

Complaint

IN THE MATTER OF

**SOUTHEASTERN NEW MEXICO
PHYSICIANS IPA, INC., ET AL.**

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

*Docket C-4113; File No. 0310134
Complaint, August 5, 2004--Decision, August 5, 2004*

This consent order, among other things, prohibits Respondent Southeastern New Mexico Physicians IPA, Inc. ("SENM") -- an independent practice association with 68 physician members -- and two of its non-physician employees, also respondents, from entering into or facilitating any agreement between or among any physicians (1) to negotiate with payors on behalf of any physician; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents. The order also prohibits the respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor, and from attempting to engage, or inducing anyone to engage in, any action prohibited by the order. In addition, the order prohibits the individual respondents, for three years, from negotiating with any payor on behalf of SENM or any SENM member, and 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: *Steve Vieux, Patrick English, David Pender, Jeffrey W. Brennan, Anne R. Schenof, Daniel P. Ducore, Louis Silvia and Luke Froeb.*

For the Respondents: *Andrew S. Gordon.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Southeastern New Mexico Physicians IPA, Inc. ("SENM"), Barbara Gomez, and

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Lonnie Ray, hereinafter 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 horizontal agreements among competing physicians in the Roswell, New Mexico, area, to fix prices charged to health care plans and other third-party payors (“payors”), and to refuse to deal with payors except on collectively agreed upon terms. These physicians constitute most of the physicians in the Roswell area. They orchestrated these price-fixing agreements and refusals to deal through SENM and its non-physician employees, Barbara Gomez and Lonnie Ray, and their conduct raised the price of physician services in the Roswell area.

RESPONDENTS

2. SENM is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 500 North Main Street, Suite 618, Roswell, NM 88201.

3. Barbara Gomez and Lonnie Ray are individuals who negotiate payor contracts on behalf of SENM’s physician members. Their principal address is 500 North Main Street, Suite 618, Roswell, NM 88201.

THE FTC HAS JURISDICTION OVER RESPONDENTS

4. At all times relevant to this Complaint, SENM has been engaged in the business of contracting with payors, on behalf of its physician members, for the provision of health care services to persons for a fee.

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5. SENM was founded by, is controlled by, and carries on business for the pecuniary benefit of its physician members. Accordingly, SENM is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. Except to the extent that competition has been restrained as alleged herein, SENM physician members have been, and are now, in competition with each other for the provision of physician services in the Roswell area for a fee.

7. 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**

8. SENM is an independent practice association ("IPA") with approximately 68 physician members, all of whom are licensed to practice allopathic or osteopathic medicine in the State of New Mexico, and engaged in the business of providing physician services to patients in the Roswell area. Approximately 73% of the physicians who independently practice in the Roswell area are members of SENM. To be competitively marketable in the Roswell area, a payor's health insurance plan must include in its physician network a large number of primary care physicians and specialists who practice in that area.

9. Roswell is in southeastern New Mexico. The closest major cities to Roswell are El Paso, Texas, approximately 200 miles to the southwest; Lubbock, Texas, approximately 260 miles to the east; Albuquerque, the largest city in New Mexico, approximately 200 miles to the northwest; and Santa Fe, the state capital and second largest city in the state, approximately 190 miles to the northwest.

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10. 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 insureds. These contracts may reduce payors' costs and enable them to lower the price of insurance, and thereby result in lower medical care costs for subscribers to the payors' health insurance plans.

11. 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.

12. 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 Roswell 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").

13. 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 significant terms on behalf of the participating physicians, or facilitate the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the messenger's opinion on the appropriateness, or lack thereof, of the offer.

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**RESPONDENTS NEGOTIATED PAYOR CONTRACTS
FOR SENM PHYSICIAN MEMBERS**

14. SENM's physician members each pay \$500 annual membership dues. A physician member becomes eligible to participate in SENM's contracts by entering into a "Physician Agreement" with the organization. SENM's representatives, Respondents Gomez and Ray, negotiate one single-signature contract with each payor, signed by SENM's president, on behalf of all of SENM's physician members. The contracts include a uniform fee schedule that applies to the entire general membership.

15. SENM's Managed Care Contract Committee ("Contract Committee") is responsible for evaluating, on behalf of SENM's physician members, contracts and contracting opportunities with payors. According to one SENM document, the Contract Committee's goal is to convince members "to agree . . . to handle managed care as a group." The Contract Committee reports to SENM's Board of Directors ("SENM Board").

16. Another Contract Committee function is to "arrange for external negotiation resources." SENM has contracted with payors through Ms. Gomez and Ms. Ray. Ms. Gomez and Ms. Ray were once employees of a consulting firm that negotiated contracts for SENM. After that firm exited the business in 2001, Ms. Gomez and Ms. Ray became SENM employees and continued to negotiate payor contracts for SENM.

17. Ms. Gomez and Ms. Ray, with the assistance of the SENM Board and Contract Committee, developed and periodically updated an IPA fee schedule that, according to Contract Committee minutes, was "used to negotiate contracts" with payors. The IPA fee schedule – which the SENM Board must approve – lists the minimum prices at which SENM will accept a payor contract offer.

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18. In developing the IPA fee schedule, SENM surveyed its members on the minimum price levels they would accept. To aid physicians in making this decision, SENM informed them of the prices they were paid for their most common medical procedures under preexisting, SENM-negotiated payor contracts. All such contracts contained prices that the physicians had fixed and jointly demanded through SENM. Many SENM physician members used these fixed prices to determine the minimum price levels they would accept through SENM negotiations with payors.

19. Ms. Ray reported to the Contract Committee that the SENM physicians “expected fees that were far beyond any amount that most payors would be willing to accept.” According to Contract Committee minutes, members nonetheless “agreed that she should make every effort to obtain the desired reimbursement or as close as possible.”

20. Ms. Gomez and Ms. Ray negotiate with payors on the prices and other contract terms pursuant to which SENM members will provide medical care to subscribers of payors’ health plans, and report to the SENM Board and Contract Committee on developments in payor negotiations. The Contract Committee must approve any negotiated contract, at which point it then submits the contract to the SENM Board for approval. The SENM Board, once it approves a contract, presents the contract to the individual members and recommends that they approve it. If a majority of the general membership approves the contract, then SENM’s president signs the contract on the organization’s behalf. Thereafter, SENM’s members decide whether to opt into or out of the contract. Members routinely opted into contracts jointly negotiated on their behalf in this manner.

21. SENM’s physician members agreed with each other and with SENM that they would not deal individually, or through any other organization, with any payor with which SENM was attempting to negotiate, or had signed, a contract jointly on behalf of SENM’s members. SENM’s members often refused payor offers made to them individually, hindering payors’ efforts to

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establish competitive physician networks in the Roswell area. Due to SENM's large share of Roswell area physicians, payors have repeatedly acceded to Respondents' price demands for all SENM members.

22. Reflecting SENM's mission as a contracting entity for its members' joint benefit, minutes from a SENM general membership meeting, under the heading "President's Report," state: "Solidarity of IPA – Reinforced the importance that the bargaining strength of the overall organization rests with the solidarity of its membership." When a payor attempted to negotiate individual contracts with SENM's physician members, it was repeatedly rebuffed.

23. In a November 1998 letter to one payor, a SENM representative stated that SENM members had agreed on prices they should receive for physician services, would forward that fee schedule to the payor the next day, and would not deal with that payor unless it "meets or exceeds" those prices. The letter added that SENM would not accept a contract offer "if any single fee is less than what has been approved by the general membership."

24. Prices for physician services in New Mexico typically range from approximately 120% to 140% of RBRVS, for most procedures. Through collective negotiations and threatened refusals to deal, Respondent SENM has contracted for much higher prices than the New Mexico average, including prices as high as 250% of RBRVS for some procedures.

HEALTHSMART PREFERRED CARE

25. Healthsmart Preferred Care, Inc. ("Healthsmart"), is a health plan doing business in the Roswell area. In July 1997, Healthsmart and SENM, on its members' collective behalf, first entered into a contract. In March 1998, SENM demanded to negotiate a new contract. During these negotiations, SENM, through Ms. Gomez and Ms. Ray, collectively demanded higher fees from Healthsmart. SENM insisted on fees that were, on

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average, more than 15% above Healthsmart's fee schedule with comparable IPAs in the region.

26. By April 1999, Healthsmart and SENM had not agreed on new price terms. Ms. Ray, on behalf of SENM, terminated contract discussions with Healthsmart. SENM's refusal to deal forced Healthsmart to stop doing business in the Roswell area, because it had no other alternatives for a viable physician network in the area.

27. In 2001, Healthsmart and SENM resumed contract negotiations. Healthsmart, in response to SENM's consistently high price demands, proposed prices well above 130% of RBRVS, but SENM responded that those rates still were not high enough. Healthsmart approached individual SENM physicians directly, to try to establish a provider network without including SENM, but the physicians repeatedly told the payor that they would deal only through SENM. In December 2001, Healthsmart, having no reasonable alternative for a marketable health plan in the Roswell area, came to terms with SENM by meeting its price demands. The contract's prices were, depending on procedure, as much as 50% or more above Healthsmart's offer, and believed to be the highest in the region.

PRESBYTERIAN HEALTH PLAN

28. Presbyterian Health Plan, Inc. ("Presbyterian"), is a payor doing business in the Roswell area. In 1996, Presbyterian and SENM entered into the first contract between them. Under the contract, Presbyterian met SENM's call for prices that were substantially higher than New Mexico averages – reaching as high as 200% of current-year RBRVS for some procedures. In May 2001, SENM started to negotiate, collectively on its members' behalf, with Presbyterian over price and other terms in a new contract. Presbyterian proposed prices ranging from approximately 100% to 145% of 2001 RBRVS. In August of that year, Ms. Gomez, on behalf of SENM and its physician members, rejected Presbyterian's offer and told the payor that SENM

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insisted on prices in the range of 150% to 225% of RBRVS. In November 2001, Presbyterian agreed to prices that closely matched Ms. Gomez's and SENM's terms, and SENM signed a contract with the payor in December of that year.

BEECH STREET

29. Beech Street Corporation ("Beech Street") is a health plan doing business in the Roswell area. In 1997, SENM entered into a contract with Beech Street, under which Beech Street agreed to pay SENM physician members according to the fee schedule that SENM developed on its members' behalf.

30. SENM and Beech Street most recently renegotiated their contract in 2001. In November 2001, Ms. Gomez transmitted to Beech Street what she characterized as SENM's "IPA fee requirement." It contained prices for various medical procedures ranging from more than 150% to more than 220% of RBRVS. Beech Street responded that it "conducted an analysis and compared the rates to other rural areas and [felt] these rates are extremely high," and sent a counteroffer more in line with prices in other rural areas.

31. In December 2001, Ms. Gomez rejected Beech Street's counteroffer without transmitting it to individual SENM members for their unilateral acceptance or rejection. She told Beech Street that its counteroffer was too low for many specialists, and that "[t]he IPA represents all of [its] members and [has] been known to reject a contract if a proposal is not good for the majority." Ms. Gomez then sent to Beech Street what she called SENM's "final offer," which contained prices nearly identical to those that Beech Street had found to be "extremely high" the previous month. In July 2002, having no reasonable alternative for a marketable health plan in the Roswell area, Beech Street agreed to contract terms containing prices closely reflecting SENM's demand, ranging from more than 140% to 200% of 2001 RBRVS.

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OTHER PAYORS

32. SENM has orchestrated collective negotiations with other payors that do business, or attempted to do business, in the Roswell area, including Blue Cross and Blue Shield of New Mexico, Lovelace Sandia Health System, and Omni Networks, Inc. Ms. Gomez and Ms. Ray, with the assistance of the SENM Board and Contract Committee, negotiated with these payors on price, making proposals and counterproposals, as well as accepting or rejecting offers without transmitting them to physician members for their individual acceptance or rejection. SENM's members collectively accepted or rejected these payor contracts, and refused to deal with these payors individually. Due to SENM's dominant market position in the Roswell area, such coercive tactics have been highly successful. SENM has been able to extract high prices from these payors relative to what the payors pay other physicians in New Mexico.

RESPONDENTS' PRICE-FIXING IS NOT JUSTIFIED

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

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

34. Respondents' actions described in Paragraphs 14 through 32 of this Complaint have had, or have tended to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Roswell area in the following ways, among others:

1. price and other forms of competition among physician members of SENM were unreasonably restrained;
2. prices for physician services were increased; and

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3. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

**VIOLATION OF THE FEDERAL TRADE COMMISSION
ACT**

35. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of August, 2004, issues its Complaint against Respondents SENM, Barbara Gomez, and Lonnie Ray.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the Southeastern New Mexico Physicians IPA, Inc. (“SENM”), Barbara Gomez, and Lonnie Ray, hereinafter sometimes referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated 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 carefully considered the comments received from interested persons, 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 Southeastern New Mexico Physicians IPA, Inc., is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 500 North Main Street, Suite 618, Roswell, NM 88201.
2. Respondent Barbara Gomez's principal address is 500 North Main Street, Suite 618, Roswell, NM 88201.
3. Respondent Lonnie Ray's principal address is 500 North Main Street, Suite 618, Roswell, NM 88201.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER

I.

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

- A. "Respondent SENM" means Southeastern New Mexico Physicians IPA, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Southeastern New Mexico Physicians IPA, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. "Respondent Gomez" means Barbara Gomez.
- C. "Respondent Ray" means Lonnie Ray.
- D. "Respondents" means Respondent SENM, Respondent Gomez, and Respondent Ray.

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- 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 also 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 for itself or for any other person. “Payor” includes any person that develops, leases, or sells access to networks of physicians.
- H. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- I. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- 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 SENM, pursuant to Paragraph V.A.3 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.

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- L. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
1. all physicians that 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 by managing the provision of physician services, such as risk-sharing involving:
 - a. the provision of physician services for a capitated rate from payors;
 - 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

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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:

- 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 SENM;

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- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;
- 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 Paragraph II of this Order shall prohibit any agreement involving or conduct by:

- (i) Respondent Gomez or Respondent Ray, 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; or
- (ii) Respondent SENM 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, so long as the arrangement does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement.

III.

IT IS FURTHER ORDERED that Respondent Gomez and Respondent Ray, for three (3) years after the date that this Order becomes final, directly or indirectly, or through any corporate or

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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 SENM or on behalf of any physician who participates or has participated in Respondent SENM, notwithstanding whether such conduct also is prohibited by Paragraph II of this Order; and
- B. Advising any physician who participates, or has participated, in SENM 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, Respondents 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 Respondents would act as a messenger, or as an agent on behalf of those 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 procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Notification is not required for Respondents’ subsequent acts as a messenger pursuant to an arrangement for which this Notification has been given. Receipt by the Commission from Respondents of any Notification, pursuant to this Paragraph IV, is not to be construed as a determination by the

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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 SENM shall:

- A. Within thirty (30) days after the date on which this Order becomes final, send by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - 1. each physician who participates, or has participated, in Respondent SENM since January 1, 2000;
 - 2. each officer, director, manager, and employee of Respondent SENM; and
 - 3. the chief executive officer of each payor with which Respondent SENM has a record of having been in contact since January 1, 2000, regarding contracting for the provision of physician services, and include in such mailing the notice specified in Appendix A to this Order;
- B. 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: (1) receipt by Respondent SENM of a written request from a payor to terminate such contract, or (2) 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 (1) year after the date on which the Order becomes final if, prior to such termination or renewal date, (a) the payor submits to Respondent SENM a written request to extend such contract to a specific date no later than one (1) year after the date this Order becomes final, and (b) Respondent SENM has

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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 (1) of Paragraph V.B of this Order, to terminate the contract at any time;

- C. Within ten (10) days after receiving a written request from a payor, pursuant to Paragraph V.B(1) of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician participating in Respondent SENM as of the date Respondent SENM receives such request;
- D. For a period of 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 SENM, and who did not previously receive a copy of this Order and the Complaint from Respondent SENM, within thirty (30) days of the time that such participation begins;
 - b. each payor that contracts with Respondent SENM for the provision of physician services, and that did not previously receive a copy of this Order and the Complaint from Respondent SENM, within thirty (30) days of the time that such payor enters into such contract;
 - c. each person who becomes an officer, director, manager, or employee of Respondent SENM, and who did not previously receive a copy of this Order and the Complaint from Respondent SENM, within thirty (30) days of the time that he or she assumes such responsibility with Respondent SENM; and

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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 SENM, with such prominence as is given to regularly featured articles;
- E. File a verified written report 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 such report shall include:
1. a detailed description of the manner and form in which Respondent SENM has complied and is complying with this Order; and
 2. copies of the return receipts required by Paragraphs V.A, V.C, and V.D of this Order; and
- F. Notify the Commission at least thirty (30) days prior to any proposed change in Respondent SENM, 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 SENM that may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that, if Respondent SENM fails to comply with all or any portion of Paragraph V.A or Paragraph V.D.1.b of this Order within sixty (60) days of the times set forth in the paragraph, then Respondent Ray shall, within thirty (30) days thereafter, comply with those portions of Paragraphs V.A and V.D.1.b of this Order with which Respondent SENM did not comply.

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VII.

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

- A. To each physician who participates, or has participated, in a physician group represented by Respondent Gomez or Respondent Ray since August 1, 2001; and
- B. To each payor with which Respondent Gomez or Respondent Ray has dealt since August 1, 2001, 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.

PROVIDED, HOWEVER, that Respondent Gomez and Respondent Ray are not required to send a copy of this Order and the Complaint to any physician who has participated in Respondent SENM or any payor that has been in contact with Respondent SENM and that received a copy of this Order and the Complaint from Respondent SENM, pursuant to Paragraph V.A.1 and Paragraph V.A.3 of this Order.

VIII.

IT IS FURTHER ORDERED that Respondent Gomez and Respondent Ray shall:

- A. For three (3) years after the date this Order becomes final, distribute a copy of this Order and the Complaint by first-class mail, return receipt requested:
 - 1. to all physicians that Respondent Gomez or Respondent Ray represents relating to contracting, or seeking to contract, with payors for the provision of physician

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services, or that Respondent Gomez or Respondent Ray advises relating to providing payors with physician services, within (30) days of the time that Respondent Gomez or Respondent Ray begins providing such representation or advice; and

2. to each payor with which Respondent Gomez or Respondent Ray deals for the purpose of contracting, or seeking to contract, pursuant to any arrangement to represent or advise any physician, relating to contracting with such payor for the provision of physician services, within thirty (30) days of such dealing; *provided, however*, that Respondent Gomez and Respondent Ray are not required to send a copy of this Order and the Complaint to any physician who begins participating in Respondent SENM or any payor that contracts with Respondent SENM for the provision of physician services and that received a copy of this Order and the Complaint from Respondent SENM, pursuant to Paragraph V.D.1.a or Paragraph V.D.1.b of this Order; 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 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 Gomez or Respondent Ray has complied and is complying with this Order; and
2. copies of the return receipts required by Paragraphs VII and VIII.A.

IX.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission of any change in her or its respective

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principal address within twenty (20) days of such change in address.

X.

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:

- 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 her or its possession, or under her or 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 her or it, to interview such Respondent or employees of such Respondent.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on August 5, 2024.

Analysis

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

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with the Southeastern New Mexico Physicians IPA, Inc. (SENM), and two of its non-physician employees. 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 SENM to fix prices and other terms on which they would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by 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.

SENM is an independent practice association (IPA) with 68 physician members. SENM's members represent 73% percent of all physicians independently practicing (that is, those not employed by area hospitals) in and around Roswell, New Mexico, which is located in southeastern New Mexico.

Analysis

SENM members refuse to deal with health plans on an individual basis. Instead, two SENM employees, Barbara Gomez and Lonnie Ray, negotiate price and other contract terms with health plans that desire to contract with SENM members.

Contracts that Ms. Gomez and Ms. Ray negotiate for SENM with health plans are presented to SENM's Managed Care Contract Committee for approval, then to SENM's Board of Directors. After SENM's Board approves it, a contract is presented to the general membership, which votes on whether SENM should accept the contract. If a majority of SENM members vote to accept, SENM's president signs the contract. Following this process, respondents have orchestrated collective agreements on fees and other terms of dealing with health plans, have carried out collective negotiations with health plans, and have orchestrated refusals to deal and threats to refuse to deal with health plans that resisted respondents' desired terms. Although SENM 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

Respondents have succeeded in forcing numerous health plans to raise fees paid to SENM members, and thereby raised the cost of medical care in the Roswell area. SENM engaged in no efficiency-enhancing integration sufficient to justify respondents' joint negotiation of fees. By orchestrating agreements among SENM members to deal only on collectively-determined terms,

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 at 125. See <http://www.ftc.gov/reports/hlth3s.htm#8> .

Analysis

and actual or threatened refusals to deal with health plans that would not meet those terms, respondents have violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and 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.

The proposed order’s specific provisions are as follows:

Paragraph II.A prohibits 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, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents.

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 contract 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 Commission 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

Analysis

participate in legitimate joint contracting arrangements among competing physicians, whether a “qualified risk-sharing joint arrangement” or a “qualified clinically-integrated joint arrangement.” The arrangement, however, must not facilitate the refusal of, or restrict, physicians from contracting with payors outside of the 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. 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.

Also, 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.E).

Paragraph III, for a period of three years, bars Ms. Gomez and Ms. Ray from negotiating with any payor on behalf of SENM or any SENM member, and from advising any SENM member to accept or reject any term, condition, or requirement of dealing

Analysis

with any payor. This temporary “fencing-in” relief is included to ensure that the alleged unlawful conduct by these respondents does not continue.

Paragraph IV, for three years, requires respondents 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, which applies only to SENM, requires SENM to distribute the complaint and order to all physicians who have participated in SENM, and to payors that negotiated contracts with SENM or indicated an interest in contracting with SENM. Paragraph V.B requires SENM, at any payor’s request and without penalty, or within one year after the Order is made final, to terminate its current contracts with respect to providing physician services. Paragraph V.C requires SENM to distribute payor requests for contract termination to all physicians who participate in SENM. Paragraph V.D.1.b requires SENM to distribute the complaint and order to any payors that negotiate contracts with SENM in the next three years.

In the event that SENM fails to comply with the requirements of Paragraph V.A or Paragraph V.D.1.b, Paragraph VI would require Ms. Ray to do so.

Paragraphs VII and VIII generally require Ms. Gomez and Ms. Ray to distribute the complaint and order to physicians who have participated in any group that has been represented by Ms. Gomez or Ms. Ray since August 1, 2001, and to each payor with which Ms. Gomez or Ms. Ray has dealt since August 1, 2001, for the purpose of contracting.

Analysis

Paragraphs V.E, V.F, VIII.B, IX, and X 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

**ITRON, INC. AND SCHLUMBERGER
ELECTRICITY, INC.**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

*Docket C-4114; File No. 0310201
Complaint, August 5, 2004--Decision, August 5, 2004*

This consent order addresses the acquisition by Respondent Itron, Inc. -- the leading supplier of mobile radio frequency ("RF") automatic meter reading ("AMR") systems, which gather electricity consumption information from meters and then broadcast the data to electric utilities -- of Respondent Schlumberger Electricity, Inc. and other assets. The order, among other things, requires the respondents to grant a royalty-free, perpetual and irrevocable license to their mobile RF AMR technology, and related assets, to Hunt Technologies, Inc. The order also requires the respondents to provide Hunt with technical assistance and, for three years, with any updates to the covered technology that they may produce.

Participants

For the Commission: *Matthew J. Reilly, Randall A. Long, Sean G. Dillon, Stephanie C. Bovee, Stephanie A. Parks, Sylvia M. Brooks, Richard A. Levy, Jessica Yarnall, Michael R. Moiseyev, Eric D. Rohlck, Jennifer Lee, Daniel P. Ducore, Malcolm B. Coate, Jeffrey Fischer and Mark Frankena.*

For the Respondent: *Benjamin S. Sharp, Perkins Coie, LLP, John A. Herfort, Gibson, Dunn & Crutcher LLP, and Lawrence Fullerton, Sidley, Austin, Brown & Wood, LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Itron, Inc. ("Itron"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Schlumberger