

Complaint

IN THE MATTER OF

SPA HEALTH ORGANIZATION

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

Docket C-4088; File No. 0110197
Complaint, July 17, 2003--Decision, July 17, 2003

This consent order, among other things, prohibits Respondent SPA Health Organization, doing business as Southwest Physician Associates – a nonprofit corporation that contracts with third-party payors for the provision of medical services on behalf of its approximately 1,000 participating physicians in the eastern part of the Dallas-Fort Worth metropolitan area – from entering into or facilitating agreements among 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 through any arrangement other than the respondent. The order also prohibits the respondent from exchanging or facilitating the 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. In addition, the order 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. The order also requires the respondent to terminate, without penalty, payor contracts that it had entered into during the collusive period, at any such payor's request.

Participants

For the Commission: *Michael Joel Bloom, Susan M. Gelles, Barbara Anthony, D. Bruce Hoffman and Thomas R. Iosso.*

For the Respondent: *Lewis Noonberg and F. Martin Dajani, Piper Rudnick LLP.*

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 SPA Health Organization (“SPA”),

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doing business as Southwest Physician Associates (hereinafter “Respondent”), has 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:

RESPONDENT

PARAGRAPH 1: Respondent is a non-profit corporation, organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal place of business at 8150 North Central Expressway, Suite 1250, Dallas, Texas 75206.

JURISDICTION

PARAGRAPH 2: At all times relevant to this Complaint, almost all participating practitioners of Respondent were physicians, most of whom were engaged in the business of providing medical services for a fee. Except to the extent that competition has been restrained as alleged herein, participating physicians of Respondent have been, and are now, in competition with each other for the provision of physician services.

PARAGRAPH 3: The general business practices of Respondent, 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.

PARAGRAPH 4: Respondent has been organized in substantial part, and is engaged in substantial activities, for the pecuniary benefit of its participating physicians and is therefore a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

PARAGRAPH 5: Respondent has approximately 1,000 participating physicians who are licensed to practice medicine in the State of Texas and who are engaged in the business of providing medical services to patients in the eastern part of the Dallas-Fort Worth metropolitan area (hereinafter “Dallas area”).

PARAGRAPH 6: Physicians often contract with third-party 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 to obtain access to additional patients made available by the payors’ relationship with insureds. These contracts may reduce third-party 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.

PARAGRAPH 7: Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by third-party payors, competing physicians decide individually whether to enter into contracts with third-party payors to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

PARAGRAPH 8: Medicare’s Resource Based Relative Value System (hereinafter “RBRVS”) is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, it is the practice of third-party payors in the Dallas area to make contract offers to individual physicians or groups at a fee level specified in the RBRVS, plus a markup based on some percentage of that fee (e.g., “110% of 2001 RBRVS”).

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PARAGRAPH 9: To be competitively marketable in the Dallas area, a third-party payor's health insurance plan must include in its physician network a large number of primary care physicians and specialists who practice in the Dallas area. Many of the primary care physicians and specialists who practice in the Dallas area are participating physicians of Respondent.

PARAGRAPH 10: Competing physicians sometimes use a "messenger" to facilitate the establishment of contracts between themselves and third-party payors in ways that do not constitute or facilitate an unlawful agreement on fees and other competitively significant terms. Such a messenger may not, however, consistent with a competitive model, negotiate fees and other competitively significant terms on behalf of the participating physicians, or facilitate the physicians' coordinated responses to contract offers by, for example, electing not to convey a third-party payor's offer to them based on the messenger's opinion on the appropriateness, or lack thereof, of the offer.

RESTRAINT OF TRADE

PARAGRAPH 11: Respondent, acting as a combination of competing physicians, has acted to restrain competition by, among other things:

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

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FORMATION AND OPERATION OF SPA

PARAGRAPH 12: In 1984 Respondent's predecessor, Southwest Physician Associates, P.A., undertook to educate and assist physicians in contracting with third-party payors for the provision of physician services. That entity, directly or through other organizations which it controlled, entered into contracting activities on behalf of its participating physicians, often pursuant to arrangements in which the physicians bore some financial risk (*e.g.*, through agreements to provide required medical services in return for a capitated fee). In or about 1997, Southwest Physician Associates, P.A. was merged into SPA Health Organization. The purpose and activities of the successor entity, SPA, remained substantially the same.

PARAGRAPH 13: Respondent's risk contracting resulted in significant losses to its participating physicians. Respondent increasingly undertook, on behalf of its participating physicians, to negotiate non-risk contracts with third-party payors – *i.e.*, contracts that do not involve the sharing of financial risk by third-party payors and physicians through arrangements such as fee withholds or capitation – that provide for higher fees and other, more advantageous terms than its individual participating physicians could obtain by negotiating unilaterally with third-party payors. By the spring of 2000, Respondent engaged exclusively in non-risk contracting.

PARAGRAPH 14: Physicians seeking to join Respondent apply for membership and, if qualified, are approved for membership by the SPA Board of Directors. Each physician then typically has signed a "Physician Managed Care Agreement" with SPA, authorizing SPA to negotiate non-risk contracts with third-party payors on his or her behalf.

PARAGRAPH 15: Respondent has negotiated with third-party payors the fees and other terms pursuant to which SPA's participating physicians may render medical care to persons covered by the third-party payors. Following acceptance of a

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contract by Respondent, Respondent has summarized and commented to SPA's participating physicians on the terms of that contract and offered SPA's participating physicians an opportunity to opt in or out of the agreement.

PARAGRAPH 16: Rather than acting simply as a "messenger," as described in Paragraph 10 of this Complaint, Respondent actively bargained with third-party payors, often proposing and counter-proposing fee schedules to be applied, among other terms. To maintain its bargaining power, Respondent has discouraged its participating physicians from entering into unilateral agreements with third-party payors. Respondent has communicated to its participating physicians the general bargaining advantage gained by negotiating with third-party payors collectively through SPA, as well as SPA's determinations that specific fees and other contract terms being offered by third-party payors may be inadequate. Many of Respondent's participating physicians have been unwilling to negotiate with third-party payors apart from SPA, and have communicated that fact to third-party payors seeking to resist SPA's collective demands.

PARAGRAPH 17: Respondent often did not convey to its participating physicians third-party payor offers that SPA deemed deficient, including offers that provided for fees that did not satisfy SPA's Board of Directors. The practice of not conveying third-party payor offers to participating physicians is inconsistent with the messenger model. Respondent instead demanded, and often received, more favorable fee and other contract terms – terms that third-party payors would not have offered to SPA's participating physicians had those physicians engaged in unilateral, rather than collective, negotiations with the third-party payors. Only after the third-party payor acceded to fee and other contract terms acceptable to SPA, would SPA convey the third-party payor's proposed contract to SPA's participating physicians for their consideration.

PARAGRAPH 18: Respondent refused to convey third-party payors' proposed fee and other contract terms to SPA's

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participating physicians even when the payor explicitly requested that it do so. Respondent's discouragement of its participating physicians' contracting directly with third-party payors and its unwillingness to convey third-party payors' proposed contracts to SPA's participating physicians unless and until those offers satisfy SPA's criteria have rendered it less likely and more costly for third-party payors to establish competitive physician networks in the Dallas area without first coming to terms with SPA. As a result, third-party payors often have offered or acceded to Respondent's demands for supracompetitive fees for all of SPA's participating physicians.

LACK OF SIGNIFICANT EFFICIENCIES

PARAGRAPH 19: Since March 2000, Respondent has neither sought nor been willing to enter into agreements with third-party payors in which SPA's participating physicians undertake financial risk-sharing. Further, Respondent's participating physicians have not integrated their practices to create significant potential efficiencies. Respondent's joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

ANTICOMPETITIVE EFFECTS

PARAGRAPH 20: Respondent's actions described in Paragraphs 11 through 18 of this Complaint have had, or have the tendency to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Dallas area in the following ways, among others:

- A. price and other forms of competition among Respondent's participating physicians 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.

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PARAGRAPH 21: 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 seventeenth day of July, 2003, issues its Complaint against Respondent.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of SPA Health Organization, doing business as Southwest Physician Associates, hereinafter sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorney, 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 an interested person 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:

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1. SPA Health Organization (“SPA”), doing business as Southwest Physician Associates, is a non-profit corporation, organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal place of business at 8150 North Central Expressway, Suite 1250, Dallas, Texas 75206. SPA was incorporated by, and its officers and directors are, physicians engaged in the private practice of medicine. It was established and has operated in material part for the pecuniary benefit of physicians associated with SPA.
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 SPA Health Organization, doing business as Southwest Physician Associates, its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.
- B. “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.”)

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- C. “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.
- D. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- E. “Preexisting Contract” means a contract that was in effect prior to the receipt, by all Payors that are parties to such contract, of notice sent by Respondent pursuant to Paragraph III.B. of this Order, of each such Payor’s right to terminate such contract.
- F. “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.
- G. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- H. “Qualified Risk-Sharing Joint Arrangement” means an arrangement to provide Physician services in which:
 - 1. all Physicians who Participate in the arrangement share substantial financial risk through their Participation in the arrangement and thereby create incentives for the Physicians who Participate to jointly control costs and improve quality by managing the provision of Physician services, such as risk-sharing involving:
 - a. the provision of Physician services to Payors at a capitated rate,
 - b. the provision of Physician services for a predetermined percentage of premium or revenue from Payors,

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- c. the use of significant financial incentives (e.g., substantial withholds) for Physicians who Participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by Physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and
 - 2. any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.
- I. "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, and all other

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Persons in active concert or participation with Respondent who receive notice of this Decision and Order by personal service or otherwise, in connection with the provision of Physician services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Physicians:
 - 1. to negotiate on behalf of any Physician with any Payor,
 - 2. to deal, refuse to deal, or threaten to refuse to deal with any Payor,
 - 3. regarding any term, condition, or requirement upon which any Physician deals, or is willing to deal, with any Payor, including, but not limited to, price terms, or
 - 4. not to deal individually with any Payor, or not to deal with any Payor through any arrangement other than Respondent.
- B. Exchanging or facilitating in any manner the exchange or transfer of information among Physicians concerning any Physician’s willingness to deal with a Payor, or the terms or conditions, including price terms, on which the Physician is willing to deal;
- C. Attempting to engage in any action prohibited by Paragraph II.A. or II.B., above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any Person to engage in any action that would be prohibited by Paragraphs II.A. through II.C. above.

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PROVIDED, HOWEVER, that nothing in this Paragraph II 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, so long as the arrangement does not restrict the ability, or facilitate the refusal, of Physicians who Participate in it to deal with Payors on an individual basis or through any other arrangement.

III.

IT IS FURTHER ORDERED that Respondent 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, or has Participated, in Respondent, and
 2. each officer, director, manager, and employee of Respondent;
- B. Within thirty (30) days after the date on which this Order becomes final, send copies of this Order, the Complaint, and the notice specified in Appendix A to this Order, by first-class mail return receipt requested, to the chief executive officer of each Payor that is listed in Appendix B or that contracts with Respondent for the provision of Physician services;
- C. Terminate, without penalty or charge, any Preexisting Contract with any Payor for the provision of Physician services, upon receipt by Respondent of a written request to terminate such contract from any Payor that is a party to the contract or that pays for the Physician services provided through the contract; PROVIDED, HOWEVER, that nothing

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contained herein shall affect the operation of any Preexisting Contract provision pertaining to the continuation of patient care for patients undergoing a course of treatment, or payment therefor, following expiration or termination of the Preexisting Contract;

- D. For a period of three (3) years after the date this Order becomes final:
 - 1. Distribute by first-class mail a copy of this Order and the Complaint to:
 - a. each 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,
 - b. each Payor that contracts with Respondent for the provision of Physician services, and that did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such Payor enters into such contract, and
 - c. each person who becomes an officer, director, manager, and employee of Respondent, 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; and
 - 2. Annually publish a copy of this Order and the Complaint in an official annual report or newsletter sent to all Physicians who Participate in Respondent, with such prominence as is given to regularly featured articles;
- E. Notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any

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other change in Respondent that may affect compliance obligations arising out of this Order; and

- F. File verified written reports within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, setting forth:
1. in detail, the manner and form in which Respondent has complied and is complying with this Order, including, but not limited to, (a) information sufficient to describe, for each Qualified Risk-Sharing Joint Arrangement established or operated by Respondent, the manner in which the Physicians who Participate in such arrangement share financial risk, and (b) information sufficient to describe, for each Qualified Clinically-Integrated Joint Arrangement established or operated by Respondent, the manner in which the Physicians who Participate in such arrangement have integrated their practices, and
 2. the name, address, and telephone number of each Payor with which Respondent has had any contact during the reporting period.

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:

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- A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in their possession, or under their control, relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to Respondent, and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on July 17, 2023.

By the Commission.

Decision and Order

Appendix A
[letterhead of SPA][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 SPA Health Organization ("SPA"), doing business as Southwest Physician Associates. I call to your attention Paragraph III.C. of the order, which gives you the right to terminate, without penalty or charge, any contracts with SPA that were in effect prior to your receipt of this letter.

Sincerely,

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Appendix B

Accountable Health Plans of America, Inc.
Aetna U.S. Healthcare North Texas, Inc.
Beech Street Corp.
Blue Cross Blue Shield of Texas, A Division of Health Care
Service Corp.
Carrollton-Farmers Branch Independent School District
City of Carrollton
First Health Group Corp.
Harris Select
HealthSmart Preferred Care, Inc.
Humana Health Plan of Texas, Inc.
Lewisville Independent School District
North Texas Healthcare Network
One Health Plan
PacifiCare of Texas, Inc.
Plano Independent School District
ppoNext, Inc.
Private Healthcare Systems, Inc.
ProAmerica Managed Care, Inc.
Provider Networks of America, Inc.
Prudential Healthcare
TML Intergovernmental Employee Benefits Pool
Teacher Retirement System of Texas Coordinated Care
Unicare Life & Health Insurance Company
United Healthcare of Texas, Inc.

Analysis

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

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with SPA Health Organization, doing business as Southwest Physician Associates (“Respondent” or “SPA”). 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 among SPA members on price and other competitively significant terms; refusing to deal with payors except on collectively agreed-upon terms; and negotiating fees and other competitively significant terms in payor contracts and refusing to submit to members payor offers that do not conform to Respondent’s standards for contracts.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final. The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true. The allegations in the Commission’s proposed complaint are summarized below.

The Complaint

Respondent SPA is a nonprofit corporation that contracts with third-party payors for the provision of medical services on behalf of its approximately 1,000 participating physicians. Respondent is organized and operated to further the pecuniary interests of

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those physicians, who are licensed to practice medicine in the State of Texas and who are engaged in the business of providing medical services to patients in the eastern part of the Dallas-Fort Worth metropolitan area (hereinafter “Dallas area”).

Physicians often contract with third-party payors, such as insurance companies and preferred provider organizations. The contracts typically establish the price and other terms under which the physicians will render services to the payors’ subscribers. Contracting physicians often agree to accept lower-than-customary compensation from these third-party payors to gain access to additional patients through the payor. Thus, these contracts may reduce payor costs, and may result in lower medical care costs to the payor’s subscribers.

Absent agreements among competing physicians, each competing physician decides for himself or herself whether, and on what price and other terms, the physician will contract with third-party payors to provide medical services to the payors’ subscribers. To be competitively marketable in the Dallas area, a payor must include in its physician network a large number of primary care physicians (“PCPs”) and specialists who practice in the Dallas area. Many of the PCPs and specialists who practice in the Dallas area are members of SPA. Accordingly, many payors concluded that they could not establish a viable physician network in areas in which SPA physicians are concentrated, without including a large number of SPA physicians in that network.

Respondent actively bargained with third-party payors, often proposing and counter-proposing fee schedules to be applied, among other terms. To maintain its bargaining power, SPA has discouraged its participating physicians from entering into unilateral agreements with third-party payors, and it has communicated to its participating physicians SPA’s determinations that specific fees and other contract terms offered by third-party payors may be inadequate. Many of SPA’s participating physicians have been unwilling to negotiate with third-party payors apart from SPA, and have communicated that

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fact to third-party payors seeking to resist SPA's collective demands.

Sometimes a network of competing physicians uses an agent to convey to payors information, obtained from each of its participating physicians individually, about fees and other significant contract terms that the physicians are willing to accept. In other instances, the agent may convey all payor contract offers to network physicians, with each physician then unilaterally deciding whether to accept or reject each offer. These "messenger model" arrangements, which are described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice (see <http://www.ftc.gov/reports/hlth3s.htm>), can facilitate contracting between physicians and payors without fostering agreements among competing physicians on fees and other competitively sensitive terms. Such agreements are likely, however, if the messenger negotiates fees and other competitively significant terms on behalf of the participating physicians, or facilitates the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to the physicians based on the messenger's opinion of the acceptability or appropriateness of the offer.

Rather than acting simply as a "messenger," Respondent facilitated and implemented agreements among its members on price and other competitively significant contract terms. It actively sought higher prices for its members and often did not convey to its participating physicians third-party payor offers that SPA deemed deficient, including offers that provided for fees that did not satisfy SPA's Board of Directors. SPA instead demanded, and often received, more favorable fee and other contract terms – terms that third-party payors would not have offered to SPA's participating physicians had those physicians engaged in unilateral, rather than collective, negotiations with the payors. Only after the third-party payor acceded to fee and other contract terms acceptable to SPA, would SPA convey the payor's proposed contract to SPA's participating physicians for their consideration.

Analysis

Since July of 1999, SPA and its members have entered only into fee-for-service agreements with payors, pursuant to which SPA and its members did not undertake financial risk-sharing. Further, SPA members have not integrated their practices to create significant potential efficiencies. Respondent's joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration. Instead, the Respondent's acts and practices have restrained trade unreasonably and hindered competition in the provision of physician services in the Dallas area in the following ways, among others: prices and other forms of competition among Respondent's members were unreasonably restrained; prices for physician services were increased; and health plans, employers, and individual consumers were deprived of the benefits of competition among physicians. Thus, Respondent's conduct has harmed patients and other purchasers of medical services by restricting choice of physicians and increasing the prices of medical services.

The Proposed Consent Order

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

Paragraph II.A prohibits Respondent from entering into or facilitating agreements among 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 through any arrangement other than SPA.

Paragraph II.B prohibits Respondent from exchanging or facilitating the transfer of information among physicians concerning any physician's willingness to deal with a payor, or the

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

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

Paragraph II contains a proviso that allows 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,” so long as the arrangement does not restrict the ability, or facilitate the refusal, of participating physicians to deal with payors on an individual basis or through any other arrangement. To be a “qualified risk-sharing joint arrangement,” an arrangement must satisfy two conditions. First, all participating physicians 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 also 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 physicians 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.

As explained previously, the order would bar SPA from encouraging or facilitating agreements among or on behalf of

Analysis

otherwise competing physicians as to the terms under which the physicians would provide medical services. SPA's negotiating with a third-party payor of contract terms applicable only to SPA's own proposed performance ordinarily would not encourage or facilitate an agreement among its participating physicians as to the terms under which the physicians would provide medical services. Therefore, a SPA-payor negotiation of terms applicable only to SPA's own proposed performance ordinarily would not be affected by the order. SPA's conduct in such a negotiation may not, however, encourage, facilitate, or conceal an agreement by or on behalf of participating physicians as to the terms upon which they would provide medical services. Thus, for example, the order would not ordinarily preclude SPA's negotiating with third-party payors as to whether, and on what terms, SPA itself would engage in delegated credentialing of physicians on behalf of the payor, undertake specified contract administration activities, maintain specified insurance coverages, or indemnify the payor.

Similarly, the order ordinarily would not affect SPA's communicating to its participating physicians accurate, factual, and objective analyses of proposed third-party payor contract terms, so long as such communication does not encourage, facilitate or conceal a prohibited agreement. SPA may not, however, do so in a manner that directly or by implication suggests that physicians should or should not accept the contract offers or particular terms thereof upon which they would provide medical services. Further, the order ordinarily would not preclude SPA's sharing with a third-party payor SPA's objective analysis of the proposed contract terms prior to communicating that analysis to its participating physicians, provided that SPA informs the payor that SPA will promptly messenger the contract proposal to its participating physicians upon the payor's request, that SPA promptly complies with each such request, and that any such communications by SPA to the payor do not directly or by implication encourage, facilitate, or conceal a prohibited agreement.

Analysis

Paragraphs III.A and III. B require SPA to distribute the complaint and order to its members, payors with which it previously contracted, and specified others. Paragraph III.C requires SPA to terminate, without penalty, payor contracts that it had entered into during the collusive period, at any such payor's request. This provision is intended to eliminate the effects of Respondent's joint price setting. Paragraph III.C also contains a proviso to preserve payor contract provisions defining post-termination obligations relating to continuity of care during a previously begun course of treatment.

The remaining provisions of the proposed order impose complaint and order distribution, reporting, and other compliance-related provisions. For example, Paragraph III. D requires SPA to distribute copies of the complaint and order to incoming SPA physicians, payors that contract with SPA for the provision of physician services, and incoming SPA officers, directors, and employees. Further, Paragraph III.F requires SPA to file periodic reports with the Commission detailing how SPA has complied with the order. Paragraph V. authorizes Commission staff to obtain access to Respondent's records and officers, directors, and employees for the purpose of determining or securing compliance with the order. The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

UNITHER PHARMA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 AND SEC. 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4089; File No. 0223036
Complaint, July 22, 2003--Decision, July 22, 2003

This consent order, among other things, prohibits Respondents Unither Pharma, Inc. and United Therapeutics Corporation – which market HeartBar products, chewy food bars and powders enriched with L-Arginine, vitamins, and minerals – from representing that HeartBar (HeartBar, HeartBar Plus, or HeartBar Sport), or any other L-Arginine product used in or marketed for the treatment, cure, or prevention of cardiovascular disease, or the improvement of cardiovascular or vascular function (1) substantially decreases leg pain for people with cardiovascular disease; (2) reverses damage or disease to the heart caused by high cholesterol, smoking, diabetes, estrogen deficiency, or any other medical condition or health risk; (3) prevents age-related vascular problems, including “hardening of the arteries” and plaque formation, or reduces the risk of developing cardiovascular disease; (4) reduces or eliminates the need for surgery, such as a coronary bypass or angioplasty, or for medications, such as nitroglycerin, in patients with cardiovascular disease; or (5) improves endurance, circulation, and energy for the general population, unless the claims are substantiated by competent and reliable scientific evidence. The order also requires the respondents to possess competent and reliable scientific evidence to support any future claims about the health benefits, performance, or efficacy of any food, medical food, or dietary supplement used in or marketed for (1) the treatment, cure, or prevention of cardiovascular disease, or (2) the improvement of cardiovascular or vascular function. In addition, the order prohibits the respondents from misrepresenting, with respect to the above products, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research. The order also requires the respondents notify their distributors as to the claims the Commission has challenged and report to the Commission any distributors who continue to make claims that the Commission’s order prohibits.

Participants

For the Commission: *Matthew Daynard, Keith Fentonmiller, Mary K. Engle and Dennis Murphy.*

For the Respondents: *Daniel Ferrel McInnis, Akin, Gump, Strauss, Hauer & Feld L.L.P.*