

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.*

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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 Physician Network Consulting, L.L.C. (“Physician Network Consulting”), Michael J. Taylor, Professional Orthopedic Services, Inc. (“Professional Orthopedic Services”), The Bone and Joint Clinic of Baton Rouge, Inc. (“The Bone and Joint Clinic”), Baton Rouge Orthopaedic Clinic, L.L.C. (“Baton Rouge Orthopaedic Clinic”), and Orthopaedic Surgery Associates of Baton Rouge, L.L.C. (“Orthopaedic Surgery Associates”), hereinafter collectively referred to as “Respondents,” have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns a horizontal agreement among competing physicians to fix prices charged to United HealthCare of Louisiana, Inc. (“United HealthCare”), and to refuse to deal with United HealthCare except on terms to which the physicians collectively agreed. The physicians orchestrated this behavior with and through their independent practice association, Professional Orthopedic Services, and with and through their non-physician agent, Physician Network Consulting. Respondents’ conduct raised the price of orthopedic services in the Baton Rouge, Louisiana, area.

RESPONDENTS

2. Physician Network Consulting is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal address at 3900 N. Causeway Boulevard, Suite 1470, Metairie,

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LA 70002. Physician Network Consulting represents physicians in contract negotiations with health insurance firms and other third-party payors (“payors”). Physician Network Consulting’s client base includes physicians in approximately seven states.

3. Michael J. Taylor is the founder and managing director of Physician Network Consulting. His principal address is located at 3900 N. Causeway Boulevard, Suite 1470, Metairie, LA 70002. Mr. Taylor, operating through Physician Network Consulting, represents physicians in contract negotiations with payors.

4. Professional Orthopedic Services is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal address at 5408 Flanders Drive, Baton Rouge, LA 70808. Professional Orthopedic Services is an independent practice association consisting of approximately 28 physicians who practice orthopedic medicine. Its members provide approximately 70% of the orthopedic medicine services in the Baton Rouge, Louisiana, area.

5. The Bone and Joint Clinic is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal address at 7777 Hennessy Boulevard, Suite 7000, Baton Rouge, LA 70808. The Bone and Joint Clinic is a group practice consisting of approximately 10 physicians. These physicians practice orthopedic medicine for a fee in the Baton Rouge, Louisiana, area, and are members of Professional Orthopedic Services.

6. Baton Rouge Orthopaedic Clinic is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal address at 7443 Picardy Avenue, Baton Rouge, LA 70808. Baton Rouge Orthopaedic Clinic is a group practice consisting of approximately 15 physicians. These physicians practice orthopedic medicine for a fee in the Baton Rouge,

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Louisiana, area, and are members of Professional Orthopedic Services.

7. Orthopaedic Surgery Associates is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal address at 5408 Flanders Drive, Baton Rouge, LA 70808. Respondent Orthopaedic Surgery Associates includes, but is not limited to, Kenneth C. Cranor, M.D., Samuel C. Irwin, M.D., and Charles S. Walker, M.D. During the period of illegal conduct described in the Complaint, Orthopaedic Surgery Associates was a partnership among these three physicians. These physicians practice orthopedic medicine for a fee in the Baton Rouge, Louisiana, area, and are members of Professional Orthopedic Services.

THE FTC HAS JURISDICTION OVER RESPONDENTS

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

**OVERVIEW OF MARKET AND PHYSICIAN
COMPETITION**

9. The Bone and Joint Clinic, Baton Rouge Orthopaedic Clinic, and Orthopaedic Surgery Associates, through their shareholders, members, and other affiliated physicians, are engaged in the business of providing orthopedic services to patients in the Baton Rouge area. Except to the extent that competition has been restrained as alleged herein, The Bone and Joint Clinic, Baton Rouge Orthopaedic Clinic, and Orthopaedic Surgery Associates have been, and are now, in competition with each other for the provision of orthopedic services.

10. To be competitively marketable in the Baton Rouge area, a payor's health insurance plan must include in its physician

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network members of Professional Orthopedic Services, including physicians from at least The Bone and Joint Clinic or Baton Rouge Orthopaedic Clinic.

11. Physicians often contract with payors to establish the terms and conditions, including price terms, under which the physicians will render services to the payors' subscribers. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payors' relationship with their subscribers. These contracts may reduce payors' costs, enable them to lower the price of health insurance, and reduce their subscribers' out-of-pocket medical care expenditures.

12. Absent agreements among competing physicians on the terms, including price, on which they will provide services to enrollees in payors' health care plans, competing physicians decide individually whether to enter into payor contracts to provide services to their subscribers or enrollees, and what prices they will accept pursuant to 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 in the Baton Rouge, Louisiana, area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fee for a particular year (*e.g.*, "110% of 2003 RBRVS" or "110% of 2003 Medicare").

14. Competing physicians sometimes use a "messenger" to facilitate the establishment of contracts between themselves and payors in ways that do not constitute or facilitate an unlawful agreement on prices and other competitively significant terms. Such a messenger may not, however, consistent with a competitive model, negotiate prices and other competitively

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significant terms on behalf of the participating physicians. Nor should a messenger facilitate the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the messenger's opinion on the appropriateness, or lack thereof, of the offer.

RESPONDENTS CONSPIRED TO FIX THEIR PRICES TO UNITED HEALTHCARE

15. United HealthCare is a payor doing business in the Baton Rouge area. In 2001, the physicians in The Bone and Joint Clinic, Baton Rouge Orthopaedic Clinic, and Orthopaedic Surgery Associates were under contract with United HealthCare as network participants in United HealthCare's health plans. By letter dated June 29, 2001, United HealthCare notified these and other physicians of a new price schedule to take effect August 1, 2001, pursuant to United HealthCare's contract with its network of physicians in Louisiana. This price schedule would have paid network physicians an estimated 93% to 114% of 2001 RBRVS, depending on the medical procedures performed.

16. Physician Network Consulting coordinated the physicians' response to United HealthCare. On July 9, 2001, Michael J. Taylor of Physician Network Consulting held a conference call with the business managers of The Bone and Joint Clinic, Baton Rouge Orthopaedic Clinic, and Orthopaedic Surgery Associates, during which the participants discussed jointly terminating their United HealthCare contracts in response to the new price schedule announcement. The same day, The Bone and Joint Clinic and the physicians in Orthopaedic Surgery Associates all sent letters to United HealthCare, terminating their respective United HealthCare contracts effective in 90 days, pursuant to the 90-day termination notice provision contained in the United HealthCare contract. The next day, Baton Rouge Orthopaedic Clinic also sent a letter to United HealthCare, terminating the contract. Thus, within 24 hours of their conference call with Michael Taylor, all the members of Professional Orthopedic Services terminated their United HealthCare contracts, to become effective in October

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2001. On July 11, 2001, the business manager for The Bone and Joint Clinic sent a letter to Mr. Taylor, enclosing “information that you may find helpful in your negotiations on behalf of POS with United Healthcare,” including an “analysis of the proposed fee schedule.”

17. On July 19, 2001, Michael Taylor, in a broadcast fax to the same business managers, provided a form letter that he urged all of them to prepare and deliver to United HealthCare. The form letter advised United HealthCare that the signatory physicians had authorized Physician Network Consulting and its representative “to act as my agent regarding any contracting between United HealthCare and myself,” and told United HealthCare to contact Physician Network Consulting “to affect [sic] a prompt and equitable agreement” with the physicians. On July 23, 2001, The Bone and Joint Clinic and the physicians in Orthopaedic Surgery Associates transferred Mr. Taylor’s form letter onto their respective letterheads and sent them to United HealthCare. Two days later, Baton Rouge Orthopaedic Clinic did the same thing.

18. On July 24, 2001, and over the next two months, Physician Network Consulting negotiated with United HealthCare for higher payments for the Professional Orthopedic Services members. For example, on August 6, 2001, a Physician Network Consulting representative told United HealthCare in a letter that: “As we discussed during last week’s telephone conversation, [we] have been authorized by the member practices of Professional Orthopaedic [sic] Services, a messenger model IPA, to represent these practices in all fee schedule and contract negotiations with United.” The same letter asserted that the physicians required “130%-135% of 2001 Medicare in order to remain profitable” and that “no extension shall be granted” under the physicians’ termination notices unless United HealthCare agreed to pay them a higher price. The letter concluded by stating: “If [United HealthCare] wishes to maintain these orthopaedic practices in your panel, you should arrange your schedule to meet with me so that I can messenger your response to each practice.” Listed on the letter as blind-copy recipients were the business managers of

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The Bone and Joint Clinic, Baton Rouge Orthopaedic Clinic, and Orthopaedic Surgery Associates.

19. In September 2001, under the threat of impending contract termination, United HealthCare contacted The Bone and Joint Clinic and Baton Rouge Orthopaedic Clinic directly to attempt to negotiate contract terms with at least one of them. Both groups refused to deal directly and unilaterally with United HealthCare. Instead, they demanded that United HealthCare deal for their services with Professional Orthopedic Services, and do so only through their common agent – Mr. Taylor and Physician Network Consulting.

20. On September 28, 2001, Mr. Taylor sent a letter to United HealthCare, in which he stated that he “messengered your last proposal” to The Bone and Joint Clinic and to Baton Rouge Orthopaedic Clinic but that “both groups have rejected” it, and further that “I believe both would favorably entertain” payment of “120% of Current Medicare” so long as “[t]his fee schedule would be available to all members of POS.” Mr. Taylor asserted in the letter that Professional Orthopedic Services “is a messenger IPA” yet gave copies of the letter – including its explicit statement of a price term for all the competing members of Professional Orthopedic Services – to the practice managers of The Bone and Joint Clinic and Baton Rouge Orthopaedic Clinic.

21. In response to Mr. Taylor’s demand, United HealthCare offered 120% of 2001 RBRVS to The Bone and Joint Clinic and Baton Rouge Orthopaedic Clinic, but made no contract offer to the physicians in Orthopaedic Surgery Associates. On October 3, 2001, Mr. Taylor told United HealthCare that he “messengered” this proposal to The Bone and Joint Clinic and to Baton Rouge Orthopaedic Clinic, but was “sorry to report they have declined your offer.” He continued: “However, the groups are countering a contract that is 125% of 2001 Medicare, and includes all members of the IPA. It is agreed that this will be an IPA contract and all members are to be included therein.”

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22. On October 11, 2001, facing imminent contract termination by The Bone and Joint Clinic, Baton Rouge Orthopaedic Clinic, and Orthopaedic Surgery Associates, United HealthCare was coerced into accepting Mr. Taylor's contract demands. Accordingly, United HealthCare agreed to a contract with all members of Professional Orthopedic Services, and to pay them 125% of 2001 RBRVS.

**RESPONDENTS HAVE ENGAGED IN RESTRAINTS OF
TRADE**

23. The Bone and Joint Clinic, Baton Rouge Orthopaedic Clinic, and Orthopaedic Surgery Associates, acting as a combination of competing physicians through and with Professional Orthopedic Services, and in conspiracy with Physician Network Consulting and Mr. Taylor, have restrained competition by, among other things:

- a. facilitating, negotiating, entering into, and implementing agreements among themselves and Professional Orthopedic Services on price and other competitively significant terms;
- b. refusing to deal with United HealthCare except on collectively agreed-upon terms; and
- c. negotiating prices and other competitively significant terms in a contract with United HealthCare for themselves and Professional Orthopedic Services.

**NO SIGNIFICANT EFFICIENCIES JUSTIFY
RESPONDENTS' CONDUCT**

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

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

25. Respondents' actions described in Paragraphs 16 through 23 of this Complaint have had, or have tended to have, the effect of restraining trade unreasonably and hindering competition in the provision of orthopedic services in the Baton Rouge area in the following ways, among others:

- a. price and other forms of competition among physician members of Professional Orthopedic Services were unreasonably restrained;
- b. prices for orthopedic services were increased; and
- c. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

26. 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 Respondents Physician Network Consulting, L.L.C., Michael J. Taylor, Professional Orthopedic Services, Inc., The Bone and Joint Clinic of Baton Rouge, Inc., Baton Rouge Orthopaedic Clinic, L.L.C., and Orthopaedic Surgery Associates of Baton Rouge, L.L.C.

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 Physician Network Consulting, L.L.C. (“Physician Network Consulting”), Michael J. Taylor, Professional Orthopedic Services, Inc. (“Professional Orthopedic Services”), The Bone and Joint Clinic of Baton Rouge, Inc. (“The Bone and Joint Clinic”), Baton Rouge Orthopaedic Clinic, L.L.C. (“Baton Rouge Orthopaedic Clinic”), and Orthopaedic Surgery Associates of Baton Rouge, L.L.C. (“Orthopaedic Surgery Associates”), 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 (and, for Respondent Orthopaedic Surgery Associates, each physician member), their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondents (or, for Respondent Orthopaedic Surgery Associates, each physician member) 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 (or, for Respondent Orthopaedic Surgery Associates, each physician member) 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 (or, for Respondent Orthopaedic Surgery Associates, each physician member) have violated said Act, and that a Complaint

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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 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 Physician Network Consulting is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal address at 3900 N. Causeway Boulevard, Suite 1470, Metairie, LA 70002.
2. Respondent Michael J. Taylor is the founder and managing director of Physician Network Consulting. His principal address is 3900 N. Causeway Boulevard, Suite 1470, Metairie, LA 70002.
3. Respondent Professional Orthopedic Services is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal address at 5408 Flanders Drive, Baton Rouge, LA 70808.
4. Respondent The Bone and Joint Clinic is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal address at 7777 Hennessy Boulevard, Suite 7000, Baton Rouge, LA 70808.
5. Respondent Baton Rouge Orthopaedic Clinic is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal address at 7443 Picardy Avenue, Baton Rouge, LA 70808.

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6. Respondent Orthopaedic Surgery Associates is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal address at 5408 Flanders Drive, Baton Rouge, LA 70808.
7. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents (and, for Respondent Orthopaedic Surgery Associates, each physician member), 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 Physician Network Consulting” means Physician Network Consulting, L.L.C., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Physician Network Consulting, L.L.C., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “ Respondent Taylor” means Michael J. Taylor.
- C. “ Respondent Professional Orthopedic Services” means Professional Orthopedic Services, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Professional Orthopedic Services, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

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- D. “Respondent The Bone and Joint Clinic” means The Bone and Joint Clinic of Baton Rouge, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by The Bone and Joint Clinic of Baton Rouge, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- E. “ Respondent Baton Rouge Orthopaedic Clinic” means Baton Rouge Orthopaedic Clinic, L.L.C., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Baton Rouge Orthopaedic Clinic, L.L.C., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- F. “ Respondent Orthopaedic Surgery Associates” means Orthopaedic Surgery Associates of Baton Rouge, L.L.C., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Orthopaedic Surgery Associates of Baton Rouge, L.L.C., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each. Respondent Orthopaedic Surgery Associates includes, but is not limited to, Kenneth C. Cranor, M.D., Samuel C. Irwin, M.D., and Charles S. Walker, M.D. During the period of illegal conduct described in the Complaint, Orthopaedic Surgery Associates was a partnership among these three physicians.
- G. “Respondent Physician Practices” means Respondent The Bone and Joint Clinic, Respondent Baton Rouge Orthopaedic Clinic, and Respondent Orthopaedic Surgery Associates.

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- H. “Respondents” means Respondent Physician Network Consulting, Respondent Taylor, Respondent Professional Orthopedic Services, and Respondent Physician Practices.
- I. “ 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.
- J. “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.”
- K. “Payor” means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. Payor includes any person that develops, leases, or sells access to networks of physicians.
- L. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, limited liability companies, unincorporated entities, and governments.
- M. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- N. “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.
- O. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:

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1. all physicians who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.
- P. “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

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treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 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 Professional Orthopedic Services;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any

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

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

- (i) Respondent Physician Network Consulting or Respondent Taylor, 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, or that solely involves physicians in the same medical group practice;
- (ii) Respondent Professional Orthopedic Services 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; or
- (iii) A Respondent Physician Practice 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.

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III.

IT IS FURTHER ORDERED that Respondent Physician Network Consulting and Respondent Taylor, for three (3) years from the date that this Order becomes final, 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. Negotiating with any payor on behalf of Respondent Professional Orthopedic Services, or any Respondent Physician Practice, notwithstanding whether such conduct also is prohibited by Paragraph II of this Order; and
- B. Advising any physician who participates, or has participated, in Respondent Professional Orthopedic Services, or any Respondent Physician Practice, to accept or reject any term, condition, or requirement of dealing with any payor, notwithstanding whether such conduct also is prohibited by Paragraph II of this Order.

IV.

IT IS FURTHER ORDERED that, for three (3) years from the date this Order becomes final, Respondent Physician Network Consulting and Respondent Taylor shall notify the Secretary of the Commission in writing (“Notification”) at least sixty (60) days prior to entering into any arrangement with any physicians under which Respondent Physician Network Consulting or Respondent Taylor would act as a messenger, or as an agent on behalf of any physicians, with payors regarding contracts. The Notification shall include the identity of each proposed physician participant; the proposed geographic area in which the proposed arrangement will operate; a copy of any proposed physician participation agreement; a description of the proposed arrangement’s purpose and function; a description of any resulting efficiencies expected to be obtained through the arrangement; and a description of

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procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Notification is not required for Respondent Physician Network Consulting's or Respondent Taylor's subsequent acts as a messenger pursuant to an arrangement for which this Notification has been given. Receipt by the Commission from Respondent Physician Network Consulting or Respondent Taylor of any Notification, pursuant to this Paragraph IV, is not to be construed as a determination by the Commission that any action described in such Notification does or does not violate this Order or any law enforced by the Commission.

V.

IT IS FURTHER ORDERED that Respondent Professional Orthopedic Services 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 who participates, or has participated, in Respondent Professional Orthopedic Services; and
 - 2. each officer, director, manager, and employee of Respondent Professional Orthopedic Services;
- B. For three (3) years after 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 who begins participating in Respondent Professional Orthopedic Services, and who did not previously receive a copy of this Order and the Complaint from Respondent Professional Orthopedic Services, within thirty (30) days of the time that such participation begins;

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- b. each payor that contracts with Respondent Professional Orthopedic Services for the provision of physician services, within thirty (30) days of the time that such payor enters into such contract, excluding arrangements entered into pursuant to a qualified clinically-integrated joint arrangement or a qualified risk-sharing joint arrangement;
 - c. each person who becomes an officer, director, manager, or employee of Respondent Professional Orthopedic Services, and who did not previously receive a copy of this Order and the Complaint from Respondent Professional Orthopedic Services, within thirty (30) days of the time that he or she assumes such responsibility with Respondent Professional Orthopedic Services; 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 Professional Orthopedic Services, with such prominence as is given to regularly featured articles;
- C. Notify the Commission at least thirty (30) days prior to any proposed change in Respondent Professional Orthopedic Services, 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 Professional Orthopedic Services that may affect compliance obligations arising out of this Order; and
- D. 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 Professional Orthopedic Services has complied and is complying with this Order;
2. the name, address, and telephone number of each payor with which Respondent Professional Orthopedic Services has had any contact; and
3. copies of the delivery confirmations and return receipts required by Paragraphs V.A and V.B.

VI.

IT IS FURTHER ORDERED that, within thirty (30) days after the date on which this Order becomes final, Respondent Physician Network Consulting shall send a copy of this Order and the Complaint by first-class mail:

- A. With delivery confirmation, to each physician who participates, or has participated, in a physician group represented by Respondent Physician Network Consulting since January 1, 1999, excluding physicians being represented only to provide services pursuant to a qualified clinically-integrated joint arrangement or a qualified risk-sharing joint arrangement;
- B. With return receipt requested, to each present and past employee of Respondent Physician Network Consulting, and to each individual who has acted as a contractor for Respondent Physician Network Consulting (1) relating to contracting, or seeking to contract, with payors for the provision of physician services, or (2) relating to advising physicians with regard to their dealings with payors in connection with the provision of physician services; and
- C. With delivery confirmation, to each payor with which Respondent Physician Network Consulting deals or has dealt since January 1, 1999, for the purpose of contracting,

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or seeking to contract, while representing or advising any physician or group of physicians relating to contracting with such payor for the provision of physician services, excluding contracting only for the provision of physician services provided pursuant to a qualified clinically-integrated joint arrangement or a qualified risk-sharing joint arrangement.

VII.

IT IS FURTHER ORDERED that Respondent Physician Network Consulting shall:

- A. For three (3) years after the date this Order becomes final, distribute a copy of this Order and the Complaint:
 - 1. by first-class mail, with delivery confirmation, to all physicians, excluding any physicians only involved in a medical group practice, that Respondent Physician Network Consulting represents relating to contracting, or seeking to contract, with payors for the provision of physician services, or that Respondent Physician Network Consulting advises relating to providing payors with physician services, within (30) days of the time that Respondent Physician Network Consulting begins providing such representation or advice;
 - 2. by first-class mail, with delivery confirmation, to each payor with which Respondent Physician Network Consulting deals for the purpose of contracting, or seeking to contract, while representing or advising any physician or group of physicians relating to contracting with such payor for the provision of physician services, excluding contracts only for the provision of physician services provided by a medical group practice, within thirty (30) days of such dealing; and
- 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

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final, and at such other times as the Commission may by written notice require. Each report shall include:

1. a detailed description of the manner and form in which Respondent Physician Network Consulting has complied and is complying with this Order;
 2. the name, address, and telephone number of each physician that Respondent Physician Network Consulting has represented or advised with respect to his or her dealings with any payor in connection with the provision of physician services, excluding those physician services provided pursuant to a qualified clinically-integrated joint arrangement or a qualified risk-sharing joint arrangement;
 3. the name, address, and telephone number of each payor with which Respondent Physician Network Consulting has dealt while representing any physicians in connection with the provision of physician services, excluding those represented pursuant to a qualified clinically-integrated joint arrangement or a qualified risk-sharing joint arrangement;
 4. copies of the delivery confirmations and return receipts required by Paragraphs VI and VII.A; and
- C. Notify the Commission at least thirty (30) days prior to any proposed change in Respondent Physician Network Consulting, such as dissolution, assignment, sale resulting in the emergence of a successor company or corporation, or the creation or dissolution of subsidiaries or any other change in Respondent Physician Network Consulting that may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that, if Respondent Physician Network Consulting fails to comply with all or any portion of Paragraphs IV, VI, VII.A.2, VII.B, or VII.C of this Order within

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sixty (60) days of the time set forth in those paragraphs, then Respondent Taylor shall, within thirty (30) days thereafter, comply with those portions of Paragraphs IV, VI, VII.A.2, VII.B, or VII.C of this Order with which Respondent Physician Network Consulting did not comply.

IX.

IT IS FURTHER ORDERED that each Respondent Physician Practice (and, for Respondent Orthopaedic Surgery Associates, each physician member) shall:

- A. 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 Vice President of Network Management for United HealthCare of Louisiana, Inc. ("United HealthCare"); and
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any contract with United HealthCare upon receipt of a written request to terminate such contract from United HealthCare.

X.

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

XI.

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

Decision and Order

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

XII.

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

By the Commission, Commissioner Harbour not participating.

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Appendix A.

[letterhead of Respondent sending letter]

[date]

[name],
Vice President of Network Management
United HealthCare of Louisiana, Inc.
3838 North Causeway Boulevard
Metairie, Louisiana 70002

Dear [name]:

Enclosed is a copy of a complaint and a consent order issued by the Federal Trade Commission against Physician Network Consulting, L.L.C., and others.

Pursuant to Paragraph IX of the enclosed consent order, [Respondent] must allow you to terminate, upon your written request, without any penalty or charge, any contracts with [Respondent] that were in effect prior to your receipt of this letter.

Any request to terminate the contract should be made in writing, and sent to me at the following address: [Respondent's address].

Sincerely,

[Respondent]

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 an independent practice association (“IPA”) of physicians who practice orthopedic medicine, its members’ physician practices, their negotiating agent, and the agent’s managing director. The agreement settles charges that the respondents violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements to fix prices and other terms on which they would deal with a payor, and to refuse to deal with that payor except on collectively-determined terms. The respondents named in the complaint are the agent, Physician Network Consulting, L.L.C., and its managing director, Michael J. Taylor; the IPA, Professional Orthopedic Services, Inc.; and the three physician practices whose physicians are members of the IPA, The Bone & Joint Clinic of Baton Rouge, Inc., Baton Rouge Orthopaedic Clinic, L.L.C., and Orthopaedic Surgery Associates of Baton Rouge, L.L.C. 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 respondents that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

Analysis

The Complaint Allegations

Professional Orthopedic Services consists of approximately 28 physicians who provide approximately 70 percent of the orthopedic medicine services in the Baton Rouge, Louisiana, area. To be competitively marketable in the Baton Rouge area, a payor's health insurance plan must include in its physician network members of Professional Orthopedic Services, including physicians from at least The Bone and Joint Clinic or Baton Rouge Orthopaedic Clinic.

Physician Network Consulting is an agent for Professional Orthopedic Services' members. It represents physicians in contract negotiations with health insurance firms and other third-party payors. Physician Network Consulting's client base includes physicians in approximately seven states. Michael J. Taylor is the founder and managing director of Physician Network Consulting.

As the complaint alleges, this matter involves the fixing of price terms demanded from United HealthCare of Louisiana, Inc., by Professional Orthopedic Services' members. With and through Mr. Taylor, the members agreed to terminate their respective contracts with United. They authorized Physician Network Consulting to be their common agent to negotiate more lucrative price terms with United. Although Physician Network Consulting purported to operate as a "messenger" – that is, an arrangement that does not facilitate horizontal agreements on price – it engaged in various actions that reflected or orchestrated such agreements.¹

¹ Some arrangements can facilitate contracting between physicians and payors without fostering an agreement among competing physicians on fees or fee-related terms. One such approach, sometimes referred to as a "messenger model" arrangement, is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice. *See*

Analysis

According to the complaint, respondents succeeded in coercing United to accept their price demands, and thereby raised the cost of orthopedic services in the Baton Rouge area. Professional Orthopedic Services engaged in no efficiency-enhancing integration sufficient to justify respondents' agreement on price. By orchestrating agreements among Professional Orthopedic Services' members to deal only on collectively-determined terms, and by refusing to deal with United unless it would meet those terms, respondents violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and to prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans. The order also includes temporary "fencing-in" relief to ensure that the alleged unlawful conduct by respondents does not continue. Respondents Physician Network Consulting and Mr. Taylor conduct business in a number of states, and the order applies to their activities in all such states.

The proposed order's specific provisions are as follows:

Paragraph II. contains the proposed order's core prohibitions against collectively negotiating prices or organizing group boycotts of payors. Paragraph II.A prohibits the respondents from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, 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.

<http://www.ftc.gov/reports/hlth3s.htm>.

Analysis

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

As defined in the proposed order, a "qualified risk-sharing joint arrangement" possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the participants to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A "qualified clinically-integrated joint arrangement," on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any

Analysis

agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

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

Paragraph III, for three years, bars Physician Network Consulting and Mr. Taylor from negotiating with any payor on behalf of the other respondents, and from advising any physician who participates in Professional Orthopedic Services, or advising the respondent Physician Practices (defined in Paragraph I.G), to accept or reject any term, condition, or requirement of dealing with any payor. This temporary “fencing-in” relief will ensure that the alleged unlawful conduct by these respondents does not continue.

Paragraph IV, for three years, requires Physician Network Consulting and Mr. 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. Paragraph IV sets out the information necessary to make the notification complete.

Paragraph V requires Professional Orthopedic Services to send the complaint and order to all physicians who have participated in Professional Orthopedic Services, and to payors that contract with Professional Orthopedic Services.

Paragraphs VI and VII generally require Physician Network Consulting to distribute the complaint and order to physicians who have participated in any group that has been represented by Physician Network Consulting since January 1, 1999, and each payor with which Physician Network Consulting has dealt since January 1, 1999, for the purpose of contracting.

Analysis

Paragraph VI.B requires Physician Network Consulting to distribute the complaint and order to present and past employees, and to each individual who has acted as a contractor for Physician Network Consulting relating to contracting or advising physicians with regard to their dealings with payors. Paragraph VI.B is intended to ensure that past as well as present employees and contractors of Physician Network Consulting are made aware of the complaint and consent in order to discourage similar illegal conduct.

In the event that Physician Network Consulting fails to comply with the requirements set forth in Paragraphs IV, VI, VII.A.2, VII.B, or VII.C, Mr. Taylor must do so pursuant to Paragraph VIII.

Paragraph IX requires the respondent Physician Practices to terminate any contract with United HealthCare at United HealthCare's request and without penalty.

Paragraphs VII.B, VII.C, X, and XI of the proposed order impose various obligations on respondents to report or provide access to information to the Commission in order to facilitate monitoring respondents' compliance with the order.

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

**IOWA MOVERS AND WAREHOUSEMEN'S
ASSOCIATION**

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

Docket C-4096; File No. 0210115

Complaint, September 10, 2003--Decision, September 10, 2003

This consent order, among other things, prohibits Respondent Iowa Movers and Warehousemen's Association – an association with, as members, approximately 70 household goods movers that conduct business within the State of Iowa – from filing tariffs that contain collective intrastate rates. The order also prohibits the respondent from engaging in activities such as exchanges of information that would facilitate member movers in agreeing on the rates contained in their intrastate tariffs. In addition, the order prohibits the respondent from maintaining a tariff committee or agreeing with movers to institute any automatic intrastate rate increases. The order also requires the respondent to cancel all tariffs it has filed that contain intrastate collective rates; to cancel any provisions in its governing documents that permit it to engage in activities prohibited by the order; and to send its members a letter explaining the terms of the order.

Participants

For the Commission: *Dana Abrahamsen, Patrick J. Roach, Richard B. Dagen, John Howell and Mary T. Coleman.*

For the Respondent: *Richard Howe, Howe, Cunningham & Lowe. P.L.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (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 Iowa Movers and Warehousemen's Association (hereinafter sometimes referred to as "respondent" or "IMWA"), a corporation, has violated and is now violating the provisions of Section 5 of said Act, and it appearing to the Commission that a