

Complaint

IN THE MATTER OF

SURGICAL SPECIALISTS OF YAKIMA, P.L.L.C., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4101; File No. 0210242**Complaint, November 14, 2003--Decision, November 14, 2003*

This consent order, among other things, prohibits Respondent Surgical Specialists of Yakima ("SSY") -- which has 24 physician members in South Central Washington State that practice in five specialties: Ear Nose and Throat, OB/GYN, Ophthalmology, Plastic Surgery, and General Surgery -- and Cascade Surgical Partners ("CSP") and Respondent Yakima Surgical Associates ("YSA"), which are members of SSY -- 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, to refuse to deal, or to threaten to refuse to deal with payors; (3) regarding the terms of dealing with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving SSY. The order also prohibits the respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to deal with a payor, and from attempting to engage in, or from inducing anyone to engage in, any action prohibited by the order. In addition, the order requires Respondent SSY to revoke the membership of either CSP or YSA; to distribute the complaint and order to all physicians who have participated in SSY, and to payors that negotiated or indicated an interest in negotiating contracts with SSY; and to terminate, at any payor's request and without penalty, its current contracts with respect to providing physician services.

Participants

For the Commission: *Joseph Lipinsky, Robert J. Schroeder, Charles A. Harwood, D. Bruce Hoffman, Louis Silvia and Mary T. Coleman.*

For the Respondents: *Douglas C. Ross, Davis Wright Tremaine, LLP.*

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (“FTC 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 Surgical Specialists of Yakima, P.L.L.C. (“SSY”), Cascade Surgical Partners, Inc., P.S. (“Cascade Surgical”), and Yakima Surgical Associates, Inc., P.S. (“Yakima Surgical”), hereinafter collectively referred to as “Respondents,” have violated Section 5 of the FTC 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 horizontal agreements among competing physicians who constitute most of the physicians who specialize in general surgery in the Yakima, Washington, area, to fix price and other terms charged to health care plans and other third-party payors (“payors”). In furtherance of their agreements, the physicians formed SSY to negotiate and to enter into contracts with payors upon collectively agreed upon price and other contract terms. The physicians further agreed to refuse to negotiate or to contract individually with any payor. This conduct raised the price of physician services for surgery in the Yakima, Washington, area.

RESPONDENTS

2. Respondent SSY is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal address at 307 South 12th Avenue, Yakima, WA 98902. SSY’s Executive Committee (“Committee”) consists of the organization’s officers: the President, Vice President, Treasurer, Secretary, and three Members-at-Large. The Committee generally has negotiated and reviewed proposed payor contracts prior to submitting any

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information to SSY's physician members. Once a proposed contract has been submitted to the physician members, however, they have voted on whether to accept it. Once the terms of a payor's contract have been accepted by a majority of SSY's members, the Committee then has signed that contract on behalf of the members.

3. Respondent Cascade Surgical is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal address at 3003 Tieton Drive, Yakima, WA 98902. Its membership consists of four physicians who specialize in general surgery. Respondent Cascade Surgical is a member of Respondent SSY.

4. Respondent Yakima Surgical is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal address at 111 South 11th Avenue, Yakima, WA 98902. Its membership consists of five physicians who specialize in general surgery. Respondent Yakima Surgical is a member of Respondent SSY.

5. Except to the extent that competition has been restrained as alleged herein, Respondents Cascade Surgical and Yakima Surgical have been, and are now, in competition with each other for the provision of physician services.

THE FTC HAS JURISDICTION OVER RESPONDENTS

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

**OVERVIEW OF MARKET AND PHYSICIAN
COMPETITION**

7. SSY has approximately 24 physician members, all of whom are licensed to practice medicine in the State of Washington, and are engaged in the business of providing physician services to

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patients in the Yakima, Washington area. SSY's physicians practice in the following specialties: ENT, OB/GYN, General Surgery, Ophthalmology, and Plastic Surgery. There are ten physicians who specialize in general surgery in the Yakima, Washington area – Yakima Surgical's five surgeons, Cascade Surgical's four surgeons, and one independent surgeon who is not a member of SSY. Thus, SSY has 90% of the physicians who specialize in general surgery who practice in the Yakima, Washington area.

8. The area centers on the Yakima Valley and extends from the Cascade Mountain Range to the Columbia River. The area's largest city, Yakima, with a population of 72,000, is the processing and shipping hub for the produce grown in the Yakima Valley. Other communities in the Yakima, Washington area include Sunnyside and Toppenish, headquarters for the Yakima Indian Nation. To be competitively marketable in the Yakima, Washington area, a payor's health insurance plan must include in its physician network a large number of general surgery physicians who practice in the Yakima, Washington area.

9. 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 in order to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs and enable them to lower the price of insurance, and reduce out-of-pocket medical care expenditures by subscribers to the payors' health insurance plans.

10. Physicians organize their practices under several models, including, but not limited to, sole proprietorships, partnerships, and professional corporations (collectively "physician entities"). Absent agreements among competing physician entities on the terms, including price, on which they will provide services to enrollees in payors' health care plans, competing physician entities decide individually whether to enter into payor contracts

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to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

11. 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 Yakima, Washington area, payors negotiate the conversion factor, rather than a percentage of the RBRVS fee, with physicians. For example, if a Yakima, Washington area payor offers a conversion factor of \$42, rather than the Medicare conversion factor of \$35, and the RVU that CMS assigns for a particular physician service is 2.34, then the physician’s price for that service to the payor would be \$42 x 2.34, or \$98.28.

**SSY WAS FORMED TO, AND DID, COLLECTIVELY
NEGOTIATE HIGHER FEES**

12. In an attempt to prevent payors from decreasing reimbursement rates, in late 1996 several competing physicians founded SSY to negotiate collectively their payor contracts. These physicians did not, however, want to combine or integrate their practices. To assure prospective members that joining SSY would not affect any doctor’s ability to operate his or her individual practice, an SSY organizational document states, “[a]lthough your employees will be paid through the PLLC, you will retain management control of your own office including personnel, and all day to day operations as you currently control them.” That same document goes on to assure, “[a]lthough collections will be done on a centralized basis the actual billing of

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your services will be done through your own office and under your own control to ensure that each speciality maintains the knowledge necessary to bill using the CPT codes for their individual speciality services.” The cost of joining SSY was addressed in another organizational document, which states, “[n]et costs may well be insignificant if the organization enables us to improve our reimbursement rates by even a few points on the relative value scale.”

13. SSY’s operating agreement was drafted to create the appearance that SSY was operating as an integrated single entity, despite the reality that each member physician retained control of his or her individual practice. The operating agreement states, “all files of patients serviced or treated by or on behalf of the Company [SSY] shall remain the property of the Member which provides such services.” It also says, “each Member which is a corporation or who employs physician employees shall have the sole responsibility for paying its physician employees who render professional medical services on behalf of the Company. No physician employee of a Member shall be permitted to look to the Company for payment for services rendered.” The operating agreement’s system allocated income and expenses so that each member’s income was independent of the income earned by SSY or any of its individual members.

14. SSY’s first task after its formation was to implement its plan to collectively negotiate contracts with payors. It solicited fee information from its members saying, “we need to know as much as we can about your fees.”

15. SSY then provided its members with instructions on dealing with third party payers, telling them not to sign any new contracts or renew any existing contracts. In the summer of 1996, SSY instructed each individual physician or member of a medical group practice, including Respondents Cascade Surgical and Yakima Surgical, to send a form letter to payors, which states in part,

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I have joined a group practice, Surgical Specialists of Yakima, PLLC, and will be practicing totally as a member of that group effective October 1, 1996. This will require negotiation of a new contract for covered services as of that date. This should be negotiated through the representatives of Surgical Specialists of Yakima, PLLC.

Please accept this letter as notification of my resignation from our current existing contract effective October 1, 1996.

16. Since its formation, SSY has acted as the exclusive negotiator for its members, including Respondents Cascade Surgical and Yakima Surgical. For example, in 1999, when a payor approached some of SSY's doctors individually, SSY's clinic coordinator "warned" that if it continued to approach member doctors individually, SSY and its members would terminate their dealings with it.

17. All SSY negotiations with payors have followed the same pattern: SSY demands price increases of as much as 50 percent, and, when a payor balks, SSY's members, including Respondents Cascade Surgical and Yakima Surgical, following instructions from SSY's executive committee, then send form letters to their patients. For example, a letter that was sent to patients in July 2001 states:

Your physician _____ is a member of a larger group, Surgical Specialists of Yakima, PLLC. In April 2001 we requested that Premera Blue Cross renegotiate the terms of our contract which have been in effect since August 1999. They have declined to negotiate with us and our contract with Premera Blue Cross will terminate August 1, 2001.

We encourage you to contact your employer or Premera Blue Cross for the specific details of your policy and whether or not Premera will continue to pay benefits to non-participating physicians. If they do, then your out of pocket expense may be higher because you will be responsible for

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the difference between Premera's payment and the billed amount.

Whether we are participants in their network or not we are always willing to provide medical care for you and your family.

Please call any of our offices with any questions or concerns.

18. When such a letter fails to change a payor's stance, SSY then follows through on its threat and departicipates. In fact, during its existence SSY has, at least once, departicipated from contracts with the three largest commercial payors in the Yakima, Washington area.

19. A large share of the physicians who specialize in general surgery in the Yakima, Washington area are members of SSY, giving it substantial bargaining power with payors, with the result that payors have repeatedly acceded to Respondent SSY's demands for higher fees for its members than those members individually could have negotiated.

20. Through Respondent SSY's negotiations with payors for physician services at collectively agreed-upon terms, Respondent SSY's physician members, including Respondents Cascade Surgical and Yakima Surgical, have successfully contracted for the highest prices in the state for surgical codes, with conversion factors for surgical codes that are substantially higher than the conversion factors other physicians in the Yakima, Washington area receive for surgical codes.

**RESPONDENTS HAVE ENGAGED IN RESTRAINTS OF
TRADE**

21. Respondents have acted to restrain competition by, among other things:

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- a. facilitating, negotiating, entering into, and implementing agreements among the members of SSY 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 SSY's members.

**THERE ARE NO SIGNIFICANT EFFICIENCIES IN
RESPONDENTS' CONDUCT**

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

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

23. Respondents' actions described in Paragraphs 12 through 20 of this Complaint have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Yakima, Washington area in the following ways, among others:

- a. price and other forms of competition among Respondents Cascade Surgical and Yakima Surgical and other members of SSY were unreasonably restrained;
- b. prices for physician services were increased; and
- c. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

24. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of

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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 fourteenth day of November, 2003, issues its Complaint against Respondents SSY, Cascade Surgical and Yakima Surgical.

By the Commission.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Surgical Specialists of Yakima, P.L.L.C. (“SSY”), Cascade Surgical Partners, Inc., P.S. (“Cascade Surgical”), and Yakima Surgical Associates, Inc., P.S. (“Yakima Surgical”), hereinafter sometimes referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of the draft of Complaint that the 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 the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

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1. Respondent SSY is a for-profit professional limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal address at 307 South 12th Avenue, Yakima, WA 98902.
2. Respondent Cascade Surgical is a for-profit professional service corporation, organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal address at 3003 Tieton Drive, Yakima, WA 98902.
3. Respondent Yakima Surgical is a for-profit professional service corporation, organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal address at 111 South 11th Avenue, Yakima, WA 98902.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of 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 SSY” means Surgical Specialists of Yakima, P.L.L.C., its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by SSY, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.
- B. “Respondent Cascade Surgical” means Cascade Surgical Partners, Inc., P.S., its officers, directors, employees, agents, representatives, successors, and assigns; and the

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subsidiaries, divisions, groups, and affiliates controlled by Respondent Cascade Surgical, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.

- C. “Respondent Yakima Surgical” means Yakima Surgical Associates, Inc., P.S., its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Respondent Yakima Surgical, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.
- D. “Respondents” means Respondent SSY, Respondent Cascade Surgical, and Respondent Yakima Surgical.
- E. “ 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.
- F. “ Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- G. “Payor” means any person that pays, or arranges for the payment, for all or any part of any physician services 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.
- H. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

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- I. “ Physician” means a doctor of allopathic medicine (“M.D.”), a doctor of osteopathic medicine (“D.O.”), a doctor of chiropractic medicine (“D.C.”), or a doctor of podiatric medicine (“D.P.M.”).
- J. “ 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 SSY, pursuant to Paragraph IV.A.4 of this Order, of such payor’s right to terminate such contract.
- K. “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.
- L. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
 - 1. all physicians who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 - 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.
- M. “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

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by managing the provision of physician services, such as risk-sharing involving:

- a. the provision of physician services to payors at a capitated rate,
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and
2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the 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, 15 U.S.C. § 44, cease and desist from:

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- 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 SSY;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;
- C. Attempting to engage in any action prohibited by Paragraph II.A or II.B, above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED, HOWEVER, that nothing in this Paragraph II shall prohibit any agreement involving or conduct by Respondent SSY, subject to the provisions of Paragraph III below, or by Respondents Cascade Surgical and Yakima Surgical, that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or

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qualified clinically-integrated joint arrangement, or that solely involves physicians in the same medical group practice.

III.

IT IS FURTHER ORDERED that:

- A. Respondent SSY shall, pursuant to each purported qualified risk-sharing joint arrangement or purported qualified clinically-integrated joint arrangement (“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 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 in such Arrangement.

PROVIDED, HOWEVER, that Notification required by this Paragraph III.A is not required for negotiations or agreements with subsequent payors pursuant to any Arrangement for which this Notification was given; and

- B. Respondent SSY shall include the following information in this Notification:
1. for each physician participant, his or her name, address, telephone number, medical specialty, medical practice group, if applicable, and the name of each hospital where he or she has privileges;

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2. a description of the Arrangement, its purpose, function, and area of operation;
3. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;
4. 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;
5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and
6. all studies, analyses, and reports, which were prepared for the purpose of evaluating or analyzing competition for physician services in any relevant market, including, but not limited to, Respondent SSY's, any physician's, or any medical practice group's market share of physician services in any relevant market.

PROVIDED, HOWEVER that the expiration of the waiting period described herein 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 SSY that the Arrangement has been rejected shall not be construed as a determination by the Commission, or its staff, that the Arrangement has been approved. Provided further that, receipt by the Commission from SSY 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.

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IV.

IT IS FURTHER ORDERED that Respondent SSY shall:

- A. Within thirty (30) days after the date on which this Order becomes final:
 1. send by first-class mail, with delivery confirmation, a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment to each physician who participates, or has participated, in Respondent SSY;
 2. send by first-class mail, return receipt requested, a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment to each officer, director, manager, and employee of Respondent SSY;
 3. send by first-class mail, return receipt requested, copies of this Order, the Complaint, the Analysis of the Proposed Order to Aid Public Comment, and the notice specified in Appendix A to this Order to the chief executive officer of each payor Respondent SSY has a record of having been in contact with since January 1, 2001, regarding contracting for the provision of physician services; and
 4. terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of physician services, at the earlier of: (a) receipt by Respondent SSY of a written request from a payor to terminate such contract, or (b) the earliest termination or renewal date (including any automatic renewal date) of such contract. Provided, however, a preexisting contract may extend beyond any such termination or renewal date no later than one year after the date on which the Order becomes final, if prior to such termination or renewal date, (i) the payor submits to Respondent SSY a written request to extend such contract to a specific date no later than one year after the Order

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becomes final, and (ii) Respondent SSY has determined not to exercise any right to terminate. Provided further, that any payor making such request to extend a contract retains the right, pursuant to part (a) of this paragraph, to terminate the contract at any time.

- B. Within 180 days after the date on which the Order becomes final:
 - 1. revoke the membership in Respondent SSY, without penalty or negative financial consequences, of either Respondent Cascade Surgical or Respondent Yakima Surgical (“Revoked Entity”), including the memberships of the individual physician members of that Revoked Entity; and
 - 2. cease and desist from all financial and contractual relationships with the Revoked Entity, excluding coordination of clinical activities, including, but not limited to, any arrangement under which Respondent SSY acts or would act as an agent or otherwise on behalf of the Revoked Entity, in dealing with payors regarding contracts under which the Revoked Entity would be compensated for the provision of physician services; provided, however, that Respondent SSY may engage in those activities that are required to comply with the terms of this Order, including, but not limited to Paragraph IV.B.1.
- C. For five (5) years after the date on which this Order becomes final:
 - 1. cease and desist from admitting as a member and having any financial relationship or contractual relationship with any individual doctor, who currently is a member of the Revoked Entity;
 - 2. notify the Secretary of the Commission in writing at least sixty (60) days prior to admitting into membership any physician or medical group practice, who during the prior

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year, provided physician services in Yakima County, Washington;

3. distribute by first-class mail, return receipt requested, a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment to:
 - a. each physician who begins participating in Respondent SSY for the provision of physician services, and who did not previously receive a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment, within thirty (30) days of the time that such participation begins;
 - b. each payor who contracts with Respondent SSY for the provision of physician services, who did not previously receive a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment from Respondent SSY, within thirty (30) days of the time that such payor enters into such contract; and
 - c. each person who becomes an officer, director, manager, or employee of Respondent SSY, and who did not previously receive a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment from Respondent SSY, within thirty (30) days of the time that he or she assumes such status with Respondent SSY; and
4. annually publish in an official annual report or newsletter sent to all physicians who participate in Respondent SSY a copy of the Analysis of the Proposed Order to Aid Public Comment, published in conjunction with this Order and the accompanying Complaint, with such prominence as is given to regularly featured articles; and
5. notify the Commission at least thirty (30) days prior to any proposed change in Respondent SSY, such as dissolution,

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assignment, sale resulting in the emergence of a successor, the formation of a medical group practice, the creation or dissolution of subsidiaries or any other change in Respondent SSY that may affect compliance obligations arising out of this Order.

- D. For ten (10) years after the date on which the Order becomes final, cease and desist from readmitting the Revoked Entity as a member.

V.

IT IS FURTHER ORDERED that Respondent Cascade Surgical and Respondent Yakima Surgical shall:

- A. Within thirty (30) days after the date on which the Order becomes final, send by first-class mail, return receipt requested, a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment to each officer, director, manager, and employee of that Respondent;
- B. For five (5) years after the date on which this Order becomes final, distribute by first-class mail, return receipt requested, a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment to each person who becomes an officer, director, manager, or employee of that Respondent, and who did not previously receive a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment, within thirty (30) days of the time that he or she assumes such status with such Respondent;
- C. If it is the Revoked Entity, for five (5) years after the date on which this Order becomes final, distribute by first-class mail, return receipt requested, a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment to:

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1. each physician who begins participating in the Revoked Entity for the provision of physician services, and who did not previously receive a copy of this Order, the Complaint, and the Analysis of the Proposed Order to Aid Public Comment from Respondent SSY, within thirty (30) days of the time that such participation begins; and
 2. each payor who contracts with the Revoked Entity for the provision of physician services, and who did not contract with Respondent SSY at the date that this Order became final, within thirty (30) days of the time that such payor enters into such contract;
- D. If it is not the Revoked Entity, for three (3) years after the date on which this Order becomes final, cease and desist from admitting into its practice any physician who participated in the practice of the Revoked Entity at the date on which this Order becomes final.

VI.

IT IS FURTHER ORDERED that Respondents shall file verified written reports within sixty (60) days after the date on which this Order becomes final, annually thereafter for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, setting forth:

- A. In detail, the manner and form in which Respondents have complied and are complying with this Order;
- B. The name, address, and telephone number of each payor with which Respondents have had any contact; and
- C. Copies of the delivery confirmations and signed return receipts required by Paragraphs IV. and V.

Decision and Order

VII.

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 its possession, or under their control, relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to such Respondents, and in the presence of counsel, and without restraint or interference from it, to interview such Respondents or employees of such Respondents.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on November 14, 2023.

By the Commission.

Decision and Order

Appendix A

[letterhead of Surgical Specialists of Yakima, P.L.L.C.]

[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 Surgical Specialists of Yakima ("SSY"), and others.

Pursuant to Paragraph IV.A.6. of the enclosed consent order, SSY must allow you to terminate, upon your written request, without any penalty or charge, any contracts with SSY that were in effect prior to your receipt of this letter.

Paragraph IV.A.6. 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 SSY], but only if SSY waives its right to terminate the contract. If you choose to extend the term of the contract, you may later terminate the contract at any time.

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,

[CEO of SSY]

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 Surgical Specialists of Yakima, P.L.L.C. (SSY), and two general surgery groups – Cascade Surgical Partners, Inc., P.S. (CSP) and Yakima Surgical Associates, Inc., P.S. (YSA) – that are members of SSY. The agreement settles charges that these parties violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among members of SSY to fix prices and other terms on which they would deal with health plans, agreements enforced by SSY's members' refusal to deal with such purchasers except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by any Respondent that said Respondent violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the complaint are summarized below.

SSY was organized in 1996 by several independent medical practices. Those medical practices, which became "members" of SSY, were and are separate and independent in all material

Analysis

respects, are not subject to the control of SSY, have not unified their economic interests and incentives through SSY, and are not significantly integrated (either clinically or financially). SSY's activities on behalf of its members constitute the combined action of those members, and not unilateral action by SSY. SSY presently has 24 physician members that practice in five specialties, ENT, OB/GYN, Ophthalmology, Plastic Surgery, and General Surgery. SSY represents 90 percent of all physicians practicing general surgery in and around Yakima, Washington, which is located in south-central Washington.

According to the complaint, SSY members refuse to negotiate or contract with health plans on an individual basis. Instead, all negotiations are conducted by SSY, and SSY's members accept only those contracts deemed acceptable by SSY. In accordance with this model, Respondents have orchestrated collective agreements on fees and other terms of dealing with health plans, have carried out collective negotiations with several health plans, and have refused and threatened to refuse to deal with health plans who resisted Respondents' desired terms.

The complaint alleges that Respondents have succeeded in forcing health plans to raise fees paid to SSY members and thereby raised the cost of medical care in the Yakima area. As a result of the challenged actions of Respondents, SSY members receive the highest fees for surgical services in Washington. By orchestrating agreements among SSY members to deal only on collectively-determined price and other terms, Respondents have 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 prevent its recurrence. It is similar to many previous 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, but with one additional provision. In addition to the core prohibitions, the

Analysis

proposed order in this matter requires that SSY revoke the membership of either CSP or YSA. Such structural relief is not routinely imposed but is necessary in this case to reduce SSY's market power in general surgery.

The proposed order's specific provisions are as follows:

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, to refuse to deal, or to threaten to refuse to deal with payors; (3) regarding the terms of dealing with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the Respondent SSY.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to deal with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B; and 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. 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 physician participants jointly to control costs and improve quality by managing the provision of services.

Analysis

Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A “qualified clinically-integrated joint arrangement” on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph IV, which applies only to SSY, solves the market power issue by requiring SSY to revoke the membership of either CSP or YSA. It also requires SSY to distribute the complaint and order to all physicians who have participated in SSY, and to payors that negotiated or indicated an interest in negotiating contracts with SSY, and requires SSY to terminate, at any payor’s request and without penalty, its current contracts with respect to providing physician services. Finally, SSY is prohibited from readmitting any physician from the revoked entity for five years and from readmitting the revoked entity for 10 years.

Paragraph V, which applies only to CSP and YSA, requires them to distribute the complaint and order to all physicians who have participated in their activities and to any physicians who become involved with either CSP or YSA in the future.

Paragraphs III, VI, and VII 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

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION

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

Docket C-4102; File No. 0210115

Complaint, December 4, 2003--Decision, December 4, 2003

This consent order, among other things, prohibits Respondent New Hampshire Motor Transport Association – an association with, as members, approximately 400 firms primarily engaged in the trucking industry, including approximately 19 household goods movers that conduct business within the State of New Hampshire – from filing tariffs that contain rules mandating automatic price increases. The order also prohibits the respondent from engaging in activities such as exchanges of information that would facilitate member movers’ agreement to include such rules in their intrastate tariffs. In addition, the order requires the respondent to cancel all tariffs it has filed that contain rules concerning automatic rate increases; to cancel any provisions in its governing documents that permit it to engage in activities prohibited by the order; and to send a letter explaining the terms of the order to its members engaged in moving household goods.

Participants

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

For the Respondent: *Daniel Luker, Prety, Flaherty, Beliveau & Haley.*

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 New Hampshire Motor Transport Association (hereinafter sometimes referred to as “respondent” or “NHMTA”), an association, has violated and is now violating the provisions of Section 5 of said Act, and it appearing to the Commission that a