

Complaint

IN THE MATTER OF

WASHINGTON UNIVERSITY PHYSICIAN NETWORK

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4093; File No. 0210188**Complaint, August 22, 2003--Decision, August 22, 2003*

This consent order, among other things, prohibits Respondent Washington University Physician Network – a not-for-profit corporation consisting of 900 faculty physicians and 600 community physicians who provide health care services in the greater St. Louis area, and whose sole legal member is Washington University – 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, refuse to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or not to deal with any payor through an arrangement other than the respondent. The order also prohibits the respondent from facilitating exchanges of information among physicians concerning whether, or on what terms, to contract with a payor. 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 send notice of the order and complaint to all its participating physicians, employees and principals – and to all payors it has contacted since January 1, 1998, concerning the provision of physician services – and to terminate, without penalty, any preexisting contract with a payor upon receipt of a payor's written request to terminate the contract.

Participants

For the Commission: *Garry Gibbs, Melea Epps Greenfeld, David R. Pender, Eric D. Rohlck, Daniel P. Ducore, Jeffrey W. Brennan, Louis Silvia, Jr. and Mary T. Coleman.*

For the Respondent: *John J. Miles and E. John Steren, Ober Kaler.*

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Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority

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vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that the Washington University Physician Network (“WUPN”) has violated and is violating Section 5 of the Federal Trade Commission Act, as amended, 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 its Complaint stating its charges in that respect as follows:

Nature of the Case

1. This matter concerns horizontal agreements among competing physicians in the greater St. Louis, Missouri, 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 WUPN, and their conduct increased the prices of physician services in the greater St. Louis area.

Respondent WUPN

2. WUPN is organized under The General Not for Profit Corporation Law of Missouri, and is doing business under and by virtue of the laws of the State of Missouri. WUPN’s office and principal place of business is located at 7425 Forsyth Boulevard, Suite 307, Clayton, Missouri 63105.
3. Washington University and approximately 1,500 physicians are members of WUPN. WUPN, among other things, negotiates on the physicians’ behalf for contracts with payors. All of the WUPN physicians practice medicine in the greater St. Louis area. These physicians include not only approximately 900 members of the clinical faculty of the Washington University School of Medicine (“faculty physicians”), but also approximately 600 independent physicians, whom WUPN refers to as “community physicians.”

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4. At all times relevant to this Complaint, WUPN's community physicians have been engaged in the business of providing medical services to patients for a fee. WUPN's faculty physician members are full-time, salaried employees of the Washington University School of Medicine. Except to the extent that competition has been restrained as alleged herein, WUPN's community physicians compete with one another and with faculty physician members for the provision of physician services.

The Commission Has Jurisdiction over WUPN

5. WUPN's general business activities and those of its members, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 44.
6. WUPN is a corporation within the meaning of Section 4 of the FTC Act. Although WUPN's articles of incorporation and by-laws designate Washington University, a non-profit corporation, as its "sole member" for purposes of Missouri corporation law, WUPN's community physicians are "members" of the corporation within the meaning of Section 4 of the FTC Act. WUPN engages in substantial activities for the pecuniary benefit of its for-profit community physician members.
7. WUPN is governed by its Board of Directors, which includes 29 "Voting Directors," a majority of whom (16) are community physicians. These community physician board members are elected by WUPN's community physician membership. The board's remaining voting members are faculty physicians chosen by Washington University.
8. WUPN regularly and in the ordinary course of business classifies its community physicians as "members," and conducts its business affairs in a manner that demonstrates that the community physicians are "members" of WUPN. To

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participate in WUPN's network and utilize WUPN's contract negotiation and other services, a community physician must complete a WUPN "Membership Application." WUPN's "Membership and Credentialing Committee," a 12-member panel of board members and appointees, evaluates the physician's credentials and recommends to the board the physician's eligibility for membership. Once community physicians become members, they receive a "New Member Information Packet" and are required to pay annual WUPN membership dues.

9. Community physicians, through their elected representatives on the board, actively participate in WUPN's management and business operations. WUPN's activities substantially advance its community physician members' economic interests, including providing discounted insurance rates, group purchasing, continuing medical education, and financial planning opportunities; and engaging in lobbying, marketing, and public relations on behalf of its community physicians.

Overview of Market and Physician Competition

10. WUPN's community physicians provide health care services to patients in St. Louis city and St. Louis County, Missouri; St. Charles and Jefferson Counties in Missouri; and Madison County, Illinois ("the greater St. Louis area").
11. Physicians often deal with payors through contracts that establish the terms and conditions, including prices and other competitively significant terms, pursuant to which the physicians provide medical services to patients who are enrollees in the payors' health insurance plans. Payors may also develop and sell access to networks of physicians to employers and other purchasers of health insurance benefits. Physicians entering into payor contracts often agree to reductions in their compensation to obtain access to additional patients made available by the payors' relationship with enrollees of their health insurance plans.

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Physician-payor contracts may reduce payors' costs, enable them to lower the price of health insurance, and reduce out-of-pocket medical care expenditures by subscribers to the payors' health insurance plans.

12. Absent agreements among them to the contrary, competing physicians decide unilaterally whether to enter into contracts with payors to provide services to enrollees of the payors' health insurance plans, and on the prices and other terms and conditions of dealing that they will accept under such contracts.
13. 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 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 2002 RBRVS").
14. In light of WUPN's large number of member physicians and the extensive geographic territory that they collectively cover in the greater St. Louis area, payors believe that, to be competitively marketable in that area, their health insurance plans must offer physician networks that include WUPN's physician members.

**WUPN Negotiated Payor Contracts
on the Physicians' Behalf**

15. WUPN was established in 1993 to promote, among other things, the collective economic interests of its community physicians by increasing their negotiating leverage with payors. Among other things, WUPN, through its board, develops guidelines for negotiating, reviewing, approving,

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rejecting, terminating, and renewing payor contracts; approves price terms for dealing with payors; establishes procedures for credentialing WUPN's physicians; approves formulas for distributing revenues among the School of Medicine and community physicians from payor contracts; and establishes billing and payment procedures for the community physicians. WUPN has implemented agreements among its physician members to restrain competition by, among other things, engaging in collective negotiations over price and other terms and conditions of dealing with payors, and resisting payors' cost containment measures. In 2000, WUPN reported that it had "successfully negotiated 25 managed care fee-for-service contracts for its members, most of which have very favorable terms when compared to contracts entered into on an individual basis or through another organization."

16. WUPN negotiates payor contracts, including the price terms therein, on the collective behalf of its faculty physicians and community physicians. Representatives of WUPN's management committee, a 12-member panel consisting of physician board members and other board appointees, negotiate directly with payors and report on the progress of their negotiations to the board. This committee advises the board on which proposed payor price terms to accept or reject, and which payor contracts to terminate or continue. The board decides whether to accept or reject a payor contract, including the price terms contained therein, upon the approval of a majority of the community physician directors and of the faculty physician directors present at the board meeting, so long as a majority of the board is present.
17. WUPN's member physicians sign an agreement appointing WUPN as their agent in contract negotiations with payors. If a WUPN member physician participates in a payor's health plan through a contract that WUPN negotiated after the same physician contracted to participate in the same plan through another group contract, then WUPN informs that

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payor that the WUPN contract supersedes the payor's pre-existing contract with that physician.

Negotiations with Blue Cross Blue Shield of Missouri

18. Blue Cross Blue Shield of Missouri ("BCBS") is a payor doing business in the greater St. Louis area. At a November 2000 board meeting, WUPN's management committee reported that its representatives had begun negotiating on behalf of WUPN's member physicians for a new contract with BCBS. WUPN's then-current contract with BCBS was scheduled to expire on March 31, 2001. Pursuant to their agreement with each other and with WUPN, the community physicians and faculty physicians acted in concert concerning whether and on what terms, including price, to deal with BCBS.
19. On February 26, 2001, WUPN demanded in writing that BCBS pay specific, substantial price increases before its member physicians would agree to participate in BCBS's several health plan products. For example, WUPN required that BCBS pay its member physicians 140% of 2001 RBRVS for their participation in BCBS's "BlueChoice" product. On March 19, 2001, BCBS counter proposed much smaller rate increases to WUPN. BCBS's proposed terms included, with respect to the BlueChoice product, payment levels of 85% to 110% of 2001 RBRVS, depending on the covered medical procedure. WUPN rejected this offer and, at an April 2001 board meeting, its management committee asked for and received the board's permission to issue a notice of termination to BCBS.
20. In May of 2001, shortly before the threatened termination, BCBS met WUPN's demands for substantial price increases. BCBS agreed to pay WUPN's physician members 140% of RBRVS for their participation in the BlueChoice plan. BCBS also agreed to meet WUPN's price demands for the other BCBS products.

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Negotiations with CarePartners

21. CarePartners is a payor doing business in the greater St. Louis area. Pursuant to their agreement with each other and with WUPN, the community physicians and faculty physicians acted in concert concerning whether and on what terms, including price, to deal with CarePartners. On February 1, 2000, at a WUPN board meeting, the management committee reported on a meeting that it recently held with CarePartners to discuss payment levels under CarePartners' contract with the WUPN physicians. WUPN, through its management committee negotiators, demanded substantial price increases under the CarePartners contract. CarePartners counterproposed much smaller price increases, which WUPN rejected. WUPN insisted that CarePartners submit a revised price proposal by the end of February 2000 "that better addresses WUPN Member's [sic] expectations."
22. At a March 7, 2000, WUPN board meeting, the management committee reported that CarePartners submitted a revised proposal that was "equally as unacceptable as their first proposal," and the board rejected it. On April 4, the board voted to serve CarePartners with notice that WUPN was terminating its current contract, effective April 26. After receiving this notice, CarePartners – threatened with the community physicians' and faculty physicians' concerted refusal to deal – resumed contract negotiations with WUPN. On May 1, 2000, CarePartners agreed to pay the prices that WUPN demanded. The Board voted to accept these terms, which became effective December 1, 2000.

Negotiations with Other Payors

23. Pursuant to agreements with and among the community physicians and faculty physicians, and on their collective behalf, WUPN has negotiated price and other competitively

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significant contract terms with other payors as well, including CIGNA Healthcare, UnitedHealth Group, and Healthlink. WUPN's coercive tactics, including threatened refusals to deal, have forced payors to pay higher prices to WUPN member physicians to obtain their participation in the health insurance plans available to patients in the greater St. Louis area.

WUPN Engaged in Restraints of Trade

24. The faculty physicians and community physicians, acting as a combination of competing physicians through and with WUPN, have restrained competition by, among other things:
 - a. facilitating, negotiating, entering into, and implementing agreements among themselves and WUPN on price;
 - b. refusing to deal with payors except on collectively agreed-upon terms; and
 - c. negotiating prices and other competitively significant terms in contracts with payors.

WUPN's Actions Are Not Justified by Any Efficiencies

25. WUPN's joint negotiation of price and other competitively significant contract terms has not been, and is not, reasonably related to any efficiency-enhancing integration among the community physicians themselves, or among the community physicians jointly with the faculty physicians.

WUPN's Conduct Resulted in Anticompetitive Effects

26. WUPN's actions as described in this Complaint have had, or have tended to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the greater St. Louis area in the following ways, among others:

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- a. price and other forms of competition among WUPN's member 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.
27. The combinations, conspiracies, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combinations, conspiracies, acts, and practices, or the effects thereof, are continuing and will continue in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of August, 2003, issues its Complaint against WUPN.

By the Commission, Commissioner Harbour not participating.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Washington University Physician Network (“WUPN”), hereinafter referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission 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 has reason to believe that Respondent has violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, 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 Washington University Physician Network is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of

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Missouri, with its office and principal place of business located at 7425 Forsyth Boulevard, Suite 307, Clayton, Missouri 63105.

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 Washington University Physician Network, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “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.
- C. “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 applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- D. “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. Payor includes any person

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that develops, leases, or sells access to networks of physicians.

- E. “ Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- F. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- G. “Preexisting contract” means a contract that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent by a Respondent, pursuant to Paragraph III.B. of this Order, of such payor’s right to terminate such contract.
- H. “Principal address” means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.
- I. “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 arrangement.

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- J. “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,
 - 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 arrangement.

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- K. “WU faculty members” means Washington University School of Medicine (WUSM) employees or contracted providers who provide WU physician services.
- L. “WU physician services” means physician services provided by WU faculty members on behalf of WUSM, and for which WUSM receives all financial remuneration from the payor for the physician’s services.

II.

IT IS FURTHER ORDERED that Respondent, 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;
 - 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’s arrangements;

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- 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 with a payor;
- C. Attempting to engage in any action prohibited by Paragraphs II.A. or II.B., above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A. through II.C. above.

PROVIDED HOWEVER, that nothing in Paragraph II shall prohibit any agreement involving, or conduct by, Respondent, that (A) is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically- integrated joint arrangement, so long as the arrangement does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement, or (B) solely involves WU faculty members with respect to WU physician services.

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final, send by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to:
 - 1. each physician, except for WU faculty members, who participates, or has participated, in Respondent, that respondent has a record of having been in contact with since January 1, 1998, regarding contracting for the provision of physician services; and

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2. each officer, director, manager, and employee of Respondent;
- B. Within thirty (30) days after the date on which this Order becomes final, send by first-class mail, return receipt requested, copies of this Order, the Complaint, and the notice specified in Appendix A to this Order, to the chief executive officer of each payor that Respondent has a record of having been in contact with since January 1, 1998, regarding contracting for the provision of physician services;
- C. Terminate, without penalty or charge, in compliance with any applicable state laws, any preexisting contract between Respondent and any payor for the provision of physician services, upon receipt by Respondent of a written request from such payor to terminate such contract; and
- D. For a period of three (3) years after the date this Order becomes final:
1. Distribute by certified mail, return receipt requested, 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, 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, within thirty (30) days of the time that such payor enters into such contract; and
 - c. each person who becomes an officer, director, manager, or employee of Respondent, and who did not previously receive a copy of this Order and the

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Complaint, within thirty (30) days of the time that he or she assumes such responsibility; 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.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

- A. At least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor company or corporation, the creation or dissolution of subsidiaries, or any other change in Respondent that may affect compliance obligations arising out of this Order; and
- B. Of any change in Respondent's principal address, within twenty (20) days of such change in address.

V.

IT IS FURTHER ORDERED that 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 Respondent 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 has represented or advised

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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 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 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 physician services.

VI.

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

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VII.

IT IS FURTHER ORDERED that this Order shall terminate on August 22, 2023.

By the Commission, Commissioner Harbour not participating.

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Appendix A

[letterhead of WUPN]

[date]

[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 Washington University Physician Network ("WUPN").

Pursuant to Paragraph III.C. of the enclosed order, WUPN must allow you to terminate, upon written request, without any penalty or charge, any contracts with WUPN that were in effect prior to the receipt of this letter.

Any request either to terminate or to extend the contract should be made in writing, and sent to me at the following address:
[address].

Sincerely,

[Signature of President or CEO of WUPN]
President or CEO WUPN
Washington University Physician Network

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 Washington University Physician Network (WUPN). The agreement settles charges that WUPN violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among WUPN and its independent, community-based physician members (“community physicians”), and facilitating agreements among its community physicians and its Washington University School of Medicine full-time faculty physician members (“faculty physicians”), 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 WUPN that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint Allegations

WUPN consists of 900 faculty physicians and 600 community physicians who provide health care services in St. Louis, Missouri and four neighboring counties (“the greater St. Louis area”). WUPN was established in 1993 to facilitate, among competing

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physicians, collective bargaining with health plans in order to obtain more favorable reimbursement rates and other “very favorable terms when compared to contracts entered into on an individual basis or through another organization.”

WUPN is a not-for-profit corporation, and its sole legal member is Washington University (“WU”), also a non-profit entity. Section 4 of the FTC excludes certain types of non-profit corporations from its definition of entities under its jurisdiction. However, the Commission has jurisdiction over WUPN because WUPN’s community physicians, who operate for profit, are “members” of WUPN due to their significant role in governing the organization. Also, WUPN provides substantial economic benefits for its community physician members, who make up a minority of the membership but are granted a substantial role in WUPN to enhance their incomes and bargaining power.

WUPN is managed and controlled by a Board of Directors made up of 16 community physicians and 13 faculty physicians. Contracts with health plans are negotiated by representatives of WUPN’s Management Committee, and progress of its negotiations is reported to WUPN’s Board. The Committee recommends to the Board whether to accept or reject a payor’s fee schedule, or whether to terminate or extend a payor’s existing contract. The Board votes on the recommendation, which requires majority approval.

WUPN has successfully coerced a number of health plans to increase the fees they pay to WUPN members, and thereby raised the cost of medical care in the greater St. Louis area. As a result of the challenged actions of WUPN, consumers in the greater St. Louis area are deprived of the benefits of competition among physicians. By facilitating agreements among WUPN members to deal only on collectively-determined terms, and actual or threatened refusals to deal with health plans that would not meet those terms, WUPN has violated Section 5 of the FTC Act.

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WUPN's collective negotiations with payors are not justified by any efficiency-enhancing integration among the community physicians, or among the community physicians and the faculty physicians.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of the illegal conduct charged in the complaint, while allowing WUPN to engage in legitimate conduct that does not impair competition. It is similar to recent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise the fees they receive from health plans.

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits WUPN 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, refuse to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or not to deal with any payor through an arrangement other than WUPN.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits WUPN 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.

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.

First, WUPN would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate

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joint contracting arrangements among competing physicians, whether a “qualified risk-sharing joint arrangement” or a “qualified clinically-integrated joint arrangement.” Second, WUPN would be permitted to enter into any agreement or engage in any conduct that only involves WU faculty members with respect to services provided by WU physicians.

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.

Paragraphs III.A and III.B require WUPN to send notice of the order and complaint to all WUPN participating physicians, WUPN employees and principals, and all payors WUPN has contacted since January 1, 1998, concerning the provision of physician services. Paragraph III.C. requires WUPN to terminate, without penalty, any preexisting contract with a payor upon receipt of a payor’s written request to terminate the contract. This provision is intended to eliminate the effects of WUPN’s anticompetitive actions. Paragraph III.D of the proposed order

Analysis

requires WUPN to distribute the order and complaint prospectively to new members, newly contracted payors, and new employees for a period of three years, and Paragraphs IV through VI set out WUPN's requirements to report or provide access to information to the Commission to facilitate monitoring of WUPN's compliance with the order.

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

GLOBAL INSTRUMENTS LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4092; File No. 0223122**Complaint, August 22, 2003--Decision, August 22, 2003*

This consent order, among other things, prohibits Respondents Global Instruments Ltd. and Charles Patterson from representing – unless they possess competent and reliable scientific evidence that substantiates the representations – (1) that any pest control product repels, controls, or eliminates, temporarily or indefinitely, mice, rats, cockroaches, or any other insects or animal pests and that it does so in an area of a certain size; (2) that any pest control product is an effective alternative to or eliminates the need for chemicals, pesticides, insecticides, exterminators, or any other pest control product or service; and (3) that any pest control product will alter the electromagnetic field, send a pulsating signal, or otherwise work inside the walls or through the wiring of homes or other buildings in a manner that effectively repels, controls, drives away, or eliminates mice, rats, cockroaches, or any other insects or animal pests. The order also requires the respondents to possess and rely upon competent and reliable evidence – which when appropriate must be competent and reliable scientific evidence – for claims about the benefit, performance, or efficacy of any product.

Participants

For the Commission: *Constance M. Vecellio, Janice Podoll Frankle, Patricia F. Bak, Robert M. Frisby, Elaine D. Kolish and Susan Braman.*

For the Respondents: *Stan Johnston, Lewis, Rice & Fingersh, L.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Global Instruments Ltd., a corporation, and Charles Patterson, individually and as an officer of the corporation (“respondents”), have violated the provisions of the Federal Trade Commission