

Complaint

**IN THE MATTER OF**  
**SYSTEM HEALTH PROVIDERS, INC., ET AL.**

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

*Docket C-4064; File No. 0110196*  
*Complaint, October 24, 2002--Decision, October 24, 2002*

This consent order addresses practices used by Respondent Genesis Physicians Group, Inc. (“GPG”) – comprised of approximately 1,250 physicians in the eastern part of the Dallas-Fort Worth metropolitan area (“Dallas area”) – and Respondent System Health Providers, Inc., a management services organization whose voting stock is wholly owned by GPG. The order, among other things, prohibits the respondents from entering into or facilitating agreements among providers: (1) to negotiate on behalf of any provider (including both physicians and non-physician providers of ancillary medical services) with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term upon which any providers deal, or are willing to deal, with any payor; and (4) not to deal individually with any payor or through any arrangement other than SHP or GPG. The order also prohibits the respondents from exchanging or facilitating the transfer of information among providers concerning any provider’s willingness to deal with a payor, or the terms or conditions, including price terms, on which the provider is willing to deal. In addition, the order prohibits the respondents from attempting to engage in – or encouraging, pressuring, or attempting to induce any person to engage in – any action prohibited by the order. The order also requires Respondent SHP to distribute the complaint and order to its members, payors with which it previously contracted, and specified others, and to terminate, without penalty, payor contracts that it had entered into during the collusive period, at any such payor’s request. In addition, the order contains a proviso to preserve payor contract provisions defining post-termination obligations relating to continuity of care during a previously begun course of treatment.

*Participants*

For the Commission: *Michael Joel Bloom, Dara J. Diomande, Susan M. Gelles, Robert C. Cancellaro, Barbara Anthony, Joseph Eckhaus, Roberta S. Baruch, D. Bruce Hoffman, and Timothy A. Dayek.*

For the Respondents: *Jerry Beane and Kay Lynn Brumbaugh, Strasburger & Price, LLP.*

## Complaint

**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 Genesis Physicians Group, Inc. (“GPG”) and System Health Providers, Inc. (“SHP”) have violated 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 SHP is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal place of business at 12201 Merit Drive, Suite 450, Dallas, TX 75251.

**PARAGRAPH 2:** Respondent GPG is a non-profit corporation, organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal place of business at 12201 Merit Drive, Suite 440, Dallas, TX 75251.

**JURISDICTION**

**PARAGRAPH 3:** At all times relevant to this Complaint, almost all members of GPG were physicians engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as alleged herein, members of GPG have been, and are now, in competition with each other for the provision of physician services.

**PARAGRAPH 4:** The general business practices of Respondents GPG and SHP, including the acts and practices herein alleged, are in or affecting “commerce” as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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**PARAGRAPH 5:** Respondents GPG and SHP have been organized in substantial part, and are engaged in substantial activities, for the pecuniary benefit of their members and are therefore corporations 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 6:** Respondent GPG has approximately 1,250 members, almost all of whom are physicians licensed to practice medicine in the State of Texas and engaged in the business of providing professional services to patients in the eastern part of the Dallas-Fort Worth metropolitan area (“Dallas area”).

**PARAGRAPH 7:** Respondent SHP is a management services organization, the voting stock of which is wholly owned by GPG.

**PARAGRAPH 8:** Physicians often contract with health insurance firms and other third-party payors, such as preferred provider organizations. Such contracts typically establish the terms and conditions, including price 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 payor costs and enable payors to lower the 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.

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**PARAGRAPH 10:** Medicare’s Resource Based Relative Value System (“RBRVS”) is a system used by the United States 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. In general, it is the practice of payors in the Dallas area to make contract offers to individual physicians or groups at a fee level specified in the RBRVS, plus a markup based on some percentage of that fee (*e.g.*, “110% of 2001 RBRVS”).

**PARAGRAPH 11:** In order to be competitively marketable in the Dallas area, a payor’s health insurance plan must include in its physician network a large number of primary care physicians and specialists who practice in the Dallas area. Many of the primary care physicians and specialists who practice in the Dallas area are members of GPG.

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

**RESTRAINT OF TRADE**

**PARAGRAPH 13:** Respondents GPG and SHP, each acting as a combination of competing physicians, have acted to restrain competition by, among other things:

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- A. facilitating, negotiating, entering into, and implementing agreements among GPG members on price 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 GPG's members, and refusing to submit payor offers to members that do not conform to Respondent SHP's standards for contracts.

**FORMATION AND OPERATION OF GPG AND SHP**

**PARAGRAPH 14:** In 1995 GPG undertook to educate and assist physicians in contracting with payors for the provision of medical services. GPG, directly or through other organizations which it controlled, entered into contracting activities on behalf of its members, often pursuant to arrangements in which the physicians bore some financial risk (*e.g.*, through agreements to provide required medical services in return for a capitated fee). In or about 1996, GPG formed Genesis Physicians Practice Association ("GPPA") to be the locus of GPG's risk-contracting activities. SHP was formed in 1995 by GPG and Presbyterian Healthcare System, and was envisioned to be a medical management company responsible for managing the contracting, credentialing, utilization management, and quality assurance of GPG (and later GPPA). In 1998 GPG purchased substantially all of Presbyterian's interest in SHP, becoming the sole owner of SHP's voting stock.

**PARAGRAPH 15:** GPPA's risk contracting resulted in significant losses to GPG physicians, and in 1999 GPPA filed for protection under the bankruptcy laws, discontinued its contracts, and ceased doing business. Prior to and following the demise of GPPA, SHP increasingly undertook, on behalf of GPG and its physicians, to negotiate with payors non-risk contracts that provide for higher fees and other more advantageous terms than

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its individual physicians could obtain by negotiating unilaterally with payors.

**PARAGRAPH 16:** Physicians seeking to join GPG apply for membership and, if qualified, are approved for membership by the GPG Membership Committee and Board of Trustees. Each physician then typically has signed a “Participation Agreement” with SHP, authorizing SHP to negotiate non-risk contracts with payors on his or her behalf.

**PARAGRAPH 17:** SHP personnel have negotiated with payors the fees and other terms pursuant to which SHP members may render medical care to persons covered by the payors. Following acceptance of a contract by vote of SHP’s Board of Directors, SHP has summarized and commented to GPG members on the terms of that contract and offered GPG members an opportunity to opt in or out of the agreement. Unless a physician opted out, he or she was deemed, under the SHP “Participation Agreement,” to have opted in under the SHP-negotiated contract.

**PARAGRAPH 18:** Rather than acting simply as a “messenger,” as described in Paragraph 12 of this Complaint, SHP actively bargained with payors, often proposing and counter-proposing fee schedules to be applied, among other terms. To maintain its bargaining power, SHP has discouraged GPG members from entering into unilateral agreements with payors. SHP has communicated to GPG members the bargaining advantage gained by negotiating with payors collectively through SHP, in general, and SHP’s determinations that specific fees and other contract terms being offered by payors are “not comparable to market standards” or are otherwise inadequate. Many GPG members have been unwilling to negotiate with payors apart from SHP, and have communicated that fact to payors seeking to resist SHP’s collective demands.

**PARAGRAPH 19:** SHP had a practice—inconsistent with a messenger model arrangement—of not conveying to GPG members payor offers that SHP deemed deficient, including offers that

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provide for fees that do not satisfy criteria adopted by SHP's Contracting Committee, which was comprised of 21 GPG members. SHP instead demanded, and often received, more favorable fee and other contract terms—terms that payors would not have offered to GPG's members had those members engaged in unilateral, rather than collective, negotiations with the payors. Only after the payor acceded to fee and other contract terms acceptable to SHP, would SHP convey the payor's proposed contract to GPG members for their consideration.

**PARAGRAPH 20:** SHP refused to convey payors' proposed fee and other contract terms to GPG members even where the payor has explicitly requested that it do so. SHP's discouraging of physicians' contracting directly with payors and its unwillingness to convey payors' proposed contracts to GPG members unless and until those offers satisfy SHP's criteria have rendered it less likely and more costly for payors to establish competitive physician networks in the Dallas area without first coming to terms with SHP. As a result, payors often have offered or acceded to SHP demands for supracompetitive fees for all GPG members.

**LACK OF SIGNIFICANT EFFICIENCIES**

**PARAGRAPH 21:** Since July of 1999, neither GPG and its members nor SHP has sought or been willing to enter into agreements with payors in which GPG, SHP, or GPG's members undertake financial risk-sharing. Further, GPG members have not integrated their practices to create significant 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 22:** Respondents' actions described in Paragraphs 13 through 20 of this Complaint have had, or tend to have, the effect of restraining trade unreasonably and hindering

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competition in the provision of physician services in the Dallas area in the following ways, among others:

- A. prices and other forms of competition among Respondent GPG's members were unreasonably restrained;
- B. prices 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 23:** The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-fourth day of October, 2002, issues its Complaint against Respondents GPG and SHP.

By the Commission.

Decision and Order

## **DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of System Health Providers, Inc. and Genesis Physicians Group, Inc., hereinafter sometimes referred to as “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 Respondent has violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested parties pursuant to § 2.34 of the Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following order:

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1. Respondent System Health Providers, Inc. (“SHP”) is a for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 12201 Merit Drive, Suite 450, Dallas, TX 75251.
2. Respondent Genesis Physicians Group, Inc. (“GPG”) is a non-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 12201 Merit Drive, Suite 440, Dallas, TX 75251.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

**ORDER****I.**

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

- A. “Respondent SHP” means System Health Providers, Inc., its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.
- B. “Respondent GPG” means Genesis Physicians Group, Inc. its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.

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- C. “Respondents” means Respondent SHP and Respondent GPG.
- D. “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.”)
- E. “Payor” means any Person that pays, or arranges for payment, for all or any part of any Provider services for itself or for any other Person.
- F. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- G. “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 SHP or Respondent GPG pursuant to Paragraph III.B. of this Order, of each such Payor’s right to terminate such contract.
- H. “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.
- I. “Provider” means a doctor of allopathic medicine (“M.D.”), a doctor of osteopathic medicine (“D.O.”), or any other Person licensed by the state to provide ancillary health care services.
- J. “Qualified risk-sharing joint arrangement” means an arrangement to provide Provider services in which:

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1. all Providers who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the Providers who participate to jointly control costs and improve quality by managing the provision of Provider services, such as risk-sharing involving:
    - a. the provision of Provider services to Payors at a capitated rate,
    - b. the provision of Provider services for a predetermined percentage of premium or revenue from Payors,
    - c. the use of significant financial incentives (e.g., substantial withholds) for providers 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 providers 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.
- K. "Qualified clinically-integrated joint arrangement" means an arrangement to provide Provider services in which:

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1. all Providers 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 Providers 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.

**II.**

**IT IS FURTHER ORDERED** that Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of Provider 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 Providers:
  1. to negotiate on behalf of any Provider 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 Provider 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 SHP or other than Respondent GPG.

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- B. Exchanging or facilitating in any manner the exchange or transfer of information among Providers concerning any Provider's willingness to deal with a Payor, or the terms or conditions, including price terms, on which the Provider 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, Respondent SHP or Respondent GPG that is reasonably necessary to form, participate in, or take any other action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, so long as the arrangement does not restrict the ability, or facilitate the refusal, of Providers who participate in it to deal with Payors on an individual basis or through any other arrangement.

**III.**

**IT IS FURTHER ORDERED** that Respondent SHP shall:

- A. Within thirty (30) days after the date on which this Order becomes final, distribute by first-class mail a copy of this Order and the Complaint to:
  - 1. each Provider who participates, or has participated, in Respondent SHP or Respondent GPG, and
  - 2. each officer, director, manager, and employee of Respondent SHP or Respondent GPG;

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- B. Within thirty (30) days after the date on which this Order becomes final, send copies of this Order, the Complaint, and the notice specified in Appendix A to this Order, by first-class mail return receipt requested, to the chief executive officer of each Payor that is listed in Appendix B or that contracts with Respondent SHP or Respondent GPG for the provision of Provider services;
- C. Terminate, without penalty or charge, any Preexisting Contract with any Payor for the provision of Provider services, upon receipt by Respondent SHP or Respondent GPG of a written request to terminate such contract from any Payor that is a party to the contract or that pays for the Provider services provided through the contract;  
**PROVIDED, HOWEVER,** that nothing contained herein shall affect the operation of any Preexisting Contract provision pertaining to the continuation of patient care for patients undergoing a course of treatment, or payment therefor, following termination of the Preexisting Contract;
- D. For a period of three (3) years after the date this Order becomes final:
  - 1. Distribute by first-class mail a copy of this Order and the Complaint to:
    - a. each Provider who begins participating in Respondent SHP or Respondent GPG, and who did not previously receive a copy of this Order and the Complaint from Respondent SHP or Respondent GPG, within thirty (30) days of the time that such participation begins,
    - b. each Payor that contracts with Respondent SHP or Respondent GPG for the provision of Provider services, and that did not previously receive a copy of this Order and the Complaint from Respondent SHP

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or Respondent GPG, within thirty (30) days of the time that such Payor enters into such contract, and

- c. each person who becomes an officer, director, manager, and employee of Respondent SHP or Respondent GPG, and who did not previously receive a copy of this Order and the Complaint from Respondent SHP or Respondent GPG, within thirty (30) days of the time that he or she assumes such responsibility with Respondent SHP; and
2. Annually publish in an official annual report or newsletter sent to all Providers who participate in Respondent SHP or Respondent GPG, 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 SHP or Respondent GPG, 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 SHP or Respondent GPG 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 becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, setting forth:
1. in detail, the manner and form in which Respondent SHP and Respondent GPG have complied and are complying with this Order, including, but not limited to, (a) information sufficient to describe, for each qualified risk-sharing joint arrangement established or operated by Respondent SHP or Respondent GPG, the manner in which the Providers who participate in such arrangement

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share financial risk, and (b) information sufficient to describe, for each qualified clinically-integrated joint arrangement established or operated by Respondent SHP or Respondent GPG, the manner in which the Providers who participate in such arrangement have integrated their practices, and

2. the name, address, and telephone number of each Payor with which Respondent SHP or Respondent GPG has had any contact during the reporting period.

**IV.**

**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.

**V.**

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

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**VI.**

**IT IS FURTHER ORDERED** that this Order shall terminate on October 24, 2022.

By the Commission.

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**Appendix A**  
[letterhead of SHP/GPG]

[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 System Health Providers, Inc. ("SHP") and Genesis Physicians Group, Inc. ("GPG"). I call to your attention Paragraph III.C. of the order, which gives you the right to terminate, without penalty or charge, any contracts with SHP or GPG that were in effect prior to your receipt of this letter.

Sincerely,

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**Appendix B**

Aetna U.S. Healthcare North Texas, Inc.  
Beech Street Corp.  
Blue Cross Blue Shield of Texas, A Division of Health Care  
Service Corp.  
Cigna Healthcare of Texas, Inc.  
First Health Group Corp.  
HealthSmart Preferred Care, Inc.  
Humana Health Plan of Texas, Inc.  
IMS Managed Care, Inc.  
Pacificare of Texas, Inc.  
Private Healthcare Systems, Inc.  
ProAmerica Managed Care, Inc.  
Regional Healthcare Alliance  
United Healthcare of Texas, Inc.

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 Genesis Physicians Group, Inc. (“GPG”) and System Health Providers, Inc. (“SHP”) (“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 GPG members on price and other competitively significant terms; refusing to deal with payors except on collectively agreed-upon terms; and negotiating uniform fees and other competitively significant terms in payor contracts and refusing to submit to members payor offers that do not conform to Respondent SHP’s standards for contracts. 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.

Respondent GPG has approximately 1,250 members, almost all of whom are physicians licensed to practice medicine in the State

## Analysis

of Texas and engaged in the business of providing professional services to patients in the eastern part of the Dallas-Fort Worth metropolitan area (“Dallas area”).

Respondent SHP is a management services organization, the voting stock of which is wholly owned by GPG.

Physicians often contract with health insurance firms and other third-party payors, such as preferred provider organizations. Such contracts typically establish the terms and conditions, including price 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 payor costs and enable payors to lower the price of insurance, and thereby result in lower medical care costs for subscribers to the payors’ health insurance plans.

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.

In order to be competitively marketable in the Dallas area, a payor’s health insurance plan must include in its physician network a large number of primary care physicians (PCPs) and specialists who practice in the Dallas area. Many of the PCPs and specialists who practice in the Dallas area are members of GPG. In particular, GPG members include a large number of PCPs and specialists located near and associated with the two highly-regarded hospitals comprising the Presbyterian Health System. Accordingly, many payors concluded that they could not establish a viable physician network, particularly in areas in which GPG

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physicians are concentrated, without including a large number of GPG physicians in that network.

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 the physicians are willing to accept. The agent also may convey all payor contract offers to the physicians, 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 contracting between physicians and payors and minimize the costs involved, without fostering an agreement among competing physicians on fees or fee-related 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 the physicians based on the messenger's opinion on the appropriateness, or lack thereof, of the offer.

Rather than acting simply as a "messenger," SHP actively bargained with payors, often proposing and counter-proposing fee schedules to be applied, among other terms. To maintain its bargaining power, SHP discouraged GPG members from entering into unilateral agreements with payors. SHP communicated to GPG members the bargaining advantage gained by negotiating with payors collectively through SHP, in general, and SHP's determinations that specific fees and other contract terms being offered by payors were "not comparable to market standards" or otherwise were inadequate. Many GPG members have been unwilling to negotiate with payors apart from SHP, and communicated that fact to payors seeking to resist SHP's collective demands.

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SHP had a practice – inconsistent with a messenger model arrangement – of not conveying to GPG members payor offers that SHP deemed deficient, including offers that provide for fees that do not satisfy criteria adopted by SHP’s Contracting Committee, which was comprised of 21 GPG members. SHP instead demanded, and often received, more favorable fee and other contract terms—terms that payors would not have offered to GPG’s members had those members engaged in unilateral, rather than collective, negotiations with the payors. Only after the payor acceded to fee and other contract terms acceptable to SHP, would SHP convey the payor’s proposed contract to GPG members for their consideration.

SHP refused to convey payors’ proposed fee and other contract terms to GPG members even where the payor explicitly has requested that it do so. SHP’s discouraging of physicians’ contracting directly with payors and its unwillingness to convey payors’ proposed contracts to GPG members unless and until those offers satisfy SHP’s criteria have rendered it less likely and more costly for payors to establish competitive physician networks in the Dallas area without first coming to terms with SHP. As a result, payors often have offered or acceded to SHP demands for supracompetitive fees for all GPG members.

Since July of 1999, GPG, its members, and SHP have entered only into fee-for-service agreements with payors, pursuant to which GPG, its members, and SHP did not undertake financial risk-sharing. Further, GPG members have not integrated their practices to create significant 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. Instead, the Respondents’ acts and practices have restrained trade unreasonably and hindered competition in the provision of physician services in the Dallas area in the following ways, among others: prices and other forms of competition among Respondent GPG’s members were unreasonably restrained; prices for physician services were increased; and competition in the purchase of physician services

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was restrained to the detriment of health plans, employers, and individual consumers. Thus, Respondents' conduct has harmed patients and other purchasers of medical services by restricting choice of providers and increasing the price of medical services.

**The Proposed Consent Order**

The proposed consent order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint while allowing Respondents and member-Providers to engage in legitimate joint conduct.

Paragraph II.A prohibits Respondents from entering into or facilitating agreements among providers: (1) to negotiate on behalf of any provider with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term upon which any providers deal, or are willing to deal, with any payor; and (4) not to deal individually with any payor or through any arrangement other than SHP or GPG. Use of the term "Provider" in the proposed order, rather than the narrower term "physician," reflects SHP's inclusion of non-physician providers of ancillary medical services in its contracting arrangements.

Paragraph II.B prohibits Respondents from exchanging or facilitating the transfer of information among Providers concerning any Provider's willingness to deal with a payor, or the terms or conditions, including price terms, on which the Provider is willing to deal.

Paragraph II.C prohibits Respondents from attempting to engage in any action prohibited by Paragraph II.A or II.B. Paragraph II.D prohibits Respondents from encouraging, pressuring, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C.

Paragraph II contains a proviso that allows Respondents to engage in conduct that is reasonably necessary to the formation or operation of a "qualified risk-sharing joint arrangement" or a

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“qualified clinically-integrated joint arrangement,” so long as the arrangement does not restrict the ability, or facilitate the refusal, of participating providers to deal with payors on an individual basis or through any other arrangement. To be a “qualified risk-sharing joint arrangement,” an arrangement must satisfy two conditions. First, all participating Providers must share substantial financial risk through the arrangement and thereby create incentives for the 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. To be a “qualified clinically-integrated joint arrangement,” an arrangement must satisfy two other conditions. First, all participants must join in active and ongoing programs to evaluate and modify their clinical practice patterns, creating a high degree of interdependence and cooperation among Providers 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. Both definitions reflect the analyses contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.

Paragraphs III.A and III. B require SHP to distribute the complaint and order to its members, payors with which it previously contracted, and specified others. Paragraph III.C requires SHP to terminate, without penalty, payor contracts that it had entered into during the collusive period, at any such payor’s request. This provision is intended to eliminate the effects of Respondents’ joint price-setting. Paragraph III also contains a proviso to preserve payor contract provisions defining post-termination obligations relating to continuity of care during a previously begun course of treatment. This proviso was implicit in the “termination upon request” provision of the recent Commission Order in *Physicians Integrated Services of Denver*. To avoid any risk of confusion among affected persons and the public-at-large, the proviso is made explicit here.

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The remaining provisions of the proposed order impose complaint and order distribution, reporting, and other compliance-related provisions. For example, Paragraph III. D requires SHP to distribute copies of the Complaint and Order to incoming SHP Providers, payors that contract with SHP or GPG for the provision of Provider services, and incoming SHP and GPG officers, directors, and employees. Further, Paragraph III.F requires SHP to file periodic reports with the Commission detailing how SHP and GPG have complied with the Order. Paragraph V. authorizes Commission staff to obtain access to Respondents' records and officers, directors, and employees for the purpose of determining or securing compliance with the Order.

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

**MSC.SOFTWARE CORPORATION**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 9299; File No. 0010077**Complaint, October 9, 2001--Decision, October 29, 2002*

This consent order addresses the acquisitions by Respondent MSC.Software Corporation -- the largest supplier of computer-aided engineering simulation software in the world -- of Universal Analytics, Inc. ("UAI") and Computerized Structural Analysis and Research Corporation ("CSAR"), and possible effects in the market for advanced versions of Nastran, a public domain engineering simulation software program. The order, among other things, requires the respondent to divest -- to one or two acquirers approved by the Commission -- perpetual, worldwide, royalty-free, and non-exclusive licenses to the key intellectual property needed by a new competitor to compete in the sale and licensing of advanced Nastran software, including both the version of MSC.Nastran that was most current as of August 12, 2002, and all the intellectual property rights acquired by MSC in the two challenged acquisitions. The order also requires the respondent, for twelve months, to provide the acquirer or acquirers with ongoing support with respect to MSC.Nastran, in the form of personnel, information, technical assistance, advice and training. In addition, the order requires the respondent, for three years, to grant the acquirer or acquirers the right to use the trademarks or trade names of the licensed software for the purpose of identifying the acquirer as a licensee from MSC. The order also requires the respondent, for ten years, to provide the Commission with prior notice of future acquisitions of any entity engaged in the development or sales of any version of Nastran.

*Participants*

For the Commission: *P. Abbott McCartney, Peggy D. Bayer, J. Dennis Harcketts, Cecelia M. Waldeck, Rita Leeb, Karen Mills, Kent Cox, Stephanie Langley, Susan Moreno, Melissa Kassier, Michael Cowie, Patrick J. Roach, Richard B. Dagen, Rendell A. Davis, Jr., Daniel P. Ducore, John Yun, Jeffrey H. Fischer, and Daniel P. O'Brien.*

For the Respondent: *Tefft W. Smith and Marimichael Skubel, Kirkland & Ellis.*