

Complaint

IN THE MATTER OF

**GROSSMONT ANESTHESIA SERVICES MEDICAL
GROUP, INC.**

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

*Docket C-4086; File No. 0210006
Complaint, July 11, 2003--Decision, July 11, 2003*

This consent order, among other things, prohibits Respondent Grossmont Anesthesia Services Medical Group, Inc. – a group of approximately 10 anesthesiologists in San Diego County, California, who are also members of the medical staff of Grossmont Hospital in La Mesa, California – from entering into or facilitating agreements between or among medical practices (1) to negotiate, to fix, or to establish any fee, stipend, or any other term of reimbursement for the provision of anesthesia services; (2) to deal, to refuse to deal, or to threaten to refuse to deal with any payor of anesthesia services; or (3) to reduce, or to threaten to reduce, the quantity of anesthesia services provided to any purchaser of anesthesia services. The order also prohibits the respondent from attempting to engage in – or from encouraging, pressuring, or attempting to induce any person to engage in – any action prohibited by the order.

Participants

For the Commission: *John Wiegand, Kerry O'Brien, Lisa D. Rosenthal, Gwen Fanger, Erika Wodinsky, Jeffrey Klurfeld, D. Bruce Hoffman, Louis Silvia, Mary T. Coleman, and Randi Boorstein.*

For the Respondent: *David Diehl, MD., pro se.*

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that Grossmont Anesthesia Services Medical Group, Inc., a California corporation, (“Respondent” or “GAS”) has violated Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that this proceeding is in the public interest, alleges:

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PARAGRAPH 1: GAS is a professional corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 5101 Garfield Street, La Mesa, CA 91941. GAS is composed of approximately 10 anesthesiologists.

PARAGRAPH 2: Anesthesia Service Medical Group, Inc. (“ASMG”) is a professional corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 3626 Ruffin Road, San Diego, CA 92123. ASMG employs approximately 180 anesthesiologists.

PARAGRAPH 3: At all times relevant to this Complaint, ASMG and GAS have provided, and do provide, anesthesia services for a fee to patients in San Diego County, California.

PARAGRAPH 4: Except to the extent that competition has been restrained as alleged in this Complaint, ASMG and GAS have competed, and do compete, with each other to provide anesthesia services in San Diego County, California.

PARAGRAPH 5: ASMG and GAS anesthesiologists are, or have been, members of the medical staff of Grossmont Hospital in La Mesa, a municipality in central San Diego County, California. ASMG and GAS anesthesiologists make up approximately 75 percent of the anesthesiologists with active medical staff privileges at Grossmont Hospital and work on approximately 70 percent of the cases that require anesthesia services at the hospital.

PARAGRAPH 6: Respondent is, and at all relevant times has been, engaged in commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

PARAGRAPH 7: Respondent is, and at all relevant times has been, a corporation, as “corporation” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

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**DELIVERY OF ANESTHESIA SERVICES IN SAN DIEGO
COUNTY**

PARAGRAPH 8: Anesthesiologists provide anesthesia services to patients primarily at general acute care hospitals and outpatient surgery centers. Those services include evaluating a patient before surgery, consulting with the surgical team, providing pain control and support-of-life functions during surgery, supervising care after surgery in the recovery unit, and medically discharging the patient from the recovery unit.

PARAGRAPH 9: In addition to working on scheduled surgical procedures, anesthesiologists work on unscheduled obstetric and emergency cases at general acute care hospitals. An anesthesiologist who remains available to work on unscheduled cases is said to be “taking call.”

PARAGRAPH 10: Anesthesiologists in San Diego County are reimbursed for their services from several sources. Health insurance companies and other third-party payors typically reimburse anesthesiologists for services rendered to their subscribers during scheduled and unscheduled medical procedures and obstetrical cases through contracts that establish fees and other competitively significant terms. In addition, some hospitals pay anesthesiologists “stipends” for taking call and/or for rendering services to uninsured patients. Some hospitals pay anesthesiologists stipends through contracts that establish a stipend amount and other competitively significant terms.

PARAGRAPH 11: Absent agreements among competing anesthesiologists, competing anesthesiologists or anesthesiology groups decide independently whether to seek a stipend from a hospital and the amount of the stipend. They also decide independently whether they will terminate or restrict the services they provide to unscheduled or uninsured patients if the hospital refuses to pay them a stipend or if they are dissatisfied with the stipend.

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PARAGRAPH 12: Grossmont Hospital does not now, and has not in the past, paid its anesthesiologists a stipend for taking call or for rendering services to uninsured emergency room patients.

AGREEMENT TO RESTRAIN TRADE

PARAGRAPH 13: As early as February 2001, ASMG and GAS discussed between themselves a joint strategy to secure stipends from Grossmont Hospital for taking obstetric call and for rendering services to uninsured emergency room patients. As part of these communications, ASMG and GAS discussed stipend amounts that they both would demand from Grossmont Hospital. Eventually, ASMG and GAS agreed on the stipend amount both groups would demand from Grossmont Hospital for taking obstetric call.

PARAGRAPH 14: In July 2001, ASMG sent a formal request to Grossmont Hospital on behalf of ASMG anesthesiologists for a daily obstetric stipend of \$1,000, which was the price ASMG had agreed upon with GAS. ASMG also mentioned that it would be sending the hospital a separate proposal regarding a stipend for the uninsured emergency room patients. Grossmont Hospital rejected ASMG's proposal, and ASMG communicated this rejection to GAS. In response, ASMG and GAS discussed between themselves whether they would reduce the hours for which they would take call. They agreed to maintain a solid front against the hospital to prevent the hospital from (1) negotiating separately with each group to reduce the amount of the stipend or (2) seeking services solely from one group to the exclusion of the other. ASMG and GAS also agreed to meet with Grossmont Hospital administrators and agreed on a strategy for the meeting.

PARAGRAPH 15: In January 2002, ASMG and GAS met jointly with Grossmont Hospital administrators to discuss their demands for stipends for taking obstetric call and for rendering services to uninsured emergency room patients. At that meeting, ASMG and GAS demanded that the hospital pay them stipends, but the hospital refused. In March 2002, ASMG and GAS again

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discussed between themselves the hospital's refusal to pay them stipends. ASMG and GAS also discussed reducing their hours of availability for taking call to increase their negotiating power with the hospital.

PARAGRAPH 16: Through the acts and practices described above, GAS has agreed, combined, or conspired with ASMG to restrain competition by, among other things, facilitating, negotiating, entering into, and/or implementing agreements between itself and ASMG on fees, quantity of anesthesia services provided, and other competitively significant terms.

PARAGRAPH 17: Respondent's acts and practices described above constitute unfair methods of competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Such acts and practices or their effects are continuing and will continue or recur in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of July, 2003, issues its Complaint against Respondent.

By the Commission.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of Grossmont Anesthesia Services Medical Group, Inc., hereinafter sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Commission staff proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Grossmont Anesthesia Services Medical Group, Inc. is a professional corporation organized, existing, and doing

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business under and by virtue of the laws of the State of California, with its office and principal place of business located at 5101 Garfield Street, La Mesa, CA 91941.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

I.

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

- A. “Respondent” means Grossmont Anesthesia Services Medical Group, Inc., its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Grossmont Anesthesia Services Medical Group, Inc., and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.
- B. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- C. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- D. “Medical Practice” means a bona fide, integrated business entity in which Physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one Physician practices medicine.
- E. “Payor” means any Person that pays, or arranges for payment, for all or any part of any Physician services for itself or for any other Person.

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- 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. “Qualified risk-sharing joint arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the Physicians who participate to jointly control costs and improve quality by managing the provision of Physician services, such as risk-sharing involving:
 - a. the provision of Physician services to Payors at a capitated rate,
 - b. the provision of Physician services for a predetermined percentage of premium or revenue from Payors,
 - c. the use of significant financial incentives (e.g., substantial withholds) for Physicians who participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by Physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of 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

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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.
- H. “Qualified clinically-integrated joint arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the Physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of anesthesia 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 Medical Practices:
1. To negotiate, to fix, or to establish any fee, stipend, or any other term of reimbursement for the provision of anesthesia services,

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2. To deal, to refuse to deal, or to threaten to refuse to deal with any Payor of anesthesia services, or
 3. To reduce, or to threaten to reduce, the quantity of anesthesia services provided to any purchaser of anesthesia services;
- B. Attempting to engage in any action prohibited by Paragraph II.A. above; and
- C. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any Person to engage in any action that would be prohibited by Paragraph II.A. and II.B. above.

PROVIDED, HOWEVER, that nothing in this Paragraph shall prohibit any agreement involving, or conduct by, Respondent that is reasonably necessary to form, participate in, or take any other action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement.

III.

IT IS FURTHER ORDERED that Respondent 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 Physician who participates in Respondent, and
 2. each officer, director, manager, and employee of Respondent;
- B. For a period of three (3) years after the date this Order becomes final, distribute by first-class mail a copy of this Order and the Complaint to:

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3. each Physician who begins participating in Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such participation begins, and
 4. each person who becomes an officer, director, manager, and employee of Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that he or she assumes such responsibility with Respondent;
- C. Within ninety (90) days after the date on which this Order becomes final, file with the Commission a verified written report demonstrating how it has complied and is complying with this Order; and
- D. Notify the Commission at least thirty (30) days prior to any proposed change in Respondent, 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 that may affect compliance obligations arising out of this Order.

IV.

IT IS FURTHER ORDERED that 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, 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,

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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 Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent in the presence of counsel.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on July 11, 2023.

By the Commission.

Analysis

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an agreement containing a proposed consent order with Grossmont Anesthesia Services Medical Group, Inc. (“GAS” or “Respondent”). The agreement settles charges that Respondent violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating and implementing agreements with Anesthesia Service Medical Group, Inc. (“ASMG”) on fees, quantity of anesthesia services provided, and other competitively significant 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

GAS and ASMG are competing anesthesiology groups that provide anesthesia services for a fee to patients in San Diego County, California. ASMG employs approximately 180 anesthesiologists. GAS is composed of approximately 10 anesthesiologists. GAS and ASMG anesthesiologists are members of the medical staff of Grossmont Hospital in La Mesa, a municipality in central San Diego County, California. GAS and ASMG anesthesiologists make up approximately 75 percent of the

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anesthesiologists with active medical staff privileges at Grossmont Hospital and work on approximately 70 percent of the cases that require anesthesia services at the hospital.

Anesthesiologists provide anesthesia services to patients primarily at general acute care hospitals and outpatient surgery centers. Those services include evaluating a patient before surgery, consulting with the surgical team, providing pain control and support-of-life functions during surgery, supervising care after surgery in the recovery unit, and medically discharging the patient from the recovery unit. In addition to working on scheduled surgical procedures, anesthesiologists work on unscheduled obstetric and emergency cases at general acute care hospitals. An anesthesiologist who remains available to work on unscheduled cases is said to be “taking call.”

Anesthesiologists in San Diego County are reimbursed for their services from several sources. Health insurance companies and other third-party payors typically reimburse anesthesiologists for services rendered to their subscribers during scheduled and unscheduled medical procedures and obstetrical cases through contracts that establish fees and other competitively significant terms. In addition, some hospitals pay anesthesiologists “stipends” for taking call and/or for rendering services to uninsured patients. Some hospitals pay anesthesiologists stipends through contracts that establish a stipend amount and other competitively significant terms.

Absent agreements among competing anesthesiologists, competing anesthesiologists or anesthesiology groups decide independently whether to seek a stipend from a hospital and the amount of the stipend. They also decide independently whether they will terminate or restrict the services they provide to unscheduled or uninsured patients if the hospital refuses to pay them a stipend or if they are dissatisfied with the stipend.

From as early as February 2001 through March 2002, GAS and ASMG discussed between themselves a joint strategy to secure

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stipends from Grossmont Hospital for taking obstetric call and for rendering services to uninsured emergency room patients. Eventually, GAS and ASMG agreed on the stipend amount both groups would demand from the hospital for taking obstetric call. GAS and ASMG also discussed reducing their hours of availability for taking call to increase their negotiating power with the hospital. Furthermore, they agreed to maintain a solid front against the hospital to prevent the hospital from (1) negotiating separately with each group to reduce the amount of the stipend or (2) seeking services solely from one group to the exclusion of the other. ASMG and GAS ceased this collusive activity only after the Commission contacted them about this conduct. While the Commission's investigation prevented any anticompetitive effects from occurring, this conduct is a naked restraint, which constitutes an unfair method of competition in violation of Section 5 of the FTC Act.

THE PROPOSED CONSENT ORDER

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

Paragraph II.A prohibits Respondent from entering into or facilitating agreements between or among medical practices: (1) to negotiate, to fix, or to establish any fee, stipend, or any other term of reimbursement for the provision of anesthesia services; (2) to deal, to refuse to deal, or to threaten to refuse to deal with any payor of anesthesia services; or (3) to reduce, or to threaten to reduce, the quantity of anesthesia services provided to any purchaser of anesthesia services. A "medical practice" is defined as a bona fide, integrated business entity in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.

Paragraph II.B prohibits Respondent from attempting to engage in any action prohibited by Paragraph II.A. Paragraph II.C

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prohibits Respondent from encouraging, pressuring, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A and II.B.

Paragraph II contains a proviso that allows Respondent to engage in conduct that is reasonably necessary to the formation or operation of a “qualified risk-sharing joint arrangement” or a “qualified clinically-integrated joint 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 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 through V of the proposed order are reporting and compliance provisions. Paragraph VI is a provision “sunsetting” the order after 20 years.

Complaint

IN THE MATTER OF

ANESTHESIA SERVICE MEDICAL GROUP, INC.

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

*Docket C-4085; File No. 0210006
Complaint, July 11, 2003--Decision, July 11, 2003*

This consent order, among other things, prohibits Respondent Anesthesia Service Medical Group, Inc. – a group of approximately 180 anesthesiologists in San Diego County, California, who are also members of the medical staff of Grossmont Hospital in La Mesa, California – from entering into or facilitating agreements between or among medical practices (1) to negotiate, to fix, or to establish any fee, stipend, or any other term of reimbursement for the provision of anesthesia services; (2) to deal, to refuse to deal, or to threaten to refuse to deal with any payor of anesthesia services; or (3) to reduce, or to threaten to reduce, the quantity of anesthesia services provided to any purchaser of anesthesia services. The order also prohibits the respondent from attempting to engage in – or from encouraging, pressuring, or attempting to induce any person to engage in – any action prohibited by the order.

Participants

For the Commission: *John Wiegand, Kerry O'Brien, Lisa D. Rosenthal, Gwen Fanger, Erika Wodinsky, Jeffrey Klurfeld, D. Bruce Hoffman, Louis Silvia, Jr., Mary T. Coleman, and Randi Boorstein.*

For the Respondent: *Daniel J. Yakoubian, and Arthur Lerner, Crowell & Moring.*

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that Anesthesia Service Medical Group, Inc., a California corporation, (“Respondent” or “ASMG”) has violated Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that this proceeding is in the public interest, alleges: