

Complaint

IN THE MATTER OF

CARLSBAD PHYSICIAN ASSOCIATION, INC. ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 4081; File No. 0310002**Complaint, June 13, 2003--Decision, June 13, 2003*

This consent order addresses practices used by nine Respondents, including the Carlsbad Physician Association (“CPA”) – whose 38 physician members represent 76 percent of all physicians and 83 percent of the primary care physicians practicing in the Carlsbad, New Mexico area – its executive director, and seven physician members of CPA’s Board of Directors and Contract Committee. The order, among other things, prohibits the respondents from entering into or facilitating agreements between or among any physicians (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term upon which any physicians deal, or are willing to deal, with any payor; and (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents. The order also prohibits the respondents from facilitating exchanges of information among physicians concerning whether, or on what terms, to contract with a payor. In addition, the order prohibits the respondents from attempting to engage in – or from inducing anyone to engage in – any action prohibited by the order. In addition, the order prohibits the respondents, for three years – in connection with physician health plan contracting – from either (1) acting as an agent for any physicians, or (2) using an agent who represents any other physician with respect to such contracting. The order also requires Respondent CPA – at any payor’s request and without penalty or at the earliest termination or renewal date – to terminate its current contracts with respect to providing physician services. In addition, the order requires Respondent CPA to dissolve itself, following the expiration or termination of all payor contracts, and in the interim to cease all activities except those necessary to comply with the order and the winding down of its affairs.

Participants

For the Commission: *Steve Vieux, Rachel Hertzman, David R. Pender, Jeffrey W. Brennan, Anne R. Schenof, Roberta S. Baruch, and Louis Silvia, Jr..*

For the Respondents: *W.T. Martin, Jr., Martin & Lara, 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 the Carlsbad Physician Association, Inc. (“CPA”), William J. Baggs, M.D., Srichand S. Dara, M.D., Glen Moore, James J. Purpura, D.O., Deborah J. Schenck, M.D., Charles L. Secora, M.D., Majid A. Syed, M.D., and Richard L. Zizza, M.D., hereinafter collectively referred to as “Respondents,” 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:

I. NATURE OF THE CASE

1. This matter concerns horizontal agreements among competing physicians who constitute most of the physicians in the Carlsbad, New Mexico, area, to fix prices charged to health care plans and other third-party payors (“payors”), and to refuse to deal with payors except on collectively agreed-upon terms. The physicians orchestrated these price-fixing agreements and concerted refusals to deal through CPA, and their conduct had the purpose and effect of raising the prices of physician services in the Carlsbad area.

II. RESPONDENTS

2. CPA is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 2420 West Pierce St., Suite 100, Carlsbad, NM 88220. CPA’s Board of Directors (“Board”) consists of the organization’s officers: the President, Vice President, Treasurer, Secretary, and Member-at-Large. The Contract Committee, which consists of all the Board members and certain other physician members of Respondent CPA, negotiates and reviews

Complaint

proposed payor contracts before presenting contract information to CPA's physician members. Upon a majority vote of acceptance by CPA's physician members, the Board signs payor contracts on behalf of the members.

3. Glen Moore has been CPA's Executive Director since December 1999. His principal address is P.O. Box 381, Benton, MS 39039. Respondent Moore is CPA's principal negotiator of payor contracts on the physician members' behalf. Respondent Moore has participated in most, if not all, Board meetings, Contract Committee meetings, and general membership meetings in which CPA's physicians discuss and agree on the prices to charge payors. The Board and the Contract Committee often assist Respondent Moore in negotiating and reviewing proposed payor contracts.
4. The following individuals ("Physician Respondents") are physicians licensed to practice medicine in the State of New Mexico, and are engaged in the private practice of medicine for a fee in the Carlsbad, New Mexico area. The Physician Respondents are, or were, active members of CPA. Except to the extent that competition has been restrained as alleged herein, the Physician Respondents have been, and are now, in competition with each other, and with other physician members of CPA, for the provision of services. Their respective names, business addresses, and roles in CPA are as follows:
 - a. William J. Baggs, M.D., 2410 W. Pierce St., Carlsbad, NM 88220, was one of CPA's founders, and has been a member of the Board and the Contract Committee at various times between 1998 and the present.
 - b. Srichand S. Dara, M.D., 110 S. Halagueno, Carlsbad, NM 88220, was one of CPA's original Board members. Dr. Dara is a former Secretary of CPA, and has been a member of the Board and Contract Committee at various times between 1998 and the present.

Complaint

- c. James J. Purpura, D.O., 2330 West Pierce St., Carlsbad, NM 88220, is a former President of CPA, and has been a member of the Board and the Contract Committee at various times between 1998 and the present.
- d. Deborah J. Schenck, M.D., 2420 West Pierce St., Suite 103, Carlsbad, NM 88220, is a former Treasurer of CPA, and has been a member of the Board and the Contract Committee at various times between 2000 and the present.
- e. Charles L. Secora, M.D., 2402 West Pierce St., Suite 6F, Carlsbad, NM 88220, is a former Secretary and Vice President of CPA, and was a member of the Board and the Contract Committee at various times between 1998 and 2002. He is also a former Chairperson of the Contract Committee.
- f. Majid A. Syed, M.D., 2402 West Pierce St., Suite 6D, Carlsbad, NM 88220, was a founder of CPA, is a former President of CPA, and has been a member of the Board and the Contract Committee at various times between 1998 and the present. He is also a former Chairperson of the Contract Committee.
- g. Richard L. Zizza, M.D., 2420 West Pierce St., Suite 100, Carlsbad, NM 88220, has been CPA's President and the Chairperson of its Contract Committee since 2001. He has served on the Board and Contract Committee at various times between 2000 and the present.

**III. THE FTC HAS JURISDICTION OVER
RESPONDENTS**

- 5. Respondents' general business practices, 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.

Complaint

**IV. OVERVIEW OF MARKET AND PHYSICIAN
COMPETITION**

6. CPA has approximately 38 physician members, all of whom are licensed to practice allopathic, osteopathic, chiropractic, or podiatric medicine in the State of New Mexico, and are engaged in the business of providing physician services to patients in the Carlsbad, New Mexico, area. Approximately 83% of the primary care physicians and 76% of all physicians who practice in the Carlsbad area are members of CPA.
7. Carlsbad is in southeastern New Mexico. The closest major cities to Carlsbad are Roswell, New Mexico, 76 miles to the northwest of Carlsbad; El Paso, Texas, 162 miles to the southwest; and Lubbock, Texas, 179 miles to the northeast. To be competitively marketable in the Carlsbad 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 Carlsbad area.
8. Physicians often contract with payors to 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 payors' costs and enable them to lower the price of insurance, and thereby result in lower medical care costs for subscribers to the payors' health insurance plans.
9. Absent agreements among competing physicians on the terms, including price, on which they will provide services to enrollees in payors' health care plans, competing physicians decide individually whether to enter into payor contracts to provide services to their subscribers or

Complaint

enrollees, and what prices they will accept pursuant to such contracts.

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, payors in the Carlsbad area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fee for a particular year (*e.g.*, "110% of 2003 RBRVS").
11. 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 prices and other competitively significant terms. Such a messenger may not, however, consistent with a competitive model, negotiate prices and other competitively significant terms on behalf of the participating physicians. Nor should a messenger 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.

**V. CPA WAS FORMED TO, AND DID, COLLECTIVELY
NEGOTIATE HIGHER FEES**

12. In July 1998, Drs. Baggs and Syed and two other physicians organized CPA. In February 1999, it was incorporated as a for-profit corporation and formally named the "Carlsbad Physician Association." CPA was formed to negotiate contracts for physician services between CPA physician members and payors. A "position statement" that CPA created to describe itself asserts that CPA's primary goal is "to negotiate contracts between

Complaint

physicians and employers, insurers and administrators independent of influence from any Health [*sic*] care organization or facility.” Similarly, at a May 12, 1999, meeting of CPA’s Board, Dr. Secora stated that among CPA’s main goals was to “[n]egotiate favorable reimbursement for physicians.”

13. CPA’s physician members each pay \$500 annual membership dues. A physician becomes eligible to participate in CPA’s contracts by entering into a “Participating Physician Agreement” with the organization.
14. Through Executive Director Moore, the Board, and the Contract Committee, CPA negotiates with payors on the prices and other contract terms pursuant to which CPA’s members will provide medical care to subscribers of payors’ health plans. CPA does not transmit any payor’s contract offer to the members for their individual acceptance or rejection unless the Contract Committee approves the terms of the contract. Indeed, CPA told the public that it was operating as a legitimate messenger when, in fact, it repeatedly refused to messenger contract offers that it deemed deficient and engaged in collective price negotiations and refusals to deal.
15. Once the Contract Committee and Executive Director Moore negotiate payor contract terms acceptable to them, they present the contract to the general membership for a vote of approval; if approved, the Board signs it. Thereafter, CPA’s members decide whether to opt into or out of the contract. CPA’s Contract Committee and Board make recommendations to members about which offers the physicians should accept collectively, and the general membership usually follows these recommendations. At general membership meetings, CPA’s members jointly decide whether to allow payor contracts to renew automatically, and whether to allow contract negotiations

Complaint

with payors to move forward. At CPA's general membership meetings, the physicians frequently decide collectively the prices to demand from payors, and to terminate contract negotiations with those payors perceived to be making low proposals.

16. All Physician Respondents are or were members of CPA's Contract Committee and Board and participated in negotiations with payors over prices. On behalf of Physician Respondents and the entire CPA membership, Executive Director Moore actively bargains over price and other contract terms with payors, and dictates to payors the minimum compensation terms under which CPA's members will contract.
17. CPA's members, including Physician Respondents, refuse to entertain offers made to them individually, hindering payors' efforts to establish competitive physician networks in the Carlsbad area. Due to CPA's large share of the physicians in the Carlsbad area, its bargaining power with payors is substantial, with the result that payors have repeatedly acceded to Respondents' demands for supracompetitive fees for all CPA members.
18. Prices for physician services in New Mexico, on average, range from 120% to 150% of RBRVS. Through collective negotiations and threatened refusals to deal, Respondent CPA's physician members have successfully contracted for the highest prices in the state, with prices ranging from 160% to 200% of RBRVS.

A. BLUE CROSS & BLUE SHIELD OF NEW MEXICO

19. Blue Cross & Blue Shield of New Mexico is a payor doing business in the Carlsbad area. Blue Cross started contract negotiations with CPA in September 1999. The Board rejected Blue Cross' initial offer, without transmitting it to

Complaint

the individual physician members of CPA for their unilateral acceptance or rejection.

20. In December 1999, Blue Cross responded with a new offer that was higher than its original offer but far below CPA's demand. At a January 4, 2000, Board meeting, the Board members unanimously rejected that proposal. Following that meeting, Dr. Secora prepared a letter to Blue Cross, on behalf of CPA's members, rejecting Blue Cross' latest offer.
21. In January 2000, CPA invited two Blue Cross representatives to a meeting of CPA's Board to negotiate the contract. After that meeting, Blue Cross submitted another contract offer to the Board, this time with even higher prices than what it previously offered. Through Executive Director Moore, however, the Board rejected this offer and advised Blue Cross of CPA's demand for still higher prices, to which Blue Cross ultimately agreed. The Board also demanded that Blue Cross agree to contract terms that guaranteed that payments to CPA physicians would not decline. Executive Director Moore and Drs. Secora and Syed jointly presented this demand to Blue Cross on the collective behalf of CPA's members. Blue Cross agreed to this demand, and the contract that the parties signed on March 1, 2000, included the language that CPA demanded. Through negotiations that Executive Director Moore and Dr. Secora led, CPA eventually received prices substantially in excess of 20% above Blue Cross' initial offer.

B. PRESBYTERIAN HEALTH PLAN

22. Presbyterian Health Plan is a payor doing business in the Carlsbad area. CPA began contract negotiations with Presbyterian in December 1998. In July 1999, the Board and Contract Committee agreed that Presbyterian's proposal on prices for its commercial plan was

Complaint

unacceptable. CPA did not transmit Presbyterian's proposal to the members. Instead, it instructed Executive Director Moore to make a counter-proposal of 180% of RBRVS for non-surgical codes and 200% for surgical codes. Presbyterian rejected that offer and did not contract with CPA at that time. Instead, for services provided to subscribers in the Carlsbad area, Presbyterian either paid billed charges or amounts agreed upon under contracts with certain individual physicians.

23. In April 2002, CPA and Presbyterian reentered contract negotiations. On May 1, 2002, Executive Director Moore required that Presbyterian offer CPA's members uniform prices set at 210% of RBRVS for surgical codes and 190% of RBRVS for non-surgical codes. This was an 81% increase over the amount Presbyterian paid in the Carlsbad area the previous year. Presbyterian counter-proposed a contract containing lower prices, but Executive Director Moore, in a May 20, 2002, letter, rejected that offer on behalf of CPA's members.
24. In June 2002, Presbyterian proposed to contract with CPA's members at 125% of RBRVS for surgical codes and between 115% and 135% for various non-surgical codes. Dr. Dara made a motion at a general membership meeting on July 18, 2002, that CPA reject Presbyterian's latest offer. The motion was unanimously approved.
25. In September 2002, Presbyterian raised its offer to CPA to an amount equal to 122% of RBRVS for non-surgical codes and 148% of RBRVS for surgical codes. At the September 25, 2002, Contract Committee meeting, Dr. Zizza moved to recommend that the general membership reject Presbyterian's new proposal. Dr. Purpura seconded the motion, and it was approved by the Contract Committee. The general membership subsequently rejected Presbyterian's proposal, based upon the Contract Committee's recommendation. In October 2002,

Complaint

Executive Director Moore informed Presbyterian's Contracts Manager that, to continue negotiations with CPA, Presbyterian's offer on price had to be higher - - "MUCH HIGHER." Currently, Presbyterian does not contract with CPA for its commercial plan in the Carlsbad area.

C. UNITED HEALTH CARE

26. United Health Care is a payor doing business in the Carlsbad area. CPA and United began contract negotiations in December 1998, and continued to negotiate price and other contract terms over the course of two years. CPA's Board and Contract Committee often made recommendations on the prices that CPA's Executive Director should demand from United. CPA's Board and Contract Committee proposed prices substantially higher than United's offers, without transmitting United's proposals to individual members. As a result, in October 1999, United complained to CPA that it was committing "FTC violation(s)."
27. At the culmination of these negotiations, in June 2000, Executive Director Moore, under Board and Contract Committee direction, insisted that United pay 160% of RBRVS for non-surgical codes and 185% for surgical codes, or else CPA would not deal with United. United gave in to this demand and, on September 1, 2000, entered into a uniform group contract with CPA.
28. In April 2002, the Contract Committee, including Drs. Schenck, Secora, Purpura, and Zizza, demanded, through Executive Director Moore, substantial increases in the prices United paid to CPA members. CPA stood firm in its demands from United through the Spring and Summer of 2002. At a May 15, 2002, meeting, the general CPA membership unanimously passed Dr. Dara's motion, which Dr. Baggs seconded, to threaten United with termination of its contract unless United increased the

Complaint

prices paid to CPA's members and reinstated a CPA member into the United network. At a meeting on July 18, 2002, over which Dr. Zizza presided, CPA's general membership unanimously agreed with Dr. Dara's call for the termination of CPA's contract with United, due to its failure to accept CPA's collectively demanded terms. Soon thereafter, Executive Director Moore sent a letter to United, terminating CPA's contract. After a United representative requested that each CPA physician furnish United with an individual termination letter, Executive Director Moore provided each of the physician members with a copy of a letter of termination to sign and forward to United. All but six of the participating CPA physicians submitted that letter.

29. United does not have a contract with CPA, and it now pays the subset of CPA members with whom it has individual contracts the highest prices in United's New Mexico network.

D. OTHER PAYORS

30. CPA has orchestrated collective negotiations with all other payors that do business, or attempted to do business, in the Carlsbad area. With the assistance of the Board and Contract Committee, Executive Director Moore negotiated with these payors on price, making proposals and counter-proposals as well as accepting or rejecting offers without transmitting them to physician members for their individual acceptance or rejection. CPA's members collectively accepted or rejected these payor contracts, and refused to deal with these payors individually. Due to CPA's dominant market position in the Carlsbad area, such tactics have been highly successful. CPA has been able to extract far higher prices from these payors than what they pay other physicians in New Mexico.

Complaint

**VI. RESPONDENTS HAVE ENGAGED IN RESTRAINTS
OF TRADE**

31. Acting as a combination of competing physicians, the Physician Respondents, through CPA and in conspiracy with Executive Director Moore, have restrained competition by, among other things:
 - a. facilitating, negotiating, entering into, and implementing agreements among themselves and other members of CPA on price and other competitively significant terms;
 - b. refusing to deal with payors except on collectively agreed-upon terms; and
 - c. negotiating uniform prices and other competitively significant terms in payor contracts for CPA's members, and refusing to submit payor offers to CPA members that do not conform to CPA's standards for contracts.

**VII. THERE ARE NO SIGNIFICANT EFFICIENCIES IN
RESPONDENTS' CONDUCT**

32. Respondents' joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

**VIII. RESPONDENTS' ACTIONS HAVE HAD
SUBSTANTIAL ANTICOMPETITIVE EFFECTS**

33. Respondents' actions described in Paragraphs 12 through 31 of this Complaint have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Carlsbad area in the following ways, among others:

Complaint

- a. price and other forms of competition among Physician Respondents and other physician members of CPA were unreasonably restrained;
 - b. prices for physician services were increased; and
 - c. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.
34. 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 thirteenth day of June, 2003, issues its Complaint against Respondents CPA, William J. Baggs, M.D., Srichand S. Dara, M.D., Glen Moore, James J. Purpura, D.O., Deborah J. Schenck, M.D., Charles L. Secora, M.D., Majid A. Syed, M.D., and Richard L. Zizza, M.D.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the Carlsbad Physician Association, Inc. (“CPA”), William J. Baggs, M.D., Srichand S. Dara, M.D., Glen Moore, James J. Purpura, D.O., Deborah J. Schenck, M.D., Charles L. Secora, M.D., Majid A. Syed, M.D., and Richard L. Zizza, M.D., hereinafter sometimes referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of the draft of Complaint that the counsel for the Commission 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 for the receipt and consideration of public comments, and having duly considered the comment received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby issues its Complaint, makes

Decision and Order

the following jurisdictional findings and issues the following Order:

1. Respondent CPA is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 2420 West Pierce St., Suite 100, Carlsbad, NM 88220.
2. Respondent William J. Baggs, M.D., is the Member-at-Large of CPA's Board of Directors, a former member of the Contract Committee, and one of the founders of CPA. His office and principal place of business is located at 2410 W. Pierce St., Carlsbad, NM 88220.
3. Respondent Srichand S. Dara, M.D., is an active member of CPA's Contract Committee, a former Secretary of CPA, and a member of CPA's initial Board of Directors. His office and principal place of business is located at 110 S. Halagueno, Carlsbad, NM 88220.
4. Respondent Glen Moore is the Executive Director of CPA. His principal address is P.O. Box 381, Benton, MS 39039.
5. Respondent James J. Purpura, D.O., is the immediate past President of CPA, its immediate past Secretary, and a member of its Contract Committee. His office and principal place of business is located at 2330 West Pierce St., Carlsbad, NM 88220.
6. Respondent Deborah J. Schenck, M.D., is a former Treasurer of CPA, and a current member of the Contract Committee. Her office and principal place of business is located at 2420 West Pierce St., Suite 103, Carlsbad, NM 88220.
7. Respondent Charles L. Secora, M.D., is a former Vice President and Secretary of CPA, a former Chairperson of the Contract Committee, and a former member of the Contract Committee. His office and principal place of business is

Decision and Order

located at 2402 West Pierce St., Suite 6F, Carlsbad, NM 88220.

8. Respondent Majid A. Syed, M.D., is the founding President of CPA, a former Chairperson of the Contract Committee, and a member of the Contract Committee. His office and principal place of business is located at 2402 West Pierce St., Suite 6D, Carlsbad, NM 88220.
9. Respondent Richard L. Zizza, M.D., is the President of CPA, and the Chairperson of the Contract Committee. His office and principal place of business is located at 2420 West Pierce St., Suite 100, Carlsbad, NM 88220.
10. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of 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 CPA” means Carlsbad Physician Association, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Carlsbad Physician Association, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Respondent Moore” means Glen Moore.

Decision and Order

- C. “Physician Respondents” means William J. Baggs, M.D., Srichand S. Dara, M.D., James J. Purpura, D.O., Deborah J. Schenck, M.D., Charles L. Secora, M.D., Majid A. Syed, M.D., and Richard L. Zizza, M.D.
- D. “Respondents” means Respondent CPA, Respondent Moore, 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 the payment, for all or any part of any physician services for itself or for any other person. Payor includes any person that develops, leases, or sells access to networks of physicians.
- 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.”), a doctor of osteopathic medicine (“D.O.”), a doctor of chiropractic medicine (“D.C.”), or a doctor of podiatric medicine (“D.P.M.”).
- J. “Preexisting contract” means a contract that was in effect on the date of the receipt by a payor that is a party to such

Decision and Order

contract of notice sent by Respondent CPA, pursuant to Paragraph III.B.2.b. of this Order, of such payor's right to terminate such contract.

- K. "Principal address" means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.
- L. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which:
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 price 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 jointly to 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,

Decision and Order

- b. the provision of physician services for a predetermined percentage of premium or revenue from payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, 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 price 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,

Decision and Order

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 CPA;
- 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;
- 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; and
- E. For a period of three (3) years after the date this Order becomes final, acting as an intermediary or agent on behalf of any physicians, or using an intermediary or agent, who is also an intermediary or agent for any other physician, in dealing with health plans regarding contracts under which physicians would be compensated for the provision of services.

PROVIDED, HOWEVER, that nothing in this Paragraph II. shall prohibit any Respondent:

- (i) from engaging in any agreement or other conduct 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

Decision and Order

arrangement, or that solely involves physicians in the same medical group practice; or

- (ii) from securing legal services that constitute the practice of law, as defined by the laws of the State of New Mexico.

III.

IT IS FURTHER ORDERED that Respondent CPA shall:

- A. Within thirty (30) days after the date on which this Order becomes final, cease and desist from all business and all other activities of any nature whatsoever, except those activities that are required in order to comply with the terms of this Order or that are necessary to effect a winding down of Respondent CPA's affairs and its dissolution;
- B. Within thirty (30) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.D. below:
 - 1. distribute by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to each physician who participates, or has participated, in Respondent CPA;
 - 2. distribute by first-class mail, return receipt requested, a copy of this Order and Complaint to:
 - a. each officer, director, manager, and employee of Respondent CPA;
 - b. the chief executive officer of each payor who, at any time since January 1, 1998, has communicated to Respondent CPA, or to whom Respondent CPA has communicated, with regard to any desire, willingness, or interest of such payor in contracting for physician services, and include in such mailing the notice specified in Appendix A to this Order; and

Decision and Order

c. Carlsbad Medical Center, Carlsbad, New Mexico;

- C. Terminate, without penalty or charge, and in compliance with any applicable laws of the State of New Mexico, any preexisting contract with any payor for the provision of physician services, at the earlier of: (1) the termination or renewal date (including any automatic renewal date) of such contract; or (2) receipt by Respondent CPA of a written request to terminate such contract from any payor that is a party to the contract; and
- D. Dissolve itself within thirty (30) days after the termination or renewal date (including any automatic renewal date) of the last preexisting contract entered into with any payor, as provided for in Paragraph III.C.

IV.

IT IS FURTHER ORDERED that, if Respondent CPA fails to comply with all or any portion of Paragraph III.B. of this Order within sixty (60) days after the date on which this Order becomes final, then Respondent Moore shall, within ninety (90) days after the date on which this Order becomes final, comply with those portions of Paragraph III.B. of this Order with which Respondent CPA did not comply.

V.

IT IS FURTHER ORDERED that Respondent CPA shall:

- A. Within ninety (90) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.D. above, file with the Commission a verified written report demonstrating how it has complied and is complying with this Order;
- B. Prior to its dissolution, notify the Commission at least thirty (30) days prior to any proposed change in Respondent CPA,

Decision and Order

such as assignment, sale resulting in the emergence of a successor, or any other change in Respondent CPA that may affect compliance obligations arising out of this Order; and

- C. Upon dissolution, provide the Commission with evidence of that dissolution.

VI.

IT IS FURTHER ORDERED that Respondent Moore shall 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:

- A. in detail, the manner and form in which Respondent Moore has complied and is complying with this Order;
- B. the name, address, and telephone number of each physician, medical group practice, and other group of physicians that Respondent Moore has represented or advised with respect to their dealings with any payor in connection with the provision of physician services;
- C. the name, address, and telephone number of each payor with which Respondent Moore has dealt while representing any physician, medical group practice, or other group of physicians in connection with the provision of physician services;
- D. any actions taken in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement provided for in Paragraph II of this Order; and
- E. any arrangement under which Respondent Moore would act as an intermediary or agent on behalf of any physicians with health plans regarding contracts under which physicians

Decision and Order

would be compensated for the provision of services, subject to Paragraph II.E. of this Order.

VII.

IT IS FURTHER ORDERED that each Physician Respondent shall 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:

- 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 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;
- 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;

Decision and Order

- F. any actions taken in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement provided for in Paragraph II of this Order; and
- G. any arrangement under which any Physician Respondent would act as an intermediary or agent on behalf of any physicians with health plans regarding contracts under which physicians would be compensated for the provision of services, subject to Paragraph II.E. of this Order.

VIII.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission of any change in his, her, or its respective principal address within twenty (20) days of such change in address.

IX.

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

Decision and Order

X.

IT IS FURTHER ORDERED that this Order shall terminate on June 13, 2023.

By the Commission.

Decision and Order

Appendix A

[letterhead of Carlsbad Physician Association, Inc.]

[name of payor's CEO]

[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order issued by the Federal Trade Commission against the Carlsbad Physician Association, Inc. ("CPA") and others.

Paragraph III.C. of the order gives you the right to terminate, without penalty or charge, any contracts with CPA that are in effect on the date you receive this letter. In accordance with Paragraph III.C., any contract will terminate at the renewal date (including any automatic renewal date of the contract), or any earlier date if you write to CPA requesting termination.

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 the Carlsbad Physician Association (CPA), its executive director, and seven physicians. The agreement settles charges that these parties violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among members of CPA to fix prices and other terms on which they would deal with health plans, and to refuse to deal with such purchasers 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 Allegations

CPA was organized in 1998-1999 to be a vehicle for competing physicians to bargain collectively with health plans, in order to obtain “favorable reimbursement” for its members. Its 38 physician members represent 76 percent of all physicians and 83 percent of the primary care physicians practicing in the Carlsbad area, which is located in southeastern New Mexico.

Analysis

CPA members have refused to deal with health plans on an individual basis. Instead, CPA's executive director (Glen Moore), its five-member Board of Directors, and a "Contract Committee" consisting of Board members and additional physician members of CPA negotiate with health plans that desire to contract with CPA members. Each of the named physician respondents is or has been a member of CPA's Board of Directors and Contract Committee and actively participated in negotiations with payors.

Contracts that the CPA leadership negotiates are presented to the general membership, and members vote on whether CPA should accept the contract. The Board signs contracts that a majority of CPA members vote to accept. In accordance with this model, respondents have orchestrated collective agreements on fees and other terms of dealing with health plans, have carried out collective negotiations with several health plans, and have orchestrated refusals to deal and threats to refuse to deal with health plans that resisted respondents' desired terms. Although CPA purported to operate as a "messenger" -- that is, an arrangement that does not facilitate horizontal agreements on price -- it engaged in various actions that reflected or orchestrated such agreements.¹

Since its inception, CPA has operated solely to exert the collective bargaining power of its members. It engages in no activities or functions other than health plan contracting. Further, in connection with health plan contracting, its members do not engage in any cooperative activities to benefit consumers.

¹ An appropriate "messenger model" arrangement that can facilitate and minimize the costs involved in contracting between physicians and payors, without fostering an agreement among competing physicians on fees or fee-related terms, 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>.

Analysis

Respondents have succeeded in forcing numerous health plans to raise fees paid to CPA members, and thereby raised the cost of medical care in the Carlsbad area. As a result of the challenged actions of respondents, CPA members receive the highest fees for physician services in New Mexico. By orchestrating agreements among CPA members to deal only on collectively-determined terms, together with actual or threatened refusals to deal with health plans that would not meet those terms, respondents have violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence. It is similar to many previous consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans, with two exceptions. First, in addition to the core prohibitions, the proposed order in this matter requires that CPA dissolve itself. Such structural relief is not routinely imposed, but has been used in physician price-fixing consent orders in the past when circumstances warrant.² Here, the organization is alleged to have had no function other than unlawful collective bargaining activities. Second, the order includes temporary “fencing-in” relief to ensure that the alleged unlawful conduct does not continue through other means. Thus, for three years, it bars the respondents from acting as a messenger or agent in health plan contracting and limits the ability of the individual physician respondents to use the same agent in connection with health plan contracting.

² See *Obstetrics and Gynecology Medical Corporation of Napa Valley*, Docket No. C-4048 (May 14, 2002); *Physician Group, Inc.* 120 F.T.C. 567 (1995); *Southbank IPA, Inc.* 114 F.T.C. 783 (1991).

Analysis

The proposed order's specific provisions are as follows:

Paragraph II.A 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 to deal with any payor only through an arrangement involving the respondents.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the respondents from facilitating exchanges of information among physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B. Paragraph II.D proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

Paragraph II.E contains certain additional, "fencing-in" relief, which is imposed for three years. Under this provision, respondents may not, in connection with physician health plan contracting, either (1) act as an agent for any physicians; or (2) use an agent who represents any other physician with respect to such contracting. Such relief, designed to assure that respondents do not seek to use other arrangements to continue the challenged conduct, is warranted in light of complaint charges that respondents engaged in overt price-fixing behavior and respondents' assertion that their conduct was legitimate "messengering" of health plan contract offers. The prohibition on using the same agent as any other physician in connection with health plan contracting would not apply where respondents are obtaining bona fide legal services (that is, activities undertaken by an attorney that constitute the practice of law as defined by New Mexico law).

As in other orders addressing providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations.

Analysis

First, respondents would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, whether a “qualified risk-sharing joint arrangement” or a “qualified clinically-integrated joint arrangement.”

As defined in the proposed order, a “qualified risk-sharing joint arrangement” possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the participants 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.

A “qualified clinically-integrated joint arrangement,” on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Second, because the order is intended to reach agreements among horizontal competitors, Paragraph II would not bar agreements that only involve physicians who are part of the same medical group practice (defined in Paragraph I.E).

Paragraph III, which applies only to CPA, provides for the dissolution of the organization following the expiration or termination of all payor contracts, and in the interim requires that CPA cease all activities except those necessary to comply with the order and the winding down of its affairs. Further, Paragraph III.B

Analysis

requires CPA to distribute the complaint and order to all physicians who have participated in CPA, to payors that negotiated contracts with CPA or indicated an interest in contracting, and to the Carlsbad Medical Center. Paragraph III.C requires CPA, at any payor's request and without penalty, to terminate its current contracts with respect to providing physician services.

In the event that CPA fails to comply with the requirement to send out the notices set forth in Paragraph III.B, Paragraph IV requires Mr. Moore to do so.

Paragraphs V through IX of the proposed order impose various obligations on respondents to report or provide access to information to the Commission to facilitate monitoring respondents' compliance with the order.

The proposed order will expire in 20 years.

Order

**ORDER REOPENING AND MODIFYING
ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS**

On March 6, 2003, Solvay S.A. (“Solvay”) filed with the Commission the Petition of Solvay S.A. to Reopen and Modify Hold Separate Order (“Petition”). In the Petition, Solvay asks that the Commission reopen and modify the Order To Hold Separate And Maintain Assets issued by the Commission on April 29, 2002, (“Hold Separate Order”) to remove language that prohibits Solvay from hiring a former employee of the divested business that the acquirer has decided not to hire. For the reasons stated below, the Commission has determined to grant the Petition.

I. The Orders

The Hold Separate Order in this matter was issued by consent at the end of an investigation of Solvay’s proposed acquisition of Ausimont. The Complaint alleges product markets that include polyvinylidene fluoride (“PVDF”) used for coating building exteriors, coating wires and cables, manufacturing specialized pipes and tubing, and other applications. The Decision and Order (accepted for public comment on April 29, 2002, and issued on June 21, 2002) (“Decision and Order”) requires Solvay to divest the Solvay Fluoropolymers Business, which includes two plants and related assets in Decatur, Alabama, used to manufacture PVDF. See Decision and Order ¶¶ I.EE. and II.A. The Decision and Order further requires Solvay to divest its interest in a joint venture that manufactures vinylidene fluoride monomer (“VF₂”), a key raw material used to manufacture PVDF. See Decision and Order ¶¶ I.JJ. and II.A. The Hold Separate Order obligated Solvay to hold the Solvay Fluoropolymers Business and Solvay’s interest in the VF₂ manufacturing joint venture separate until divested. See Hold Separate Order ¶ II.A.

The Hold Separate Order required Solvay to operate the businesses held separate under the direction of a trustee (“Hold Separate Trustee”) appointed by the Commission. See Hold Separate Order ¶¶ II. and III.B.3. The order also required Solvay

Order

to contract with a Hold Separate Manager to manage the day-to-day operations of the business under the Hold Separate Trustee's direction. See Hold Separate Order ¶ III.C.1.

The Decision and Order encourages the employees of the divested PVDF business to continue employment with an acquirer. For example, the Order grants any acquirer the right to review a list of employees of the divested business, to review their personnel files, to interview them, and to offer employment to them. See Decision and Order ¶ II.D.6. The Decision and Order prohibits Solvay from interfering with an acquirer's attempts to hire these employees, and requires Solvay to pay a bonus to employees who accept an offer of employment from an acquirer. Id.

The Decision and Order and Hold Separate Order include special provisions to preserve the availability of the Hold Separate Manager for employment by an acquirer. Hold Separate Order ¶ III.C.5. provides:

For a period of two (2) years beginning after the termination of this Hold Separate, Respondent shall not retain the services of the Solvay Fluoropolymers Manager.¹

¹ The Hold Separate Order terminates automatically on the divestiture of the Solvay Fluoropolymers Business. See Hold Separate Order ¶ VII.B. Solvay divested the Solvay Fluoropolymers Business and its interest in the VF₂ joint venture on January 21, 2003. However, the Decision and Order effectively incorporates this provision of the Hold Separate Order into the Decision and Order by requiring Solvay to "comply fully with all terms and provisions of the Hold Separate, including, but not limited to, provisions restricting [Solvay's] employment of Persons participating in the management of assets held separate." Decision and Order ¶ II.H.

Order

The Commission appointed Rajiv Gupta as the Hold Separate Trustee on April 29, 2002, when the Commission approved the consent agreement and the proposed decision and order for public comment. As required by paragraph III.C. of the Hold Separate, Solvay obtained Mr. Gupta's approval to retain Gary Mularski as the Solvay Fluoropolymers Manager to operate the Solvay Fluoropolymers Business pending divestiture.

II. The Petition

Solvay has petitioned the Commission to reopen and modify the Hold Separate Order to remove the employment ban from Hold Separate Order ¶ III.C.5., so as to permit Solvay to re-hire Gary Mularski, the Solvay Fluoropolymers Manager. Solvay proposes to employ Mr. Mularski as the Southern Key Accounts Manager for Solvay Minerals, Inc., a subsidiary that manufactures and sells soda ash.² Petition at 2-3. Mr. Mularski's position "will not relate, directly or indirectly, to the research, development, manufacture, marketing, sale, or distribution of PVDF," *id.* at 3, and he will remain bound by provisions of the Decision and Order and Hold Separate Order prohibiting him from disclosing confidential information about the PVDF business to anyone at Solvay. *See* Order ¶ II.H. and Hold Separate Order ¶ ¶ III.C.2. and I.V.C. The Petition asserts that, based on these representations in the Petition, Dyneon does not object to the Petition. *See* Letter from James E. Gregory, President, Dyneon LLC, to Donald S. Clark, Esq., Secretary, Federal Trade Commission (March 3, 2003), attached as Exhibit A to the Petition.

III. Standard for Reopening and Modifying Final Orders

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), provides that the Commission shall reopen an Order to

² There is no commercial relationship between soda ash and PVDF.

Order

consider whether it should be modified if the Commission determines that the public interest so requires.³ Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.⁴ In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an Order and consider all of the reasons for and against its modification.

A “satisfactory showing” requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.⁵ This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the Order, that the Order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief.⁶

³ Section 5 of the FTC Act also provides that the Commission shall reopen an Order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” so require. The Petition does not allege any changed conditions of law or fact.

⁴ Letter to John Hart (June 5, 1986) at 5; 16 C.F.R. § 2.51.

⁵ 16 C.F.R. § 2.51.

⁶ Thus, a requester’s mere assertion of competitive injury or disadvantage will ordinarily not constitute a “satisfactory showing” where the requester is unable to demonstrate how the proposed modification would promote effective competition or

Order

In addition, this showing must be supported by evidence that is credible and reliable.⁷

If, after determining that the requester has made the required showing, the Commission decides to reopen the Order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an Order oblige the Commission to modify it,⁸ and the burden remains on the requester in all cases to demonstrate why the Order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of

otherwise serve the broader public interest. *See, e.g., California & Hawaiian Sugar*, 119 F.T.C. at 44-45 (1995) (a requester cannot avoid order obligations just because its competitors are not so restricted; order was reopened and modified, however, to allow limited comparative claims that encouraged competition by enabling consumers to distinguish and choose among otherwise fungible products).

⁷ The Statement of Basis and Purpose to Rule 2.51 states that, “[r]equests to reopen orders must not only allege facts that, if true, would constitute the necessary showing, but must also credibly demonstrate that the factual assertions are reliable. [The Rule] therefore specifically requires that requesters provide one or more affidavits to support facts alleged in requests to reopen and modify orders. This [requirement] will not only help the Commission in its decision making process but, by clarifying the applicable standard, aid requesters in presenting meritorious cases . . . This [requirement] specifies the procedural method for substantiating factual assertions.” 53 FR 40867 (Oct. 19, 1988).

⁸ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

Order

Commission Orders.⁹ All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.¹⁰

IV. It Is In The Public Interest To Grant The Petition

Solvay's Petition asks the Commission to reopen and modify the Hold Separate Order to eliminate the provision that prohibits Solvay from employing the Solvay Fluoropolymers Manager for two years after the divestiture. The Petition makes the requisite "public interest" showing to support reopening the Hold Separate Order by establishing that the 2-year employment ban found in the final sentence of Hold Separate Order ¶ III.C.5. is no longer needed. Moreover, the Petition establishes that a modification of the Hold Separate Order is warranted because Solvay has shown that the employment ban harms the personal interests of the former Solvay Fluoropolymers Manager without contributing to achieving the purposes of the Order.

Solvay's Petition includes a satisfactory showing of a legitimate public interest reason to reopen the Hold Separate Order. The Hold Separate Order's 2-year employment ban was one of several provisions in the Hold Separate Order and the Decision and Order designed to encourage the employees of the Solvay Fluoropolymers Business to remain with the business during the hold separate period and to accept employment with the acquirer of that business. The Hold Separate Order and Decision and Order defined a term, "Solvay Fluoropolymers Employees," to include all persons employed directly, full-time or part-time, by the divested business within one year of the divestiture, as well as all other Solvay employees anywhere in the world (including

⁹ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

¹⁰ 16 C.F.R. § 2.51(b).

Order

R&D and marketing staff) whose services were billed or paid, in whole or in part, by or to the divested business within one year of divestiture. See Decision and Order ¶ I.FF. and Hold Separate Order ¶ I.HH. Both orders also defined the term, “Solvay Fluoropolymers Key Employees,” to mean the managers of the divested business when Solvay closed the Ausimont acquisition, together with additional employees designated by Solvay and an acquirer. See Decision and Order ¶ I.GG. and Hold Separate Order ¶ I.JJ.

The Hold Separate Order prohibited Solvay from employing or offering employment to any Solvay Fluoropolymer Employee and Solvay Fluoropolymers Key Employee during the hold separate period. See Hold Separate Order ¶ III.H.3. In addition, the Commission required Solvay to offer employees a bonus equal to 5% of their annual salaries to remain with the divested business during the hold separate period. Id. at ¶ III.H.5. These provisions preserved the work force of the Solvay Fluoropolymers Business so that Dyneon could select and hire any employees of the acquired business that Dyneon desired to employ.

Both the Decision and Order and the Hold Separate Order contain other provisions to help Dyneon retain the employees of the Solvay Fluoropolymers Business. Paragraph II.D.6. of the Decision and Order requires Solvay to provide a list of employees of the business, and an opportunity to review their personnel files, at least forty-five (45) days before the divestiture. The Decision and Order further requires Solvay to make those employees available to meet privately with Dyneon at least thirty (30) days prior to divestiture to offer employment to them, and prohibits Solvay from interfering with Dyneon’s attempts to hire these employees. Id. Solvay also must pay a 10% bonus to any of the Solvay Fluoropolymers Key Employees who accept employment with Dyneon. Id. The orders prohibit Solvay from hiring any of these employees within one (1) year after the divestiture closes, unless Dyneon has terminated the person’s employment. See Decision and Order ¶ II.F. and Hold Separate Order III.H.4.

Order

As highlighted by Solvay's Petition, the Hold Separate Order singles out the Solvay Fluoropolymers Manager for special treatment. It was assumed that any acquirer likely would hire the manager to help run the divested business because he would be the day-to-day manager of the business, and perhaps the most knowledgeable person about the business, when the divestiture closed. Therefore, the Hold Separate Order explicitly prohibited Solvay from hiring the manager for two (2) years after the divestiture. See Hold Separate Order ¶ III.C.5. In marked contrast to all of the other restrictions limiting Solvay's rights to hire its former employees, this provision does not allow Solvay to re-hire the Solvay Fluoropolymers Manager *even if Dyneon terminated him*.

In fact, Dyneon has decided not to offer employment to Mr. Mularski. Although Dyneon has decided not to retain him, Dyneon has kept 35 out of 37 people employed by the business when it was divested. Dyneon's success at retaining the work force suggests that the provisions of the Decision and Order and Hold Separate Order designed to facilitate the transfer of employees from the respondent to the acquirer have been successful. The order provisions have worked well, and Dyneon has retained all of the employees that, in Dyneon's judgment, are necessary to operate the divested business successfully. These circumstances demonstrate that the two-year ban on Solvay hiring the Solvay Fluoropolymers Manager is no longer necessary, which satisfies the requirement for establishing a sufficient public interest to support reopening the Hold Separate Order.

However, Dyneon's decision leaves Mr. Mularski in a disadvantageous position to seek new employment. The orders prevent Solvay, the company most familiar with Mr. Mularski's work skills, from hiring him. From Mr. Mularski's standpoint, continued employment by Solvay is far more attractive than any other option, but the orders prevent that.

In determining whether to modify the Hold Separate Order, the Commission must consider and balance all the reasons for and

Order

against the modification. Although the Hold Separate Order's two year ban on Solvay employing the Solvay Fluoropolymers Business promoted the important goal of encouraging the employees of the divested business to accept employment with Dyneon, its decision not to hire Mr. Mularski renders the employment ban obsolete and unnecessary. The employment ban now imposes an unintended harm to Mr. Mularski's personal financial and employment interests because the employment ban prevents Solvay from hiring Mr. Mularski. In balancing and weighing the reasons for and against modifying the Hold Separate Order, it appears that Mr. Mularski will suffer personal harm if the Hold Separate Order is not modified, but that declining to modify the Hold Separate Order will not promote any competitive or public purpose.

Accordingly, the Petition satisfies the standard for reopening and modifying the Hold Separate Order under the "public interest" provision of Rule 2.51(b) of the FTC Rules of Practice and Section 5 of the FTC Act. Solvay has established that reopening the Hold Separate Order is in the public interest and warranted because Hold Separate Order ¶ III.C.5. is no longer needed. Solvay has shown that the Hold Separate Order should be modified by demonstrating that Paragraph III.C.5. harms Mr. Mularski's personal interests without promoting any public or competitive interest at all.

Accordingly, **IT IS ORDERED** that the Hold Separate Order in this matter be, and it hereby is, reopened; and,

IT IS FURTHER ORDERED that the Hold Separate Order be, and it hereby is, modified to delete Hold Separate Order ¶ III.C.5. as found in the Hold Separate Order issued on April 29, 2002, and to substitute the following language:

The Solvay Fluoropolymers Manager shall have no financial interests affected by Respondent's revenues, profits or profit margins, except that the Solvay Fluoropolymers Manager's compensation for managing the Solvay Fluoropolymers

Order

Business and the Solvay VF₂ Joint Venture Business may include economic incentives dependent on the financial performance of the Solvay Fluoropolymers Business and the Solvay VF₂ Joint Venture Business if there are also sufficient incentives for the Solvay Fluoropolymers Manager to operate the Solvay Fluoropolymers Business and the Solvay VF₂ Joint Venture Business at no less than current rates of operations (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate.

By the Commission.