

Complaint

IN THE MATTER OF

**COLEGIO DE OPTOMETRAS,
EDGAR DÁVILA GARCÍA, O.D.,
AND
CARLOS RIVERA ALONSO, O.D.**

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

Docket C-4199; File No. 051 0044

Complaint, September 6, 2007 – Decision, September 6, 2007

This consent order addresses charges that respondent Colegio de Optometras de Puerto Rico, acting as a combination of competing optometrists, and in combination with individual optometrists including two of its officers, Edgar Dávila García, O.D., and Carlos Rivera Alonso, O.D., restrained competition among its member optometrists in its dealings with Ivision International Inc., a company that contracts with Puerto Rico health plans to administer vision plans and provide vision care services and products to covered patients. The order, among other things, prohibits the Colegio, Dr. Dávila, and Dr. Rivera from entering into or facilitating agreements among any optometrists with respect to their provision of optometry services, including (1) to negotiate on behalf of any optometrist with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term upon which any optometrist 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 other than through the Colegio. Other provisions of the order include the requirement that respondents translate the Commission's order and complaint into Spanish and distribute them to Colegio members and other parties, as well as notification and compliance-related requirements.

Participants

For the Commission: Nancy F. Caban, Mark Frankena, Leonard L. Gordon, Thomas R. Iosso, Mazor Matzkevich, Carole A. Paynter, Susan E. Raitt, Louis Silvia, and David P. Wales, Jr.

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For the *Respondents: Fernando J. Fornaris, James W. McCartney and Sara E. Tolosa Ramirez, Cancio, Nadal, Rivera & Diaz, P.S.C.*

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Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Colegio de Optometras de Puerto Rico (“Respondent Colegio” or “the Colegio”), Edgar Dávila García (“Respondent Dávila”), and Carlos Rivera Alonso (“Respondent Rivera”) 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 Respondents’ price-fixing conspiracy and concerted refusal to deal with vision and health plans (collectively, “payors”) as part of a concerted effort among competing optometrists in Puerto Rico to force such plans to, among other things, raise the rates of vision care service reimbursement.

RESPONDENTS

2. Respondent Colegio is a not-for-profit incorporated professional association of optometrists in Puerto Rico, and is organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal address at Eleanor Roosevelt Avenue, #118, Hato Rey, Puerto Rico, 00918.

3. Respondent Dávila is an optometrist licensed to practice optometry in Puerto Rico and is engaged in the business of

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providing vision care services to patients for a fee in Puerto Rico. Respondent Dávila served as the Treasurer of the Colegio from 2002 through 2004; he also served as the head of the Colegio's Health Plans Commission from 2001 through 2004. Respondent Dávila's principal address is Dr. Berrocal & Asociados, 150 De Diego Avenue, Suite 404, Santurce, Puerto Rico, 00907.

4. Respondent Rivera is an optometrist licensed to practice optometry in Puerto Rico and is engaged in the business of providing vision care services to patients for a fee in Puerto Rico. Beginning in 2004, Respondent Rivera served as President Elect of the Colegio; he officially became President in October of 2004. He ceased serving as President in September of 2006. Respondent Rivera's principal address is Centro Visual Juncos, 29 Martinez, Juncos, Puerto Rico, 00777.

JURISDICTION

5. At all times relevant to this complaint, Respondent Colegio existed and operated in substantial part for the pecuniary benefit of its members.

6. Respondents are "persons, partnerships, or corporations" within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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.

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**OVERVIEW OF THE VISION CARE SERVICES MARKET
AND OPTOMETRIST COMPETITION**

8. Vision care services (including eye examinations) and products (contact lenses and eye glasses) often are offered as part of health benefits packages provided by health plans. These vision care services and products are provided to eligible members and their dependents (collectively, “patients”) by optometrists and ophthalmologists. Some health plans contract directly with such providers, while other health plans also (or alternatively) use vision plans to provide and manage these vision benefits.

9. Approximately 500 optometrists are members of Respondent Colegio, constituting all of the optometrists licensed to practice in Puerto Rico. Membership in the Colegio is required by statute in order to practice optometry in Puerto Rico; the failure to do so will result in the suspension of the optometrist’s license to practice.

10. Respondent Colegio has a Board of Directors, elected by the members of the Colegio. The Colegio also has a Health Plans Commission that is responsible for issues relating to payors. The Colegio’s enabling statute authorizes the Colegio to serve as a professional association; it does not authorize it to negotiate the reimbursement rates paid to its members by payors.

11. The officers and members of Respondent Colegio engage in the practice of providing optometry services to patients for a fee in Puerto Rico. Except to the extent that competition has been restrained as alleged herein, the members of the Colegio have competed and now are competing among themselves in Puerto Rico.

12. Absent agreements among competing optometrists on the terms, including price, on which they will provide services to patients in health and vision plans, competing optometrists decide individually whether to enter into or remain in contracts with payors,

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and on the terms and conditions under which they are willing to enter into or remain in such contracts.

ANTICOMPETITIVE CONDUCT

13. Respondent Colegio's member optometrists, including the members of its Board of Directors and Health Plans Commission, represent numerous discrete economic interests. The conduct of the Colegio constitutes combined or concerted action by its member optometrists.

14. As more fully described subsequently, Respondent Colegio, acting as a combination of competing optometrists, and in combination with individual optometrists including Respondents Dávila and Rivera, have restrained competition among its member optometrists by, among other things:

A. facilitating, negotiating, entering into, and implementing express or implied agreements among its member optometrists on price and other competitively significant terms;

B. negotiating fees and other competitively significant terms in payor contracts on behalf of the Colegio's members; and

C. refusing or threatening to refuse to deal with payors except on collectively agreed-upon terms.

15. Respondent Colegio has undertaken these acts and practices with the knowledge of its officers and other member optometrists.

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CONDUCT WITH IVISION

16. Since 1997, Ivision International Inc. (“Ivision”) has offered vision care services and products in Puerto Rico. Ivision contracts with Puerto Rico health plans to administer vision plans and provide vision care services and products to covered patients. The health plans pay Ivision on a capitated basis, per individual member. Ivision then contracts with Puerto Rico optometrists to provide these services. By August of 2004, Ivision had almost 130 optometrists – located all over Puerto Rico – in its network, making it very attractive to health plans.

17. Under a typical Ivision plan, specific benefits such as eye examinations, eye glasses and contact lenses are provided to the health plans’ patients. Ivision pays the optometrists in its network a set fee for the provision of different vision care services to each patient. The patient pays a corresponding co-payment for each covered service or product provided. As per Ivision’s agreements with optometrists, the optometrist remits to Ivision the co-payments it receives from the patients. As a result, the fees paid by Ivision to the optometrist are the total net compensation received by the optometrist for treating a patient.

18. Ivision, not the optometrist, also is the entity that “sells” the covered eye wear to the patient. Ivision sends sample frames and lenses on consignment to the optometrists and contracts with a laboratory to ship the finished products to the optometrists for dispensing to patients. Ivision pays the optometrist a fee for the dispensing of the eye wear.

19. The arrangements delineated in paragraphs 16 through 18 typically lead to optometrists, who contract through Ivision, earning less than those contracting directly with health plans; however, those optometrists also gain access to numerous patients through Ivision’s plan. Although patients remain free to decline the vision benefit provided by the health plans and to choose uncovered goods or

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services, because of the tremendous cost advantages, patients often decide to opt for the vision plan and choose covered goods and services.

20. In June and July 2004, Ivision sent out announcements to optometrists regarding its contracts with several new health plans (many of which previously had contracted only directly with optometrists). Ivision scheduled meetings with optometrists to be held that August to discuss the mechanics of implementing these new contracts.

21. Under these new contracts, Ivision paid optometrists the same fees as in its contracts with other health plans. But as a result of Ivision's new affiliations, the optometrists would lose much if not all of their more lucrative direct business with these plans.

22. In early August 2004, Ivision began receiving calls from optometrists, some of whom were Colegio representatives, complaining about the reimbursement structure and rates for the new health plan contracts and threatening that if Ivision did not pay more it would lose optometrists. In addition, as part of a collective effort to force Ivision to raise its reimbursement rates, Colegio representatives and other optometrists contacted additional optometrists and urged them to de-participate from Ivision's network.

23. On August 22, 2004, Ivision met with its providers in Hato Rey (a suburb of San Juan in the northern part of Puerto Rico). At the beginning of the meeting, only three or four optometrists were present. Twenty minutes later, approximately eighteen cars arrived at the same time. Although none of the late arrivals made explicit reference to an earlier meeting, it was apparent from the optometrists' coordinated attacks on Ivision's rates that communications had taken place among them. In fact, there had been a previous optometrists-only meeting at which a chart comparing Ivision's rates with those of health plans had been distributed.

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24. During the meeting with Ivision, the optometrists demanded that Ivision pay them higher reimbursement rates, in the form of one fee for an examination and another fee for refraction, instead of paying a flat fee for both services. The optometrists also complained that Ivision was taking over the role of health plans in Puerto Rico. Respondent Rivera, who was an Ivision provider, stated that he was the President-Elect of the Colegio and that he knew or was familiar with all the optometrists in Puerto Rico. He indicated that as President-Elect of the Colegio he had the authority to meet with Ivision and discuss rates on behalf of the Colegio's members. Respondent Rivera also indicated that if Ivision did not raise reimbursement rates, the Colegio would make sure that Ivision had no providers left in Puerto Rico. In response to Ivision's assertion that it could enlist other providers, Respondent Rivera maintained that he could get to those providers who had not yet joined Ivision and that Ivision would not have any optometrists in its network.

25. One day later, on August 23, 2004, Respondent Dávila circulated a letter on Colegio letterhead addressed to all of the members of the Colegio (all of the optometrists in Puerto Rico) concerning Ivision's new health plan contracts. Respondent Dávila, who was not an Ivision provider, wrote this letter in his capacity as President of the Colegio's Health Plans Commission. In the letter, Respondent Dávila pointed out that Ivision's reimbursement rates represent an exaggerated reduction in the revenues obtained before, and he urged optometrists not to participate in the Ivision network. Respondent Dávila informed the Colegio members that the Colegio was going to develop a policy to be followed with respect to the Ivision plan. He concluded the letter by stating that to continue onward, all of the providers were needed; that this was not a battle that the Colegio could confront alone.

26. Then, on August 25, 2004, two optometrists – a Colegio advisor and a former Colegio officer – met with Ivision representatives and told them that Ivision was going to lose all of its providers and that if it did not pay the providers what they deserved,

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they would quit. At a later meeting, the same former Colegio officer told Ivision's President that the providers were really angry and wanted to destroy Ivision. The President also was told that if Ivision agreed to pay \$51 (matching another plan's fee), the providers would forget Ivision's other problems and everything would go away.

27. On September 1, 2004, at Respondent Dávila's instigation, an officer of the Colegio announced an "extraordinary" meeting of the Board of Directors to be held on September 7, 2004. On that same day, Respondent Dávila sent to all Colegio members notice of a September 9, 2004 meeting in Guayanilla and a September 13, 2004 meeting in San Juan. In the notice, he informed the members that they would be meeting to discuss and create policies on how to work with different situations that affect the rendering of their services as health plan providers. He concluded by stressing the importance of attendance – that the members' ideas and collaboration were needed.

28. On September 7, 2004, the Colegio Board of Directors, including Respondents Dávila and Rivera, held a special meeting to discuss Ivision. That meeting was followed by the September 9, 2004 meeting, at which the Colegio members in attendance, including Respondents Dávila and Rivera, complained about Ivision's reimbursement structure and discussed the reimbursement chart that had been distributed earlier. As described by one of the attendees: "I was at the meeting in Guayanilla a few months ago. I remember exactly how the I-Vision monopoly was explained and how the optometrists who were present there (some 20) were advised to resign S.T.A.T. (immediately) from I-Vision to let them know that we were not pleased with the contract and that we had to sit down to negotiate, since the contract only benefits I-Vision."

29. At the September 13, 2004 meeting in San Juan, there were approximately sixty Colegio members in attendance, including Respondents Dávila and Rivera. Respondent Rivera asked for a show of hands as to who was going to remain in the Ivision network.

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No optometrist raised a hand. In addition, several optometrists voiced complaints about Ivision's reimbursement rates and discussed leaving Ivision. The chair of one of the Colegio's committees offered to distribute a sample letter terminating the Ivision contract and circulated a sign-up sheet for those who wanted to receive a copy.

30. At that same meeting, a former officer of the Colegio announced his resignation from Ivision. A few days later, on September 17, 2004, this same optometrist also sent letters to health plans PROgrama de Servicios de Salud de la Asociacion de Maestros ("PROSSAM"), Humana Insurance of Puerto Rico, Inc. ("Humana") and Preferred Medicare Choice, announcing that in light of Ivision's reimbursement structure and rates, the optometrists had decided to resign en masse from Ivision, which would cause a great uproar to the plan's subscribers.

31. On October 4, 2004, at the initiation of Respondent Dávila, he and Respondent Rivera, along with an officer and an advisor to the Colegio, met with officials from some of the health plans with which Ivision contracted, PROSSAM, Humana and First Medical. They discussed the Colegio's – and their own – unhappiness with Ivision's rates, as well as those rates being paid to those optometrists who still had direct contracts with the health plans. The Colegio representatives then requested that the health plans pay optometrists higher fees. They also asked the health plan officials to put pressure on Ivision, and informed them that providers were not going to remain in the Ivision network if the reimbursement rates did not increase.

32. By October 15, 2004, almost 40 Colegio members had left the Ivision network. These optometrists either quit outright by notifying Ivision that they were cancelling their optometrist agreements (some in similarly-worded letters), or by simply refusing service to those patients enrolled in Ivision plans so that Ivision was forced to terminate these doctors as optometrists.

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33. So as to maintain an effective network, retain its remaining optometrists and recruit new optometrists in the face of Respondents' efforts and success in organizing a boycott, Ivision was forced to raise substantially its reimbursement rates. In November 2004, Ivision increased its rate for an eye examination and the dispensing of eye glasses from \$30 to \$35; it made a similar increase for an examination and the dispensing of contact lenses. Ivision was also forced to waive monetary amounts that some optometrists owed it.

CONDUCT WITH OTHER PAYORS

34. In addition to the conduct described in paragraphs 22 through 33, Respondents orchestrated collective negotiations with at least two other payors.

35. Their efforts included several meetings with and letters to a certain health plan, all directed at having that plan amend its contracts with optometrists so that the optometrists could provide additional higher paying services for the plan. Indeed, to increase its negotiating leverage with this plan, Respondent Dávila sent a letter to all Colegio members urging them not to join the plan until these issues were resolved to the Colegio's satisfaction.

36. Further, officers of the Colegio on several occasions approached another health plan and attempted to negotiate higher reimbursement levels for its members who service that plan.

37. Thus far, these two health plans have been able to resist the collective action exerted by Respondent Colegio.

RESPONDENTS' PRICE FIXING AND CONCERTED REFUSAL TO DEAL IS NOT JUSTIFIED

38. Respondents' price fixing and concerted refusal to deal, and the agreements, acts, and practices described above, have not been,

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and are not, reasonably related to any efficiency-enhancing integration among the optometrist members of the Colegio. Respondent Colegio's member optometrists do not share substantial financial risk and are not otherwise integrated in ways that would increase the potential for increased quality and reduced cost of the care the optometrists provide to patients.

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

39. Respondents' acts and practices as described herein have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of optometry services in Puerto Rico in the following ways, among others:

- A. price and other forms of competition among competing optometrists were unreasonably restrained;
- B. prices for vision care services were increased; and
- C. payors, employers, and individual consumers were deprived of the benefits of competition among optometrists.

**VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT**

40. 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 sixth day of September, 2007, issues its Complaint against Respondents Colegio de Optometras, Edgar Dávila García, and Carlos Rivera Alonso.

Decision and Order

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the Colegio de Optometras, Edgar Dávila García, O.D., and Carlos Rivera Alonso (hereinafter sometimes collectively referred to as “Respondents”), and Respondents having been furnished with a copy of the draft 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 attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondents 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 this 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

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public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Colegio De Optometras (“the Colegio”) is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal address located at Eleanor Roosevelt Avenue, #118, Hato Rey, Puerto Rico, 00918.
2. Respondent Edgar Dávila García , O.D., an individual, is an optometrist licensed to practice optometry in Puerto Rico. His principal address is Dr. Berrocal & Asociados, 150 De Diego Avenue, Suite 404, Santurce, Puerto Rico, 00907.
3. Respondent Carlos Rivera Alonso, O.D., an individual, is an optometrist licensed to practice optometry in Puerto Rico. His principal address is Centro Visual Juncos, 29 Martinez, Juncos, Puerto Rico, 00777.
4. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

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ORDER**I.**

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

- A. “Respondent Colegio” means the Colegio de Optometras, a professional association, its officers, directors, employees, agents, attorneys, representatives, predecessors, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each.
- B. “Respondent Dávila” means Edgar Dávila García, O.D.
- C. “Respondent Rivera” means Carlos Rivera Alonso, O.D.
- D. “Optometrist” means a doctor of optometry (“O.D.”) and includes any optometrist who individually or through a business entity (*e.g.*, clinical group or corporation) provides services relating to a person’s vision, including eye examinations, refractions, dispensing of contact lenses and eye glasses, and fitting of same.
- E. “Optometrist group practice” means a bona fide, integrated firm in which optometrists practice optometry together as partners, shareholders, owners, or employees, or in which only one optometrist practices optometry.
- F. “Participate” in an entity or an arrangement 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

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“participate,” including, but not limited to, “participating,” “participated,” and “participation.”

- G. “Payor” means any person that pays, or arranges for payment, for all or any part of any optometrist services for itself or for any other person, as well as any person that develops, leases, or sells access to networks of optometrists.
- H. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- I. “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.
- J. “Qualified clinically-integrated joint arrangement” means an arrangement to provide optometry services in which:
 - 1. all optometrists 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 optometrists that participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 - 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.
- K. “Qualified risk-sharing joint arrangement” means an arrangement to provide optometry services in which:

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1. all optometrists who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the optometrists who participate jointly to control costs and improve quality by managing the provision of optometry services, such as risk-sharing involving:
 - a. the provision of optometry services to payors at a capitated rate,
 - b. the provision of optometry services for a predetermined percentage of premium or revenue from payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for optometrists 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 optometrists in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.
- L. "Qualified joint arrangement" means a qualified clinically-integrated joint arrangement or a qualified risk-sharing joint arrangement.

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II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of optometry 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 optometrists with respect to their provision of optometry services:
 - 1. to negotiate on behalf of any optometrist 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 optometrist 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 other than through Respondent Colegio;
- B. Exchanging or facilitating in any manner the exchange or transfer of information between or among optometrists concerning any optometrist’s willingness to deal with a payor, or the terms or conditions, including any price terms, on which the optometrist is willing to deal with a payor;
- C. Attempting to engage in any action prohibited by Paragraphs II.A. or II.B. above; and

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- 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 or conduct involving any Respondent: (a) that subject to the requirements of Paragraph III. of this Order, is reasonably necessary to form, participate in, or take any action in furtherance of, a qualified joint arrangement, so long as such qualified joint arrangement does not restrict the ability of, or facilitate the refusal of, optometrists who participate in it to deal with payors on an individual basis or through any other arrangement; or (b) where such agreement or conduct solely involves optometrists in the same optometrist group practice.

III.

IT IS FURTHER ORDERED that for three (3) years from the date this Order becomes final, pursuant to each qualified joint arrangement (referred to in this Paragraph III. as “Arrangement”) in which any Respondent is a participant, that Respondent participant shall notify the Secretary of the Commission in writing (“Paragraph III. Notification”) at least sixty (60) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any optometrists in such Arrangement relating to price or other terms or conditions of dealing with any payor; or
- B. 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 optometrist or any optometrist group practice in such Arrangement.

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Provided further, Paragraph III. Notification shall include the following information regarding the Arrangement pursuant to which Respondent intends to engage in the above identified conduct:

- a. the total number of optometrists participating in the Arrangement;
- b. a description of the Arrangement, including its purpose and geographic area of operation;
- c. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;
- d. 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;
- e. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and
- f. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for optometry services in any relevant market, including, but not limited to, the market share of optometry services in any relevant market.

Provided, however, that if Respondent Dávila or any Respondent Rivera is Participating in an Arrangement solely as participant of an optometrist group practice, that Respondent, may, upon written affirmation, exclude from his Paragraph III. Notification any information that is not known by such Respondent.

Provided further that:

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- (a) if, within sixty (60) days from the Commission's receipt of the Paragraph III. Notification, a representative of the Commission makes a written request for additional information to the Respondent providing such Paragraph III. Notification, that Respondent shall not participate in any Arrangement described in Paragraph III.A. or Paragraph III.B. of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition;
- (b) the expiration of any waiting period described herein without a request for additional information shall not be construed as a determination by the Commission, or its staff, that the proposed Arrangement does or does not violate this Order or any law enforced by the Commission;
- (c) the absence of notice that the Arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the Arrangement has been approved;
- (d) receipt by the Commission of any Paragraph III. Notification regarding participation pursuant to 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; and
- (e) Paragraph III. Notification shall not be required prior to participating in any Arrangement described at Paragraph III.A. or Paragraph III.B. of this Order pursuant to an Arrangement for which Paragraph III. Notification has previously been given.

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IV.

IT IS FURTHER ORDERED that Respondent Colegio shall:

- A. Translate the Order and the Complaint into Spanish (“translated Order and Complaint”), and within thirty (30) days after the date on which this Order becomes final, send a copy of this Order and the Complaint with a copy of the translated Order and Complaint by:
 1. first-class mail, with return receipt requested or delivery confirmation, or electronic mail, with return confirmation, to each optometrist that is a member of Respondent Colegio;
 2. first-class mail, with return receipt requested or delivery confirmation, or electronic mail, with return confirmation, to each present officer, director, manager, and employee of Respondent Colegio; and
 3. first-class mail, return receipt requested, to the chief executive officer of each payor with whom Respondent Colegio has a record of being in contact since January 1, 2001.
- B. For a period of three (3) years after the date this Order becomes final:
 1. Distribute a copy of this Order and the Complaint with a copy of the translated Order and Complaint by:
 - a. first-class mail, with return receipt requested or delivery confirmation, or electronic mail, with return confirmation, to each optometrist that joins Respondent Colegio, and who did not previously

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receive a copy of this Order and the Complaint from Respondent Colegio, within thirty (30) days of the day that such membership begins;

- b. first-class mail, with return receipt requested or delivery confirmation, or electronic mail, with return confirmation, to each person who becomes an officer, director, manager, or employee of Respondent Colegio, and who did not previously receive a copy of this Order and the Complaint from Respondent Colegio, within thirty (30) days of the day that he or she assumes such responsibility with Respondent Colegio;
 2. Annually publish a copy of this Order and the Complaint with a copy of the translated Order and Complaint, in an official annual report or newsletter sent to all members of Respondent Colegio, with such prominence as is given to regularly featured articles.
- C. File a verified written report within sixty (60) days after the date on which 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 Colegio has complied and is complying with this Order;
 2. The name, address, and telephone number of each payor with which Respondent Colegio has had any contact; and
 3. Depending on the method of delivery used, copies of the delivery confirmations, electronic mail confirmations, or signed return receipts required by Paragraphs IV.A. and IV.B. of this Order.

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V.

IT IS FURTHER ORDERED that Respondents Dávila and Rivera shall each file a verified written report within ninety (90) days after the date on which 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 a detailed description of the manner and form in which Respondents Dávila and Rivera individually have complied and are complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent Colegio shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent Colegio, (2) acquisition, merger, or consolidation of Respondent Colegio, or (3) other change in Respondent Colegio that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent Colegio.

VII.

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

VIII.

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

Decision and Order

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

IX.

IT IS FURTHER ORDERED that this Order shall terminate on September 6, 2027.

By the Commission.

Analysis to Aid Public Comment

**ANALYSIS OF 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 Colegio de Optometras de Puerto Rico (“the Colegio”) and two of its officers, Edgar Dávila García, O.D., and Carlos Rivera Alonso, O.D. The agreement settles charges that the Colegio, acting as a combination of otherwise competing optometrists, and in combination with individual optometrists, including Drs. Dávila and Rivera, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating, negotiating, entering into, and implementing express or implied agreements on price and other competitively significant terms; negotiating fees and other competitively significant terms in vision and health plan contracts on behalf of the Colegio’s members; and refusing or threatening to refuse to deal with such entities except on collectively agreed-upon terms. 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 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 its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by the Colegio or Drs. Dávila and Rivera that any of them 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.

Analysis to Aid Public Comment

The Colegio is a not-for-profit, incorporated professional association of optometrists that is organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico (“Puerto Rico”), with its office and principal place of business in San Juan, Puerto Rico.

The Colegio has approximately 500 member optometrists, constituting all of the optometrists licensed to practice in Puerto Rico. Except to the extent that competition has been restrained, the member optometrists of Colegio have been, and are now, in competition with each other for the provision of optometry services in Puerto Rico.

Dr. Dávila is a licensed optometrist who provides vision care services to patients for a fee. Dr. Dávila served as the Treasurer of the Colegio from 2002 through 2004; he also served as the President of the Colegio’s Health Plans Commission from 2001 through 2004. Dr. Rivera is a licensed optometrist who provides vision care services to patients for a fee. Dr. Rivera served as President-Elect of the Colegio in 2004, and then as President from October 2004 through September 2006.

Since 1997, Ivision International Inc. (“Ivision”) has offered vision care services and products in Puerto Rico. Ivision contracts with Puerto Rico health plans to administer vision plans and provide vision care services and products to covered patients. The health plans pay Ivision on a capitated basis, per individual member. Ivision then contracts with Puerto Rico optometrists to provide these services. By August of 2004, Ivision had almost 130 optometrists – located all over Puerto Rico – in its network, making it very attractive to health plans.

In June and July 2004, Ivision sent out announcements to optometrists regarding contracts with several new health plans (many of which previously had contracted only directly with optometrists). Ivision scheduled meetings with optometrists to be held that August to discuss the mechanics of implementing these

Analysis to Aid Public Comment

new contracts. Under these new contracts, Ivision paid optometrists the same fees as in its contracts with other health plans. As a result of these new contracts, the optometrists would lose much if not all of their more lucrative direct business with these plans.

In early August, Ivision began receiving calls from optometrists, some of whom were Colegio representatives, complaining about the reimbursement structure and rates for the new health plan contracts, and threatening that if Ivision did not pay more, it would lose optometrists. In addition, as part of a collective effort to force Ivision to raise its rates, Colegio representatives and other optometrists contacted additional optometrists and urged them to stop participating in Ivision's network.

On August 22, Ivision met with its providers. Just prior to that meeting, the optometrists held their own meeting at which a chart comparing Ivision's rates with those of other health plans had been distributed. During their meeting with Ivision, the optometrists demanded that Ivision pay them higher reimbursement rates, in the form of one fee for an examination and another fee for refraction, instead of paying a flat fee for both services. Dr. Rivera, who was an Ivision provider, stated that he was the President-Elect of the Colegio and that he knew or was familiar with all the optometrists in Puerto Rico. He indicated that as President-Elect of the Colegio he had the authority to meet with Ivision and discuss rates on behalf of the Colegio's members. Dr. Rivera also indicated that if Ivision did not raise reimbursement rates, the Colegio would make sure that Ivision had no providers left in Puerto Rico. In response to Ivision's assertion that it could enlist other providers, Dr. Rivera maintained that he could get to those providers who had not yet joined Ivision and that Ivision would not have any optometrists in its network.

The next day, Dr. Dávila circulated a letter on Colegio letterhead addressed to all of the members of the Colegio concerning Ivision's new health plan contracts. Dr. Dávila, who was not an Ivision provider, wrote this letter in his capacity as President of the

Analysis to Aid Public Comment

Colegio's Health Plans Commission. In the letter, he urged optometrists not to participate in the Ivision network, and informed the Colegio members that the Colegio was going to develop a policy to be followed with respect to the Ivision plan. He concluded the letter by stating that to continue onward, all of the providers were needed, and that this was not a battle the Colegio could confront alone.

Two days later, a Colegio advisor and a former Colegio officer met with Ivision representatives and told them that Ivision was going to lose all of its providers and that if it did not pay the providers what they deserved, they would quit. At a later meeting, the same former Colegio officer told Ivision's President that the providers were really angry and wanted to destroy Ivision. The President also was told that if Ivision agreed to pay a certain amount (matching another plan's fee), the providers would forget Ivision's other problems and "everything would go away."

In September 2004, there were a number of meetings held by the Colegio Board of Directors and by Colegio members discussing how to deal with Ivision. At one meeting, the Colegio members present were advised to resign immediately from Ivision network to force Ivision to increase its reimbursement rates. At another meeting, attended by several Colegio members, Dr. Rivera asked for a show of hands as to who was going to remain in the Ivision network. No optometrist raised a hand. Several optometrists voiced complaints about Ivision's reimbursement rates and discussed leaving Ivision; an offer was made to circulate a sample letter terminating the Ivision contract. A former Colegio officer who announced his resignation from Ivision at that meeting followed this up a few days later by sending letters to certain health plans, stating that because of Ivision's reimbursement structure and rates, the optometrists had decided to resign en masse from Ivision, which would cause a great uproar among the plans' subscribers.

In early October 2004, some Colegio representatives, including Dr. Dávila and Dr. Rivera, met with officials from some of the

Analysis to Aid Public Comment

health plans with which Ivision contracted. The Colegio representatives requested that the health plans pay optometrists higher fees. They also asked the health plan officials to put pressure on Ivision, and informed them that providers were not going to remain in the Ivision network if the reimbursement rates did not increase.

The Colegio's and Drs. Dávila's and Rivera's efforts to obtain higher reimbursement rates from Ivision succeeded. By mid-October, almost 40 Colegio members had left the Ivision network. These optometrists either quit outright by notifying Ivision that they were cancelling their optometrist agreements (some in similarly-worded letters), or by simply refusing service to those patients enrolled in Ivision plans, so that Ivision was forced to terminate these doctors as optometrists. In order to maintain an effective network, retain its remaining optometrists and recruit new optometrists in the face of the Colegio's efforts and success in organizing a boycott, Ivision was forced to substantially raise its reimbursement rates. In November 2004, Ivision significantly increased its reimbursement rate for an eye examination and the dispensing of eye glasses; it made a similar increase for an examination and the dispensing of contact lenses. Ivision was also forced to waive monetary amounts that some optometrists owed it.

In addition to the conduct outlined above, the Colegio and Drs. Dávila and Rivera orchestrated collective negotiations with at least two other plans. Their efforts included several meetings with and letters to a certain health plan, all directed at having that plan amend its contracts with optometrists so that the optometrists could provide additional higher paying services for the plan. Indeed, to increase its negotiating leverage with this plan, Dr. Dávila sent a letter to all Colegio members urging them not to join the plan until these issues were resolved to the Colegio's satisfaction. Further, officers of the Colegio on several occasions approached another health plan and attempted to negotiate higher reimbursement levels for its members

Analysis to Aid Public Comment

who service that plan. Thus far, these two health plans have been able to resist the collective action exerted by the Colegio.

Respondents' price fixing and concerted refusal to deal, and the agreements, acts, and practices described above, have not been, and are not, reasonably related to any efficiency-enhancing integration among the optometrist members of the Colegio. By the acts set forth in the Complaint, the Colegio and Drs. Dávila and Rivera violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed consent order is designed to prevent a recurrence of the illegal concerted actions alleged in the complaint, while allowing the Colegio and its members, including Drs. Dávila and Rivera, to engage in legitimate joint conduct. The proposed order is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements refusing to deal with health plans.¹

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits the Colegio, Dr. Dávila, and Dr. Rivera, from entering into or facilitating agreements among any optometrists with respect to their provision of optometry services, including: (1) negotiating on behalf of any optometrist with any payor; (2) dealing, refusing to deal, or threatening to refuse to deal with any payor; (3) regarding any term upon which any optometrist 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 other than through the Colegio.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Colegio, Dr. Dávila, and Dr. Rivera

¹ New Century Health Quality Alliance, Inc., File No. 051-0137 (Oct. 6, 2006); Puerto Rico Association of Endodontists, Corp., File No 051-0170 (Aug. 29, 2006).

Analysis to Aid Public Comment

from exchanging or facilitating the transfer of information among optometrists concerning any optometrist's willingness to deal with a payor, or the terms or conditions, including any price terms, on which the optometrist is willing to deal. Paragraph II.C prohibits the Colegio, Dr. Dávila, and Dr. Rivera from attempting to engage in any action prohibited by Paragraphs II.A or II.B. Paragraph II.D prohibits the Colegio from encouraging, pressuring, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C.

Paragraph III requires that the Colegio, Dr. Dávila, and Dr. Rivera for three years from the date the Order becomes final, notify the Secretary of the Commission in writing at least sixty days prior to: (1) participating in, organizing, or facilitating any discussion or understanding with or among any optometrists in any qualified joint arrangement relating to price or other terms or conditions of dealing with any payor; or (2) contacting a payor to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any payor, on behalf of any optometrists or any optometrist group practice in such arrangement. The remaining provisions of Paragraph III contain other standard notification and compliance-related provisions.

Paragraph IV requires the Colegio to translate the Order and the Complaint into Spanish, distribute the translated Order and Complaint to Colegio members, as well as payors, and annually publish these documents in official annual reports or newsletters.

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

**SOUTH CAROLINA STATE BOARD OF
DENTISTRY**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9311; File No. 021 0128**Complaint, September 12, 2003 – Decision, September 6, 2007*

This consent order relates to charges that the South Carolina State Board of Dentistry unlawfully restrained competition in the provision of preventive dental care services in the state by unreasonably restricting the delivery of dental cleanings, sealants, and topical fluoride treatments in school settings by licensed dental hygienists. The order requires the Board to affirm and publicize its support for the state legislative policy, embodied in the 2003 amendments to the Dental Practice Act that prevents the Board from requiring a dentist examination as a condition of the provision of preventive dental care in public health settings by dental hygienists. In addition, to prevent similar anticompetitive restraints in the future, the order requires the Board to give the Commission advance notice before adopting rules or taking other actions that relate to dental hygienists' provision of preventive dental services in a public health setting.

Participants

For the Commission: *Garry Gibbs, Elizabeth Hilder, Garth Huston, Markus H. Meier, Gary Schorr, and David P. Wales, Jr.*

For the Respondents: *William H. Davidson, II, Andrew Lindeman, and Kenneth P. Woodington, Davidson, Morrison & Lindeman; and Lynne W. Rogers, South Carolina Department of Labor, Licensing and Regulation.*