

Complaint

IN THE MATTER OF

THE MAINE HEALTH ALLIANCE, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4095; File No. 0210017**Complaint, August 27, 2003--Decision, August 27, 2003*

This consent order, among other things, prohibits Respondent The Maine Health Alliance – a nonprofit corporation consisting of more than 325 physicians and 11 hospitals in northeastern Maine – and its Executive Director, Respondent William R. Diggins, from entering into or facilitating any agreement between or among any physicians (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through the Alliance. The order also prohibits the respondents from facilitating exchanges of information among physicians concerning whether, or on what terms, to contract with a payor. In addition, the order prohibits the respondents from attempting to engage in – or from encouraging, pressuring, or attempting to induce any person to engage in – any action prohibited by the order. The order also prohibits the respondents from participating in, or creating, future unlawful agreements for hospital services. In addition, the order requires the Alliance to notify the Commission at least 60 days prior to negotiating or entering into certain agreements with payors related to qualified risk sharing or clinically integrated joint arrangements– or discussing price or related terms among the participants of such arrangements – and, at any payor's request and without penalty, to terminate its current contracts with respect to providing physician services. The order also requires the alliance to terminate all current contracts not otherwise terminated no later than one year from the date the order becomes final.

Participants

For the Commission: *Robert S. Canterman, Christi Braun, Mary Connelly-Draper, David R. Pender, Markus M. Meier, Jeffrey W. Brennan, Anne R. Schenof, Daniel P. Ducore, and Louis Silvia* .

For the Respondents: *Wayne A. Mack, Duane Morris, LLP, and John J. Miles, Ober, Kaler, Grimes & Shriver.*

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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 vested in it by said Act, the Federal Trade Commission, having reason to believe that the Maine Health Alliance (the “Alliance”) and William R. Diggins (the “Respondents”) have violated and are 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 this Complaint stating its charges in that respect as follows:

The Nature of the Case

1. Acting through the Alliance, the vast majority of hospitals and physicians located in a five-county area of northeastern Maine have agreed to limit competition among themselves by collectively negotiating contracts – including price terms – with employers, health insurers, and others seeking to provide health-care coverage to the people of northeastern Maine (“payors”). Further, these eleven hospitals and more than 325 physicians have refused to contract individually with those unwilling to meet the Alliance’s collective terms. These price-fixing agreements and concerted refusals to deal among otherwise competing hospitals and among otherwise competing physicians, in turn, have kept the price of health care in northeastern Maine above the level that would have prevailed absent the Alliance’s illegal conduct. The Alliance has not undertaken any efficiency-enhancing integration sufficient to justify its challenged conduct.

The Respondents

2. The Alliance is a taxable, nonprofit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Maine, and its principal address is 12 Stillwater Avenue, Suite C, Bangor, Maine 04401. The Alliance was formed in 1995, and its membership currently consists of over 325 physicians and

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eleven hospitals located throughout a five-county area in northeastern Maine.

3. William R. Diggins is the Alliance's Executive Director, and he has served in this capacity since its inception. As Executive Director, Mr. Diggins manages the Alliance's day-to-day operations, and he is one of the organization's principal contract negotiators with payors. Mr. Diggins' principal address is 12 Stillwater Avenue, Suite C, Bangor, Maine 04401.

Jurisdiction and Interstate Commerce

4. The Alliance's eleven hospital members are: Calais Regional Hospital, Cary Medical Center, Down East Community Hospital, Houlton Regional Hospital, Maine Coast Memorial Hospital, Mayo Regional Hospital, Millinocket Regional Hospital, Mount Desert Island Hospital, Northern Maine Medical Center, Penobscot Valley Hospital, and St. Joseph Hospital. Each of these hospitals is a tax-exempt organization. The Alliance is not a tax-exempt entity.

5. The Alliance's approximately 325 physician members include both primary care and specialist physicians. A substantial majority of these physicians practice in independent solo or small group practices on a for-profit basis. Some physician members are salaried employees of an Alliance hospital.

6. At all times relevant to this complaint, a substantial majority of the Alliance's physician members have been engaged in the business of providing medical services for a fee. Except to the extent that competition has been restrained as alleged herein, Alliance physicians have been, and are now, in competition with other Alliance physicians for the provision of physician services.

7. At all times relevant to this complaint, the Alliance's hospitals have been engaged in the business of providing hospital services for a fee. Except to the extent that competition has been restrained as alleged herein, Alliance hospitals have been, and are

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now, in competition with other Alliance hospitals for the provision of hospital services.

8. The Alliance's bylaws provide that physician members hold 11 of the 22 seats on the Alliance's Board of Directors ("Board"). The physician members at each of the 11 Alliance hospitals elect a representative to the Board. In addition, each Alliance hospital appoints a hospital representative to serve on the Alliance Board. The Board is the Alliance's chief policy-making body.

9. The Alliance is organized in substantial part, and is engaged in substantial activities, for the pecuniary benefit of its members, and is therefore a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

10. The Respondents' general business practices and conduct, including the acts and practices alleged herein, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

11. According to the Alliance's records, as of 2002, the contracts that the Respondents and others have negotiated with payors and entered into on behalf of the Alliance's physicians and hospital members represent "in excess of 100 million dollars in commercial revenue."

Overview of the Market and Competition

12. The Alliance and its physician and hospital members do business in Aroostook, Hancock, Penobscot, Piscataquis, and Washington Counties in northeastern Maine (the "Northeastern Maine Counties").

13. Physicians often contract with payors to establish the terms and conditions, including price and other competitively significant terms, under which they will provide services to subscribers of health plans.

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14. Hospitals, likewise, often enter into contracts with payors to establish the terms and conditions, including price and other competitively significant terms, under which they will provide services to subscribers of health plans.

15. Physicians and hospitals entering into payor contracts often agree to discount or lower their prices in exchange for access to additional patients made available by the payors' relationship with their subscribers. These contracts may reduce payors' costs and enable payors to lower the price of health insurance, and reduce out-of-pocket medical care expenditures by subscribers to the payors' health insurance plans.

16. Absent agreements among physicians or hospitals on prices and other contract terms on which they will provide services to subscribers of health plans, competing physicians and competing hospitals decide individually whether to enter into contracts with payors, and at what prices they will accept payment for services rendered pursuant to such contracts.

17. The Medicare Resource Based Relative Value Scale ("RBRVS") is a system used by the Centers for Medicare and Medicaid Services ("CMS") to determine the amount to pay physicians for the services they render to Medicare patients. Under RBRVS, the price for physician services is determined by multiplying a dollar conversion factor, set by CMS, by the Relative Value Unit ("RVU") assigned by CMS to each physician service (*e.g.*, under RBRVS, a Medicare conversion factor of \$35 x 2.34 RVU for a physician service = an \$82 fee). Payors in many areas of the country make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fee for a particular year (*e.g.*, "110% of 2003 RBRVS"). In the Northeastern Maine Counties, payors negotiate the conversion factor, rather than a percentage of the RBRVS fee, with physicians. For example, if a Maine payor offers a conversion factor of \$42, rather than the Medicare conversion factor of \$35, and the RVU that CMS assigns for a particular

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physician service is 2.34, then the physician's price for that service to the payor would be $\$42 \times 2.34$, or \$98.28.

18. The Maine Bureau of Insurance has promulgated access to care regulations requiring health maintenance organizations ("HMOs") to make physician and hospital services available within certain travel times and distances from the residences of the HMO's subscribers. To comply with these regulations, an HMO doing business in the Northeastern Maine Counties must include in its provider network a large number of primary care and specialist physicians and hospitals that provide services in the Northeastern Maine Counties.

19. To be competitively marketable in the Northeastern Maine Counties, a payor's health plan must include in its provider network a large number of primary care and specialist physicians and hospitals in the Northeastern Maine Counties.

20. The substantial majority of the primary care and specialist physicians who practice in the Northeastern Maine Counties are members of the Alliance, and more than 85% of the physicians on staff at the Alliance's hospitals are members of the Alliance. Eleven of the sixteen hospitals in the Northeastern Maine Counties are members of the Alliance.

**The Alliance Is a Joint Contracting Organization,
and Acts as an Exclusive Contracting Agent, for Its Members**

21. According to its business records, the Alliance was formed primarily to serve as a "joint contracting organization" for its physician and hospital members, and to negotiate payor contracts that contain "higher compensation" and other more "advantageous" contract terms than its physician and hospital members could obtain by dealing individually with payors. Moreover, as set forth in the Alliance's 1998 Strategic Plan, its "mission" is to provide Alliance members with "increased market strength through joint contracting."

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22. The Alliance Board, in conjunction with its Contracts Committee, has compiled written “Contracting Guidelines and Parameters” setting forth price-related and other competitively significant terms that the Alliance requires when contracting with payors on its members’ behalf.

23. As part of the process of joining the Alliance, physicians and hospitals sign an agreement designating the Alliance as their negotiating agent to contract with payors, and authorizing the Alliance to enter into, on their behalf, payor contracts that meet the organization’s “Contracting Guidelines and Parameters.”

24. The Board has authorized Mr. Diggins to serve as one of the Alliance’s principal negotiating agents with payors. Mr. Diggins reports the details of Alliance negotiations with payors, including the status of price negotiations and the specific price levels that are discussed, to the Alliance’s Contracts Committee and the Board.

25. The Board relies on Mr. Diggins’s recommendations in deciding whether to accept or reject a payor contract on behalf of the Alliance’s physician and hospital members.

26. In correspondence with Alliance physicians, Mr. Diggins has touted “the favorable compensation which the Alliance has obtained for its physician members.” Alliance representatives, including Mr. Diggins, demanded and received payor contracts containing higher conversion factors used to determine prices for physician services than physicians were able to obtain through direct, unilateral negotiations with payors. As a result of the higher conversion factors that the Alliance demanded, the Alliance physicians received higher compensation for their services.

27. Alliance hospitals determine their own respective price lists. The Alliance, representing the hospitals collectively, fixes the maximum percentage discount allowable from member hospital price lists. In correspondence with Alliance hospitals,

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Mr. Diggins asserted that “Alliance contracting has frequently afforded its members better compensation than its individual hospitals could have obtained unilaterally,” by demanding and receiving smaller discounts off the hospital’s charges and refusing payor requests to negotiate the hospital list prices underlying the discounts.

28. The Alliance and Mr. Diggins, on the Alliance members’ collective behalf, also have negotiated competitively significant contract terms in addition to price, resulting in higher compensation than the physicians and hospitals could have obtained without the Alliance’s collective bargaining power (*e.g.*, large monetary penalties for failure to pay in a timely manner, and restrictions on how payors utilize software programs to review physicians’ claims for payment).

29. Although the Alliance’s rules and bylaws state that its physician and hospital members are permitted to participate in other provider networks and to negotiate with payors individually, the Alliance and Mr. Diggins have repeatedly convinced Alliance members to contract exclusively through the organization. They have done so by, among other things:

- a. urging Alliance physicians, when contacted individually by payors, to “refer them to the Alliance” to enhance the group’s collective power;
- b. facilitating efforts by Alliance physicians to “roll their [pre-existing individual payor] contracts through the Alliance” when they came up for renewal, to benefit from the more lucrative terms that the Alliance demands from payors;
- c. discouraging Alliance physicians from contracting with other provider networks, and encouraging those who already are members of other networks to “reconsider [their] participation” in those networks, to maintain the Alliance’s collective power; and

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- d. warning Alliance hospitals that contracting outside the Alliance will “‘gut’ the organization” and “diminish” its purpose and effectiveness.

30. By agreeing with each other to negotiate concertedly through the Alliance, the Alliance’s physician members and hospital members have obtained higher compensation and other more favorable contract terms from payors than they would have by negotiating with payors individually.

Aetna, Inc.

31. In September 1996, the Alliance entered into a contract with NYLCare Health Plans of Maine, Inc. (“NYLCare”), a payor doing business in the Northeastern Maine Counties. In 1998, Aetna, Inc. (“Aetna”), acquired NYLCare, and assumed all of NYLCare’s contracts with physicians and hospitals in the Northeastern Maine Counties, including NYLCare’s contract with the Alliance.

32. Through contract negotiations with NYLCare in 1996, the Alliance, on behalf of its physician members, demanded and received a \$65 conversion factor, which is equivalent to approximately 175% of 1996 RBRVS, for services performed for non-HMO subscribers. For NYLCare’s HMO subscribers, the Alliance successfully negotiated a \$52 conversion factor, which is equivalent to approximately 140% of 1996 RBRVS. At that time, NYLCare contracted with non-Alliance physicians for services rendered to all NYLCare subscribers (HMO and non-HMO) in Maine at conversion factors ranging from \$48 to \$50, which is equivalent to approximately 130% to 135% of 1996 RBRVS. The prices obtained by the Alliance for its physician members were substantially higher than the physicians could have obtained by negotiating individually with NYLCare.

33. Since Aetna’s acquisition of NYLCare in 1998, Aetna and non-Alliance physicians have renegotiated their contracts, resulting in savings for Aetna subscribers. Aetna currently utilizes

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conversion factors ranging from \$44 to \$48, which is approximately equivalent to 120% to 130% of 2003 RBRVS, for services rendered by non-Alliance physicians to its subscribers in Maine. Aetna has made repeated attempts to renegotiate the rates that it pays to the Alliance's physician members, but the Alliance, on the collective behalf of its physician members, has refused to reduce the \$65 and \$52 conversion factors for physician services agreed to in 1996. As a result, Aetna pays Alliance physicians prices that are approximately 40% to 50% higher for non-HMO subscribers, and 10% to 20% higher for HMO subscribers, than Aetna pays to non-Alliance physicians for comparable services.

34. The Alliance's contract with Aetna was set to expire August 31, 1999. In a letter dated March 8, 1999, Aetna approached Alliance physicians directly to negotiate new contracts with individual physicians, to ensure that there would be no interruption of service to its subscribers if Aetna and the Alliance failed to reach an agreement for renewal prior to the termination of the contract.

35. In response to Aetna's attempt to negotiate with Alliance physicians unilaterally, Mr. Diggins told Alliance physicians in a March 18, 1999 memorandum that "[t]he Alliance has strenuously objected" to Aetna about its "bold effort at recruiting physicians around the Alliance." In addition, Mr. Diggins warned the physicians that Aetna's contract offer to the physicians would reduce physician compensation to a conversion factor of \$44, which Mr. Diggins characterized as a "significant reduction in compensation" and one to which Aetna realized "the Alliance is unlikely to agree." The \$44 conversion factor, which is equivalent to approximately 127% of 1999 RBRVS, was Aetna's arrangement with non-Alliance physicians in 1999.

36. On March 17, 1999, the Alliance's lawyer and business agent sent a letter to Aetna, demanding that Aetna: (a) retract its offers for direct contracts with Alliance physicians; (b) notify the physicians that the Alliance's contract with Aetna governs the relationship between the physicians and Aetna; and (3) "return,

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marked void, to the physician any contract executed by the physician” in response to Aetna’s offer.

37. The Alliance physicians collectively refused to deal with Aetna, other than as a group through the Alliance, and forced Aetna to renew its contract with the Alliance at the \$65 and \$52 conversion factor rates. Without Alliance physician members in its network, Aetna would have been unable to maintain a competitively marketable health plan in the Northeastern Maine Counties and comply with the Maine Bureau of Insurance access to care regulations.

38. The Alliance’s hospital members also negotiated collectively through the Alliance with NYLCare/Aetna for a contract. In 1996, the Alliance, on behalf of its hospital members, negotiated a 5.5% discount from billed charges for services rendered to NYLCare non-HMO subscribers, and an 11% discount from billed charges for services rendered to NYLCare HMO subscribers. Both of these discounts were approximately 33% smaller than the discounts that NYLCare contracted for, on average, with non-Alliance hospitals for the same health plan products. Since it acquired NYLCare, Aetna has attempted to negotiate with the Alliance for new hospital prices. The Alliance refused to accept lower prices and has continuously demanded higher prices.

39. In 1999, the Alliance demanded that Aetna agree to a 6% discount from billed charges for all services provided by Alliance hospitals to Aetna’s HMO and non-HMO subscribers. In response, Aetna proposed different rates for different Alliance hospitals, which provide varying services and levels of care. The Alliance refused to agree to anything other than a single discount rate for all of its member hospitals. Aetna counter-offered a 15% discount, which equaled Aetna’s statewide average discount for Maine hospitals. The Alliance also rejected this offer, continuing to insist upon a 6% discount. Due to a stalemate over compensation, the Alliance continues to provide services to Aetna subscribers under the terms of the 1996 Alliance-NYLCare

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contract, which pays Alliance hospitals substantially higher prices than Aetna pays to non-Alliance hospitals. Without the Alliance hospitals in its network, Aetna would have been unable to maintain a competitively marketable health plan in the Northeastern Maine Counties and comply with Maine Bureau of Insurance access to care regulations.

Cigna HealthCare of Maine, Inc.

40. Cigna HealthCare of Maine, Inc. (“Cigna”), is a payor doing business in the Northeastern Maine Counties that contracts with the Alliance for physician and hospital services. In May, 1998, on the collective behalf of Alliance hospital members, the Alliance told Cigna that it must reduce the discount off hospital charges that Cigna received under its existing agreement with the Alliance. In December, 1998, having no reasonable alternative but to meet the Alliance’s demand, Cigna reduced, by almost 50 percent, the discount that it received off Alliance hospital charges. This resulted in substantially higher prices paid to those hospitals.

41. In August, 2001, four months prior to the expiration date of its contract with the Alliance, Cigna directly approached the Alliance’s physician and hospital members to negotiate individual contracts containing price terms to which the physicians and hospitals would agree unilaterally, not collectively through the Alliance.

42. Upon reviewing the terms of the contract Cigna was offering Alliance members individually, Mr. Diggins advised Alliance members that the contract’s prices and price-related terms were unacceptable, and that they should not accept Cigna’s offer.

43. Mr. Diggins also provided the Alliance’s physician and hospital members with a model letter for them to use to notify Cigna that they refused to negotiate individually, and that the Alliance would negotiate on their behalf. Shortly thereafter, the physician and hospital members sent almost identical letters to

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Cigna, stating that they would not enter into direct contracts with Cigna and that Cigna should negotiate with the Alliance. As the termination date for the Alliance's Cigna contract approached, Alliance physician members started to notify Cigna that they would no longer provide services to Cigna health plan enrollees.

44. The Alliance and Mr. Diggins demanded, on behalf of Alliance physician and hospital members collectively, that Cigna continue contracting through the Alliance, and that Cigna agree to the Alliance's demands concerning a number of competitively significant price terms. These demands included continuing the limits on discounts off hospital charges, rejecting Cigna's request to negotiate the hospital list prices underlying the discounts, and rejecting Cigna's request to renegotiate physician prices.

45. Cigna was forced to continue contracting with the Alliance on the Alliance's collectively demanded terms because, without a majority of Alliance physician and hospital members in its network, Cigna would have been unable to maintain a competitively marketable health plan in the Northeastern Maine Counties and comply with the Maine Bureau of Insurance access to care regulations.

Anthem Health Plans of Maine, Inc.

46. The Alliance and Blue Cross and Blue Shield of Maine ("Blue Cross"), a payor then doing business in the Northeastern Maine Counties, entered into a contract in September, 1997, for the provision of services by the Alliance's hospital members. The agreement provided that Alliance hospital members be paid their billed charges, minus a 6% discount, during the remaining months of 1997, and billed charges minus a 7% discount, for the calendar years 1998 and 1999. Blue Cross had sought lower prices through deeper discounts, but the Alliance hospitals collectively refused to alter their terms. The Alliance's business records show that, by fixing the discount rate, the eleven Alliance hospitals increased their combined annual revenues by approximately \$700,000.

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47. On June 5, 2000, Anthem Health Plans of Maine, Inc. (“Anthem”), purchased Blue Cross and assumed the Alliance contract. Over the course of negotiations lasting nearly two years, the Alliance insisted that Anthem replace its individual physician contracts with an Alliance contract, and that Anthem not reduce its compensation to Alliance member physicians under the existing individual contracts.

48. In mid-2002, Mr. Diggins told Anthem that the Alliance’s physicians would terminate their individual contracts with Anthem, unless Anthem agreed to contract through the Alliance for the physicians’ services, at prices agreeable to them collectively. Concerned about losing the Alliance providers from its network, Anthem agreed to include the physicians in its contract with the Alliance, and engaged in several more months of price negotiations. In the midst of the investigation of the Alliance by the Federal Trade Commission and the State of Maine’s Office of Attorney General, the Alliance notified Anthem that it could not go forward with the new contract, which would have included all Alliance physician and hospital members, and agreed to an additional one year extension of the 1997 hospital-only contract.

Harvard Pilgrim Health Care, Inc.

49. In early 1999, Harvard Pilgrim Health Care, Inc. (“Harvard Pilgrim”), approached the Alliance about contracting for physician and hospital services, which would allow Harvard Pilgrim to offer an HMO product in the Northeastern Maine Counties.

50. During contract negotiations with Harvard Pilgrim, the Alliance demanded high compensation for its members. The Alliance told Harvard Pilgrim that its hospital members “have been willing to accept discounts on charges ranging up to 7%,” and “[p]hysician compensation agreed to has ranged from \$47 [conversion factor] to \$51 [conversion factor].” The Alliance’s rates were substantially higher than Harvard Pilgrim’s standard compensation terms. Nevertheless, Harvard Pilgrim offered the

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Alliance a 7% discount for its hospital members and a \$47 conversion factor for its physicians, which is equivalent to approximately 135% of 1999 RBRVS. The Alliance rejected the offer and countered with a 4% discount off of charges for hospital services and a conversion factor of \$49.95 for physician services, which is equivalent to approximately 144% of 1999 RBRVS.

51. The Alliance's repeated demands for higher compensation resulted in Harvard Pilgrim abandoning its contracting efforts with the Alliance. Harvard Pilgrim approached individual Alliance physicians and hospitals for contracts directly with Harvard Pilgrim, but was unable to sign enough physicians and hospitals to create a network. As a result, Harvard Pilgrim does not offer an HMO product in the Northeastern Maine Counties.

Fraser Paper, Inc.

52. Fraser Paper, Inc. ("Fraser Paper"), a large employer in the Northeastern Maine Counties, covers approximately 2,300 individuals under a self-insured health plan. In 1997, Fraser Paper attempted to create its own provider network by entering into individual contracts with the Alliance physician and hospital members located near Fraser Paper employees. The physicians and hospitals refused to deal directly with Fraser Paper, and told Fraser Paper that the Alliance would negotiate collectively on their behalf. Confronted with the physicians' and hospitals' refusals to deal individually, Fraser Paper entered into a contract with the Alliance in 1998.

53. Fraser Paper sought to include only two Alliance hospitals in its network, but, because of the Alliance's restrictive policy, was compelled to include all Alliance hospitals as a condition of dealing with the Alliance. This prevented Fraser Paper from selecting particular hospitals with which to negotiate for inclusion in its network. Absent the Alliance's demand, Fraser Paper could have offered select hospitals access to Fraser Paper's employees in exchange for a significant reduction in the hospitals' prices.

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54. Since 1998, Alliance hospitals have raised their charges for hospital services by as much as 15%. Fraser Paper made several attempts to negotiate larger discounts off the hospitals' charges to offset these increases, but the Alliance refused. The Alliance also rejected Fraser Paper's offers to negotiate the hospitals' charges underlying the discounts.

55. Fraser Paper attempted to contract directly with Alliance physician and hospital members on several occasions from 1998 to 2001, and to address its concerns over high health care costs. In each instance, the Alliance physician and hospital members refused to negotiate individual contracts, and directed Fraser Paper to contract with the Alliance.

Other Payors

56. Respondents have informed other payors that the Alliance represented the collective interest of its physician and hospital members, and that the Alliance would negotiate and sign contracts on behalf of all its physician and hospital members. Respondents also informed these payors of the specific price and price related terms that the Alliance demanded as a condition for signing a contract. To exert pressure on and coerce these payors to agree to the Alliance terms, Alliance physician and hospital members informed such payors that they would not negotiate individually, and told the payors to contract for the Alliance members' services only through the Alliance. As a result of the collective conduct, the Alliance has successfully obtained contracts on behalf of its physicians and hospitals with these payors on terms demanded by the Alliance.

The Alliance's Conduct Has Restrained Trade

57. The Alliance, acting as a combination of its members, combining or conspiring with its members, and acting through Mr. Diggins and others, has restrained competition by, among other things:

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- a. facilitating, negotiating, entering into, and implementing agreements among Alliance physicians on price and other competitively significant terms;
- b. refusing to deal with payors except on collectively agreed-upon terms; and
- c. negotiating uniform prices and other competitively significant terms in payor contracts for Alliance physicians.

58. The Alliance, acting as a combination of its members, combining or conspiring with its members, and acting through Mr. Diggins and others, has restrained competition by, among other things:

- a. facilitating, negotiating, entering into, and implementing agreements among Alliance hospitals on price and other competitively significant terms;
- b. refusing to deal with payors except on collectively agreed-upon terms; and
- c. negotiating uniform discounts from hospital charges and other competitively significant terms in payor contracts for Alliance hospitals.

**The Alliance Has Not Created Significant Efficiencies
Justifying Its Conduct**

59. In collectively negotiating and entering into contracts with payors, the Alliance and its physician and hospital members have failed to engage in any significant form of financial risk sharing or clinical integration. Respondents' negotiation of prices and other competitively significant contract terms on behalf of Alliance members has not been, and is not, reasonably related to any efficiency-enhancing integration among the Alliance's physician and hospital members.

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The Alliance's Conduct Has Had Anticompetitive Effects

60. Respondents' actions described in Paragraphs 11 through 58 of this Complaint have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician and hospital services in the Northeastern Maine Counties in the following ways, among others:

- a. price and other forms of competition among Alliance physicians were unreasonably restrained;
- b. price and other forms of competition among Alliance hospitals were unreasonably restrained;
- c. prices for physician services were increased;
- d. prices for hospital services were increased;
- e. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians; and
- f. health plans, employers, and individual consumers were deprived of the benefits of competition among hospitals.

61. The combination, conspiracy, 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 combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of August, 2003, issues its Complaint against the Maine Health Alliance and William R. Diggins.

By the Commission, Commissioner Harbour not participating.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of The Maine Health Alliance (the “Alliance”) and William R. Diggins (hereinafter collectively referred to as “Respondents”), and Respondents 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 Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated 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 Commission Rule 2.34, 16 C.F.R. § 2.34 (2003), now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

Decision and Order

1. Respondent Alliance is a taxable not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Maine, and its principal address is 12 Stillwater Avenue, Suite C, Bangor, Maine 04401.
2. Respondent William R. Diggins, an individual, is the Executive Director of the Alliance. His principal address is 12 Stillwater Avenue, Suite C, Bangor, Maine 04401.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

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

- A. “Respondent Alliance” means The Maine Health Alliance, 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. “Respondent Diggins” means William R. Diggins.
- C. “Respondents” means Respondent Alliance and Respondent Diggins.
- D. “Hospital” means a health care facility licensed by the State of Maine as a hospital.
- E. “Hospital system” means an organization comprised of two or more hospitals where the same person or persons control each hospital in the organization. For purposes of

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this definition, the definition of the term “control” under 16 C.F.R. § 801.1(b) shall apply. Hospital system includes a hospital that is managed under contract, or is leased, by another hospital.

- F. “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.
- G. “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.”
- H. “Payor” means any person that pays, or arranges for payment, for all or any part of any physician or hospital services for itself or for any other person. Payor includes any person that develops, leases, or sells access to networks of physicians or hospitals.
- I. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- J. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- K. “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 Respondent Alliance, pursuant to Paragraph VI.A.2 of this Order, of such payor’s right to terminate such contract.

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- L. “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.
- M. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services, hospital services, or both physician and hospital services in which:
 - 1. all physicians and hospitals 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 and hospitals 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.
- N. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services, hospital services, or both physician and hospital services in which:
 - 1. all physicians and hospitals who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians and hospitals who participate jointly to control costs and improve quality by managing the provision of physician and hospital services such as risk-sharing involving:
 - a. the provision of physician or hospital services to payors at a capitated rate,

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- b. the provision of physician or hospital services for a predetermined percentage of premium or revenue from payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians or hospitals 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 hospitals or physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, when 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.

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:

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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 Alliance;
- 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 this Paragraph II shall prohibit any agreement involving, or conduct by:

- (i) Respondent Diggins that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement, or that solely involves physicians in the same medical group practice; or

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- (ii) Respondent Alliance, subject to the provisions of Paragraph IV below, that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement, and 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 Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of hospital 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 hospitals:
 - 1. To negotiate on behalf of any hospital 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 hospital 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 Alliance;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among hospitals concerning any

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hospital's willingness to deal with a payor, or the terms or conditions, including price terms, on which the hospital is willing to deal with a payor;

- C. Attempting to engage in any action prohibited by Paragraphs III.A or III.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 III.A through III.C above.

PROVIDED, HOWEVER, that, nothing in this Paragraph III shall prohibit any agreement involving, or conduct by:

- (i) Respondent Diggins that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement, or that solely involves hospitals in the same hospital system; or
- (ii) Respondent Alliance, subject to the provisions of Paragraph IV below, that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement, and so long as the arrangement does not restrict the ability, or facilitate the refusal, of hospitals who participate in it to deal with payors on an individual basis or through any other arrangement.

IV.

IT IS FURTHER ORDERED that:

- A. Respondent Alliance shall, pursuant to each purported qualified risk-sharing joint arrangement or purported qualified clinically-integrated joint arrangement

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(“Arrangement”), for five (5) years from the date this Order becomes final, notify the Secretary of the Commission in writing (“Notification”) at least sixty (60) days prior to:

1. Participating in, organizing, or facilitating any discussion or understanding with or among any physicians or hospitals in such Arrangement relating to price or other terms or conditions of dealing with any payor; or
 2. Contacting a payor, pursuant to an Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any payor, on behalf of any physician or hospital in such Arrangement. Notification is not required for negotiations or agreements with subsequent payors pursuant to any Arrangement for which this Notification was given;
- B. Respondent Alliance shall, with respect to any Arrangement, include the following information in the Notification:
1. for each physician, his or her name, address, telephone number, medical specialty and medical practice group, if applicable, and name of each hospital where he or she has privileges;
 2. the name of each hospital and the name and telephone number of the person at each hospital responsible for that hospital’s membership relationship with the Alliance;
 3. a description of the Arrangement, its purpose, function, and area of operation;
 4. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;

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5. an explanation of the relationship of any agreement on prices or contract terms related to price to furthering the integration and achieving the efficiencies of the Arrangement;
 6. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities;
 7. all studies, analyses, and reports, which were prepared for the purpose of evaluating or analyzing competition for physician or hospital services in any relevant market, including, but not limited to, the market share of physician services in any relevant market, or the market share of hospital services in any relevant market;
- C. If, within sixty (60) days from the Commission's receipt of the Notification, a representative of the Commission makes a written request for additional information, Respondent Alliance shall not engage in any conduct described in Paragraph IV. A prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition. The expiration of any waiting period described herein without a request for additional information shall not be construed as a determination by the Commission, or its staff, that a violation of the law, or of this Order, may not have occurred. In addition, the absence of notice to the Alliance that the Arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the Arrangement has been approved. Further, receipt by the Commission from the Alliance of any Notification of an Arrangement is not to be construed as a determination by the Commission that any such Arrangement does or does not violate this Order or any law enforced by the Commission, including, but not

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limited to Sections 7 and 7A of the Clayton Act, 15 U.S.C. §§ 18 and 18a.

V.

IT IS FURTHER ORDERED that Respondent Diggins for three (3) years from the date this Order becomes final, directly or indirectly, or through any corporate or other device, in connection with the provision of physician or hospital 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. Negotiating with any payor on behalf of any physician or hospital who participates, or has participated, in Respondent Alliance, notwithstanding whether such conduct also is prohibited by Paragraph II or Paragraph III of this Order; and
- B. Advising any physician or hospital who participates, or has participated, in Respondent Alliance to accept or reject any term, condition, or requirement of dealing with any payor, notwithstanding whether such conduct also is prohibited by Paragraph II or Paragraph III of this Order.

PROVIDED, HOWEVER, nothing in this Paragraph V shall prohibit Respondent Diggins from forming, participating in, or taking any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement on behalf of the Alliance.

VI.

IT IS FURTHER ORDERED that Respondent Alliance shall:

- A. Within thirty (30) days after the date on which this Order becomes final:

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1. send by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to:
 - a. each physician and hospital who participates, or has participated, in Respondent Alliance;
 - b. each officer, director, manager, and employee of Respondent Alliance;
 2. send by first-class mail, return receipt requested, a copy of this Order, the Complaint, and the notice specified in Appendix A to this Order to the chief executive officer of each payor that contracts with Respondent Alliance for the provision of physician or hospital services;
- B. Terminate, without penalty or charge, and in compliance with any applicable laws of the State of Maine, any preexisting contract with any payor for the provision of physician or hospital services, at the earlier of: (1) receipt by Respondent Alliance of a written request to terminate such contract from any payor that is a party to the contract; or (2) the termination or renewal date (including any automatic renewal date) of such contract; provided, however, a preexisting contract may extend beyond the termination or renewal date for a maximum of one year if the payor provides written affirmation of the preexisting contract prior to the termination or renewal date, and Respondent Alliance has determined not to exercise its right to terminate pursuant to the terms of the preexisting agreement;
- C. For three (3) years from the date this Order becomes final:
1. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each physician or hospital who begins participating in Respondent Alliance, and who did not previously

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receive a copy of this Order and the Complaint from Respondent Alliance, within thirty (30) days of the time that such participation begins;

- b. each payor who contracts with Respondent Alliance for the provision of physician or hospital services, and who did not previously receive a copy of this Order and the Complaint from Respondent Alliance, within thirty (30) days of the time that such payor enters into such contract;
 - c. each person who becomes an officer, director, manager, or employee of Respondent Alliance, and who did not previously receive a copy of this Order and the Complaint from Respondent Alliance, within thirty (30) days of the time that he or she assumes such responsibility with Respondent Alliance; and
2. Annually publish in an official annual report or newsletter sent to all physicians and hospitals who participate in Respondent Alliance, a copy of this Order and the Complaint with such prominence as is given to regularly featured articles;
- D. Notify the Commission at least thirty (30) days prior to any proposed change in Respondent Alliance, 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 Alliance that may affect compliance obligations arising out of this Order;
- E. 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. Each report shall include:

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1. a detailed description of the manner and form in which Respondent Alliance has complied and is complying with this Order;
2. the name, address, and telephone number of each payor with which Respondent Alliance has had any contact; and
3. copies of the delivery confirmations required by Paragraph VI.A.1, and copies of the signed return receipts required by Paragraphs VI.A.2 and VI.C.1.

VII.

IT IS FURTHER ORDERED that Respondent Diggins shall:

- A. For three (3) years from the date this Order becomes final, distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 1. all physician groups, hospital groups, and physician-hospital organizations, other than any medical group practice or hospital system, that Respondent Diggins represents for the purpose of contracting, or seeking to contract, with payors for the provision of physician or hospital services, or that Respondent Diggins advises with regard to their dealings with payors in connection with the provision of physician or hospital services, within (30) days of the time that Respondent Diggins begins providing such representation or advice, unless such physician group, hospital group, or physician-hospital organization previously received a copy of this Order and the Complaint from Respondent Alliance or Respondent Diggins; and
 2. each payor with which Respondent Diggins deals, or has dealt, for the purpose of contracting, or seeking to contract, while representing or advising any physician

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groups, hospital groups, or physician-hospital organizations, other than any medical group practice or hospital system, with regard to their dealings regarding contracting with such payor for the provision of physician or hospital services, within thirty (30) days of such dealing, unless such payor previously received a copy of this Order and the Complaint from Respondent Alliance or Respondent Diggins;

- B. 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 Diggins has complied and is complying with this Order;
 2. the name, address, and telephone number of each physician, hospital, group of physicians or hospitals, or physician-hospital organization that Respondent Diggins has represented or advised with respect to their dealings with any payor in connection with the provision of physician or hospital services;
 3. the name, address, and telephone number of each payor with which Respondent Diggins has dealt while representing any physician, hospital, group of physicians or hospitals, or physician-hospital organization in connection with the provision of physician or hospital services; and
 4. copies of the signed return receipt required by this Paragraph VII.A.

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VIII.

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

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondents shall permit any duly authorized representative of the Commission:

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on August 27, 2023.

By the Commission, Commissioner Harbour not participating.

Decision and Order

Appendix A

[letterhead of The Maine Health Alliance]

[name of payor's CEO]
[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order issued by the Federal Trade Commission against The Maine Health Alliance.

Pursuant to Paragraph VI.B of the enclosed consent order, the Alliance must allow you, subject to compliance with Maine law, to terminate upon written request, without any penalty or charge, any contracts with the Alliance that were in effect prior to your receipt of this letter.

Paragraph VI.B of the consent order also provides that, if you do not terminate a contract, the contract will terminate on its earliest termination or renewal date (including any automatic renewal date). However, at your request, the contract may be extended to a date no later than [appropriate date to be filled in by Respondent], but only if the Alliance waives its right to terminate the contract.

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,

[Executive Director of MHA]
Executive Director
Maine Health Alliance

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 Maine Health Alliance and its Executive Director, William R. Diggins. The Alliance is an organization consisting of over 325 physicians and 11 hospitals in northeastern Maine. The agreement settles charges that respondents violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating and implementing agreements among physician members and among hospital members of the Alliance to fix prices and other terms of dealing for physician and hospital services with health insurance firms and other third-party payors, and to refuse to deal with these payors except on collectively determined terms. These price-fixing agreements and concerted refusals to deal among otherwise competing physicians and among otherwise competing hospitals, in turn, have kept the price of health care in northeastern Maine above the level that would have prevailed absent the illegal conduct. 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 the respondents that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

Analysis

The Complaint Allegations

The Alliance was formed in 1995 by the vast majority of physicians and hospitals in five counties in northeastern Maine to negotiate payor contracts that contained “higher compensation” and more “advantageous” contract terms than the physicians and hospitals could obtain by dealing individually with payors. More than 85% of the physicians on staff at Alliance member hospitals are Alliance members, as are eleven of the sixteen hospitals in the five-county area. The physician and hospital members designated the Alliance as their negotiating agent to contract with payors, and authorized the Alliance to enter into, on their behalf, payor contracts.

Although the Alliance is a nonprofit corporation, and its member hospitals are tax-exempt organizations, a substantial majority of its physician members are for-profit entities. These for-profit physicians play a significant role in the governance of the Alliance and receive pecuniary benefits as a result of their participation. Participating physicians select 11 of the 22 members of the Alliance’s Board of Directors and thus exercise substantial authority over the policies and actions of the Alliance. The participating physicians are therefore “members” of the Alliance within the meaning of Section 4 of the FTC Act, which grants the Commission jurisdiction over nonprofit organizations that carry on business for the profit of their members. Because the Alliance engages in substantial activities that confer pecuniary benefits on these for-profit members, its activities engaged in on behalf of the physician and hospital members fall within the Commission’s jurisdiction.

Alliance physician and hospital members have refused to contract with payors on an individual basis. Instead, the Alliance’s Board of Directors authorized Mr. Diggins to act as a principal negotiating agent with payors on behalf of the collective membership of the Alliance. Mr. Diggins was instrumental in forming the Alliance, coordinating the membership’s collective

Analysis

bargaining activity, and negotiating payor contracts on behalf of the collective membership.

As guidance for Mr. Diggins, the Board, in conjunction with its Contracts Committee, compiled written “Contracting Guidelines and Parameters,” setting forth price-related and other competitively significant terms that the Alliance required in order to contract with payors. Mr. Diggins reported the details of negotiations with payors to the Board and the Contracts Committee. Based on the recommendations of Mr. Diggins, and the Contracts Committee, the Board decided whether to accept or reject contracts with payors on behalf of the Alliance’s physician and hospital members.

The Alliance and Mr. Diggins negotiated higher reimbursement for Alliance physician and hospital members, and more advantageous contract language, than the physicians and hospitals could have achieved through individual contracts with payors. Despite a written Alliance policy allowing members to contract independently of the Alliance, in fact the Alliance and Mr. Diggins encouraged the physician and hospital members to contract only through the Alliance, in order to maintain the Alliance’s leverage over payors. Mr. Diggins provided Alliance physician and hospital members with a model letter for them to use to notify payors that they refused to negotiate individually, and that the Alliance would negotiate on their behalf. In response to payors’ requests to contract directly with Alliance physician and hospital members, the members directed payors to the Alliance for contracting.

The Alliance’s and Mr. Diggins’ joint negotiation of fees and other competitively significant terms has not been reasonably related to any efficiency-enhancing integration. Although the Alliance has developed some clinical programs limited primarily to hospital members, none of the Alliance’s clinical activities create any significant degree of interdependence among the physician or hospital participants, nor do the activities create sufficiently substantial potential efficiencies.

Analysis

By orchestrating agreements among Alliance physician members, and hospital members, to deal only on collectively-determined terms, together with refusals to deal with payors that would not meet those terms, respondents have violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of the illegal conduct charged in the complaint, while allowing respondents to engage in legitimate conduct that does not impair competition.

The proposed order's specific provisions are as follows:

The proposed order's core prohibitions are contained in Paragraphs II, III, and V. Paragraph II is intended to prevent the Respondents from participating in, or creating, future unlawful agreements for physician services. Paragraph II.A prohibits the Alliance and Mr. Diggins from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through the Alliance.

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

Paragraph III is intended to prevent the Respondents from participating in, or creating, future unlawful agreements for hospital services. Paragraphs III.A through D are identical to Paragraphs II.A through D, except that they apply to the

Analysis

Alliance's or Mr. Diggins' actions regarding the provision of hospital, rather than physician, services. This matter is the Commission's first law enforcement action charging an organization with price-fixing and other anticompetitive collusive conduct in the market for hospital services, in violation of Section 5 of the FTC Act. Thus, unlike previous orders involving collective bargaining with health plans, this order bars agreements relating to both physicians and hospitals.

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

As defined in the proposed order, a "qualified risk-sharing joint arrangement" possesses two key characteristics. First, all physician or all hospital 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, all 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

Analysis

dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

In the event that the Alliance forms a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, Paragraph IV requires the Alliance to notify the Commission at least 60 days prior to negotiating or entering into agreements with payors, or discussing price or related terms among the participants of the arrangement. Notification is not required for negotiations or agreements with subsequent payors pursuant to any arrangement for which notice was given under Paragraph IV. Paragraph IV.B sets out the information necessary to make the notification complete. Paragraph IV.C establishes the Commission's right to obtain additional information regarding the arrangement.

Paragraph V prohibits Mr. Diggins, for three years, from negotiating with any payor on behalf of any Alliance physician or hospital member, and from advising any Alliance physician or hospital member to accept or reject any term, condition, or requirement of dealing with any payor. Mr. Diggins, however, is permitted to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement on behalf of the Alliance.

Paragraph VI.A requires the Alliance to distribute the complaint and order to all physicians and hospitals who have participated in the Alliance, and to payors that contract with the Alliance. Paragraph VI.B requires the Alliance, at any payor's request and without penalty, to terminate its current contracts with respect to providing physician services. If a payor does request termination, Paragraph VI.B requires the Alliance to terminate the contract on its earliest termination or renewal date. Paragraph VI.B also provides that a contract may extend up to one year beyond the termination or renewal date if the payor affirms the contract in writing and the Alliance does not exercise its right to terminate the contract.

Analysis

Paragraph VII.A requires Mr. Diggins to distribute the complaint and order to physician and hospital groups he represents in contracting with payors, and to payors with which he has dealt in contracting while representing any physician or hospital groups.

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

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

PHYSICIAN NETWORK CONSULTING, L.L.C., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4094; File No. 0210178**Complaint, August 27, 2003--Decision, August 27, 2003*

This consent order, among other things, prohibits Respondent Professional Orthopedic Services, Inc., which consists of approximately 28 physicians in three Physician Practices (also Respondents) who provide approximately 70 percent of the orthopedic medicine services in the Baton Rouge, Louisiana area; their agent, Respondent Physician Consulting Network; and the agent's managing director, Respondent Michael J. Taylor, 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 any arrangement other than Professional Orthopedic Services. The order also prohibits the respondents from facilitating exchanges of information among physicians concerning whether, or on what terms, to contract with a payor. In addition, the order prohibits the respondents from attempting to engage in – or from encouraging, pressuring, or attempting to induce any person to engage in – any action prohibited by the order. The order also, for three years, requires Respondents Physician Network Consulting and Taylor to notify the Commission before entering into any arrangement to act as a messenger, or as an agent on behalf of any physicians, with payors regarding contracts.

Participants

For the Commission: *Linda Blumenreich, Karan Singh, David R. Pender, Jeffrey W. Brennan, Anne R. Schenof, Roberta S. Baruch, Louis Silvia and Mary T. Coleman.*

For the Respondents: *Jerry W. Sullivan, Leef, Gibbs, Sullivan, Dupre & Aldous, L.L.C., and John J. Miles, Ober, Kaler, Grimes & Shriver.*