level to demand from payors on the collective membership's behalf.

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

Analysis

and payors, without fostering an agreement among competing physicians on fees or fee-related terms.

AAPCP purported to operate as a messenger, but, in practice, it did not do so. Rather, in 2000 and 2001, Dr. Patt and Ms. Brauchler, together with Dr. Gaede, who is an *ex-officio* member of the board, and other physicians designated by Respondent AAPCP, on behalf of Respondent AAPCP's members, used the information gathered from members to negotiate fees and other competitively significant terms collectively on behalf of AAPCP's members. Only if a payor offered a contract containing sufficiently high fees did Drs. Patt and Gaede and Ms. Brauchler recommend that the board approve the contract and that the members accept it. The Respondents refused to recommend to the board, or convey to AAPCP's members, contract offers containing price and other terms that they 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.

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

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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. AAPCP members have not financially or 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 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 AAPCP, Drs. Patt and Gaede, 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 AAPCP.

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

Analysis

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 Drs. Patt and Gaede, and the third to AAPCP. 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 AAPCP only if the physicians who participate in the 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.

Analysis

Paragraph II's provisos, as they apply to Drs. Patt and Gaede 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 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.

Ms. Brauchler is not prohibited from performing legitimate "messenger" services, including with respect to AAPCP. 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 AAPCP's entire membership, and by advising AAPCP'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 AAPCP's messenger, but, pursuant to Paragraph III, may not negotiate for or advise any AAPCP member with respect to payor contracts.

Paragraph IV.C requires AAPCP 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

Analysis

Paragraphs V through VIII of the proposed order impose obligations on Respondents with respect to distributing the proposed complaint and order to AAPCP'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

BAYER AG, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-4049; File No. 0110199
Complaint, May 30, 2002--Decision, July 24, 2002*

This consent order addresses the acquisition by Respondent Bayer AG of Aventis CropScience Holding S.A. (“ACS”) from Respondent Aventis S.A. The Consent Agreement is intended to resolve anticompetitive effects stemming from Bayer’s proposed acquisition of Aventis CropScience Holding S.A. (“ACS”) from Aventis. The order, among other things, requires the respondents to divest the ACS businesses that produce and market acetamiprid, fipronil, tribufos, and flucarbazonone – four of a new generation of chemical insecticide active ingredients that are used in products such as non-repellent termiticides; flea control for companion animals products; a number of crop, turf, and ornamental applications; and seed treatments – that are less harmful to human health and the environment, to an acquirer or acquirers approved by the Commission. An accompanying Order to Hold Separate and Maintain Assets requires the respondents to preserve the acetamiprid, fipronil and flucarbazonone operations as a viable, competitive and ongoing operation until the divestitures are completed.

Participants

For the Commission: *Wallace Easterling, Cecelia Waldeck, Susan Huber, Angelike Andrinopoulos, Kristina Martin, April Tabor, Juston Blankenship, Brian Burgess, Eric Sprauge, Linda Cunningham, Jordan Coyle, Richard Liebeskind, Jeffrey Dahnke, Naomi Licker, Daniel P. Ducore, Roger Boner, Michael Nicholson, Elizabeth Callison, and Mary T. Coleman.*

For the Respondents: *A. Douglas Melamed and Leon B. Greenfield, Wilmer, Cutler & Pickering, and Wayne D. Collins and Beau W. Buffier, Shearman & Sterling.*