

Complaint

IN THE MATTER OF

M. CATHERINE HIGGINSCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4286; File No. 051 0252
Filed, March 30, 2010 — Decision, March 30, 2010

This consent order addresses M. Catherine Higgins' orchestrating and implementing agreements among competing physician members of Boulder Valley Individual Practice Association to fix the prices at which BVIPA physicians contract with health plans as the executive director of the BVIPA. From approximately 2001 through 2006, Ms. Higgins negotiated with numerous payers on behalf of BVIPA physicians and successfully extracted higher fees from them and, in order to maximize BVIPA's bargaining leverage, Ms. Higgins exhorted BVIPA members to contract jointly through BVIPA, rather than individually. Beginning in late in 2007 and continuing until early 2009, Ms. Higgins, as BVIPA's executive director, negotiated and consulted for some of BVIPA's physician members who sought to contract individually with a payer, thereby facilitating the exchange of rate information among them, and facilitating the coordination of rates during the individual negotiations. Shortly after BVIPA signed the consent agreement, Ms. Higgins represented physicians in her individual capacity. The consent order prohibits Ms. Higgins from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician's behalf; (2) to refuse to deal, or threaten to refuse to deal, with payers in furtherance of any prohibited conduct or agreement (3) on any terms on which a physician is willing to deal with any payer; or, (4) not to deal individually with any payer, or not to deal with any payer other than through BVIPA. The order also prohibits Ms. Higgins from facilitating exchanges of information between physicians concerning any physician's willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. Ms. Higgins is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a "Qualified Risk-Sharing Joint Arrangement" or a "Qualified Clinically-Integrated Joint Arrangement," , however, the arrangement must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

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Participants

For the *Commission*: Robert Canterman and Constance Salemi.

For the *Respondents*: James E. Hartley, Holland and Hart.

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 Respondent M. Catherine Higgins (“Ms. Higgins” or “Respondent”), Executive Director of Boulder Valley Individual Practice Association (“BVIPA”), has 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 the conduct of the executive director of a physician practice association in orchestrating agreements among competing physicians in Boulder County, Colorado, to fix the prices and other terms under which the physicians would participate in health plans offered by health insurance firms and other third-party payers (“payers”). As a result of the actions of Respondent Higgins, Executive Director of BVIPA, consumers in the Boulder County area have been forced to pay higher prices for physician services.

2. BVIPA signed a consent agreement with the Commission on or about December 8, 2008. Under its terms, the Commission ordered BVIPA and its employees, among other things, to cease and desist from facilitating agreements among physicians

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regarding price terms or collective refusals to deal. Ms. Higgins was not named as a respondent in the BVIPA Consent Agreement.

3. Shortly after the BVIPA Consent Agreement was signed, Ms. Higgins took the position that she could continue to negotiate fees on behalf of BVIPA physicians, declaring, "I could do this as an individual, not with my BVIPA hat, but as an individual. I'm not named in the settlement. There's nothing that precludes me from doing my own work. I could just do it outside."

4. Absent an order against Ms. Higgins individually, there is a substantial danger that she will continue to orchestrate unlawful price fixing agreements among physicians in the Boulder County area and that consumers will continue to suffer the adverse effects of her conduct.

THE RESPONDENT

5. Ms. Higgins (a/k/a/ Mary C. Higgins), the Executive Director of BVIPA, is an individual with a principal place of business at 6560 Gunpark Drive, Suite B, Boulder, CO 80301.

JURISDICTION

6. Ms. Higgins is a "person" within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

7. BVIPA is organized for the purpose, among others, of serving the interests of its members. BVIPA exists, and operates, and at all times relevant to this complaint has existed and operated, in substantial part for the pecuniary benefit of its physician members.

8. BVIPA is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act.

9. The general business practices of Ms. Higgins on behalf of

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BVIPA's physician members, including the acts and practices herein alleged, are in or affecting "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

10. Except to the extent that competition has been restrained as alleged herein, BVIPA's physician members have been, and are now, in competition with one another for the provision of physician services in the Boulder County area.

OVERVIEW OF PHYSICIAN CONTRACTING WITH PAYERS

11. Physicians often contract with payers to establish the terms and conditions, including price terms, under which they render services to the payers' enrollees. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payers' relationships with enrollees. These contracts between physicians and payers may reduce payers' costs and enable them to lower the price of insurance, and thereby result in lower medical-care costs for enrollees. Payers contract with physicians to ensure their enrollees have access to the medical care and services of those physicians.

12. Absent agreements among competing physicians on the terms, including price, on which they will provide services to payers' enrollees, competing physicians decide individually whether to enter into contracts with payers, and what prices they will accept pursuant to such contracts.

13. Competing physicians may use a "messenger" to facilitate their contracting with payers in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Such an arrangement, however, will not avoid a horizontal agreement if the "messenger" or another agent: (1) negotiates fees and other competitively significant terms on behalf of the

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participating physicians, or (2) facilitates the physicians' coordinated responses to contract offers by, for example, electing not to convey a payer's offer to them based on the agent's, or the participants', opinion on the appropriateness, or lack thereof, of the offer.

BVIPA

14. BVIPA is an association of approximately 365 independent primary care and specialist physicians in solo or small group practices in the Boulder County area that contracts with payers on behalf of its physician members. BVIPA was formed in 1979, in part, to coordinate "the delivery of medical care and other health services to persons enrolled in prepaid health service plans and other contractual health services arrangements."

15. BVIPA physician members represent a substantial percentage of the physicians who practice in the Boulder County area. Payers doing business in the Boulder County area have difficulty offering marketable and competitive health plans without contracting with at least a substantial portion of the BVIPA physician members.

16. Pursuant to BVIPA's Amended and Restated By-laws, ten to fifteen physician members sit on BVIPA's Board of Directors and manage the affairs of the organization. Physician members elect Board members for three-year terms at BVIPA's annual meeting.

17. When joining BVIPA, physician members sign agreements, entitled "Physician Provider Services Agreement." Pursuant to the Physician Provider Services Agreement, physician members authorize BVIPA to contract with payers on their behalf and agree to accept and adhere to such contracts.

ANTICOMPETITIVE CONDUCT

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18. Ms. Higgins became BVIPA's Executive Director in or about 1999. BVIPA's by-laws allow its Executive Director to sign contracts upon Board authorization.

19. BVIPA's Board granted Ms. Higgins blanket authority to negotiate contracts with payers on behalf of BVIPA and its physician members, including the authority to enter into contracts without obtaining approval from the BVIPA Board, Finance Committee, or any of its members.

**MS. HIGGINS ORCHESTRATED BVIPA'S ACTIONS
TO FIX PRICES AND THREATEN TO TERMINATE
CONTRACTS WITH PAYERS**

20. From approximately 2001 through 2006, Ms. Higgins, in combination and conspiracy with BVIPA's members, conducted negotiations with numerous payers on behalf of BVIPA physicians and successfully extracted higher fees from them. These payers included United Healthcare of Colorado, PacifiCare of Colorado, Aetna Inc., Sloans Lake Managed Care, Inc. and CIGNA.

21. Ms. Higgins has exhorted BVIPA members to contract jointly through BVIPA, rather than individually, in order to maximize their bargaining leverage and increase the price that BVIPA members can obtain for providing physician services to payers. For example, in a 2002 BVIPA newsletter, Ms. Higgins reminded BVIPA members that "our strength will lie in contracting together, not separately." In the same newsletter, Higgins provided an example of BVIPA members' combined leverage, reporting that BVIPA had accepted a contract at a favorable rate. According to Ms. Higgins, "This is due to your support of our efforts and [the payer's] inability to get providers to sign individual contracts. Thank you for your support!!"

22. Under Ms. Higgins' leadership, BVIPA members have used their combined negotiating leverage to increase the prices

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that they are paid for physician services. According to BVIPA's medical director, "BVIPA contracts for our physicians with the large insurance companies that do business in Boulder County. We think we negotiate the best contracts with the highest reimbursements for our physicians in general."

23. By approximately June 2006, Ms. Higgins had renegotiated BVIPA's fees on a number of occasions with United Healthcare of Colorado; PacifiCare of Colorado; Aetna Inc.; Sloans Lake Managed Care, Inc.; CIGNA; and others, and signed agreements with those payers memorializing the rate increases on behalf of BVIPA's physician members.

24. Beginning in late in 2007 and continuing until early 2009, Ms. Higgins, as BVIPA's executive director, negotiated and consulted for some of BVIPA's physician members who sought to contract individually with a payer, thereby facilitating the exchange of rate information among them, and facilitating the coordination of rates during the individual negotiations.

25. As a result of Ms. Higgins' collective negotiations of physician fees for BVIPA members, payers contracted with and reimbursed BVIPA members for physician services in Boulder County at rates approximately 15 to 27 percentage points higher than those paid in individual contracts with non-member physicians in Boulder County.

**MS. HIGGINS OFFERED PAYERS FICTITIOUS
CONTRACTING CHOICES**

26. In 2004, BVIPA purported to begin offering payers three options for contracting with BVIPA. Ms. Higgins described the three options in a so-called "white paper" that she drafted and gave to payers at the start of a renegotiation. The white paper's contracting options through BVIPA included a collectively-negotiated contract that "delivered the entire BVIPA network," and a "modified messenger model" that "may or may not deliver our entire network." A third option included direct contracting

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with individual members outside the IPA. Although Ms. Higgins' white paper appeared to offer payers a choice of contracting methods, BVIPA's contracting practices, and Ms. Higgins' conduct, did not change.

27. Despite purporting to offer a "modified messenger model," BVIPA did not forward proposals to BVIPA's individual members for review, unless Ms. Higgins deemed the prices acceptable.

28. Instead, Ms. Higgins used the same collective bargaining approach with each payer. She initiated contact with the payer and then proposed a price increase for physician services over those provided for in the current contract. If the payer agreed, Ms. Higgins signed a contract with the payer on behalf of BVIPA and all of its physician members, at the rate that she had negotiated. If and when a payer submitted a counter-offer, Ms. Higgins accepted or rejected the offer without messengering it to BVIPA's physician members.

29. When a payer did not cooperate with her demands to either begin negotiation or agree to a price increase, Ms. Higgins reported that payer to the BVIPA Board. The BVIPA Board then voted to threaten the payer with termination of its contract with BVIPA.

30. Despite purporting to offer payers the option of contracting with individual members outside of the BVIPA framework, when payers have approached individual BVIPA physician members, many of these physicians have refused to discuss contracting on an individual basis, instead, referring the payers to BVIPA.

31. Other physicians have offered to negotiate individual contracts, but with Ms. Higgins representing them in their individual capacity.

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NEGOTIATIONS WITH SPECIFIC PAYERS

32. United first signed a contract with BVIPA in approximately 2001 in order to contract with certain BVIPA specialists. By 2003, United had agreed to increase rates on approximately two occasions.

33. In January 2003, Ms. Higgins demanded another increase and United responded that it was willing to negotiate a smaller increase. Ms. Higgins rejected United's proposal and proposed instead "meeting in the middle." United then asked Ms. Higgins to go "to each of your physicians and let them make their individual decisions based on their practice." Higgins refused to do so and replied instead that her "goal was to present a proposal that most (if not all) physicians will agree to." Ms. Higgins met with the BVIPA Finance Committee to report United's rejection of her demands. The Committee minutes reported that "the increase is too low and Cathy [Higgins] will continue to follow up with United." United agreed to a rate increase that was acceptable to Ms. Higgins.

34. In 2004, Ms. Higgins demanded another increase. She gave United a copy of the white paper containing BVIPA's contracting options. Higgins reported to the Board that "they [United] . . . have requested to use the Messenger Model sending individual contracts to each physician." Despite this, Higgins did not use a messenger model but continued to negotiate a rate increase with United. When United balked at Higgins' demands, Higgins told the Board that negotiations with United have "stalled," and the Board "may have to send a termination letter if the representatives at United do not become more responsive." Thereafter, United agreed to an increase.

35. PacifiCare first contracted with BVIPA in approximately 2001. Ms. Higgins renegotiated BVIPA's contract several times by 2004. During the 2004 negotiations for an increase in rates, negotiations with PacifiCare stalled. Ms. Higgins brought

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PacifiCare to the table by notifying it that BVIPA intended to terminate its contract with PacifiCare for one of its products. Thereafter, PacifiCare agreed to an increase.

36. Aetna first contracted with BVIPA in 2000. In the fall of 2001, Ms. Higgins began to negotiate an increase in the contract rate. By February 2002, BVIPA's Board agreed that "the IPA should give Aetna an [sic] timeline under which an agreement must be met, otherwise face a termination letter from the IPA." Aetna agreed to a rate increase for 2003.

37. In 2004, when Ms. Higgins demanded another rate increase, Aetna countered stating that BVIPA fees were already high and that "[o]ther physicians have not requested yearly increases." Notwithstanding its complaint to Ms. Higgins, Aetna agreed an increase that was acceptable to Ms. Higgins.

38. Ms. Higgins demanded another increase during 2005. Aetna suggested a much smaller rate increase, reminding Ms. Higgins again that BVIPA's rates were substantially above other rates in the market. Despite this, Aetna agreed to an increase that was acceptable to Ms. Higgins.

MS. HIGGINS' CONDUCT ON BEHALF OF BVIPA MEMBERS IS NOT JUSTIFIED

39. BVIPA and its physician members have not undertaken any programs or activities that create any integration among their members in the delivery of physician services sufficient to justify their acts or practices, or Ms. Higgins' negotiations on their behalf, as described in the foregoing paragraphs. BVIPA members do not share any financial risk in providing physician services, do not collaborate in a program to monitor and modify their clinical practice patterns to control costs or ensure quality, or otherwise integrate their delivery of care to patients.

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**MS. HIGGINS' CONDUCT CONSTITUTES AN
UNLAWFUL RESTRAINT OF TRADE**

40. BVIPA's participating physicians constitute numerous discrete economic interests. BVIPA's conduct, including that of Ms. Higgins on BVIPA's behalf, constitutes combined or concerted action by its participating physicians.

41. Ms. Higgins, in combination and conspiracy with BVIPA physician members, has acted to restrain competition in the Boulder County, Colorado area in the following ways, among others:

- a. facilitating, negotiating, entering into, and implementing agreements and coordination among physician members on price and other competitively significant terms;
- b. refusing or threatening to refuse to deal with payers except on collectively agreed-upon terms; and
- c. collectively negotiating price and other competitively significant terms in payer contracts for physician members and refusing to messenger payer offers to physician members for their individual consideration about whether to participate.

**MS. HIGGINS' ACTIONS ON BEHALF OF BVIPA
MEMBERS HAVE HAD SUBSTANTIAL
ANTICOMPETITIVE EFFECTS**

42. Ms. Higgins' actions, in concert with BVIPA's physician members, have had, or tend to have had, the effect of unreasonably restraining trade and hindering competition in the provision of physician services in the Boulder County area, in the following ways, among others:

- a. unreasonably restraining price and other forms of

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competition among physicians;

- b. increasing prices for physician services; and
- c. depriving health plans, employers, and individual consumers of the benefits of competition among physicians.

**VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT**

43. 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 thirtieth day of March, 2010, issues its complaint against Respondent.

By the Commission, Commissioner Rosch dissenting.

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DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of M. Catherine Higgins, hereinafter referred to as Respondent, and Respondent having been furnished thereafter 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 Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, her attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent 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 Respondent has violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement, placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. Respondent M. Catherine Higgins is Executive Director of Boulder Valley Individual Practice

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Association. Her principal address is 6676 Gunpark Drive, Suite B, Boulder Valley, CO 80301.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “BVIPA” means Boulder Valley Individual Practice Association, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Limited Messenger” means a Person who acts as an agent, or as a messenger, on behalf of any Physician or any Medical Group Practice to receive a contract offer from a Payer, timely conveys without comment or analysis such offer to some or all of the Participating Physicians and Medical Group Practices as directed by the Payer, receives from each Participant his, her or its independent, unilateral decision to accept or reject the Payer’s contract offer, and timely conveys each such response without comment or analysis to the Payer.
- C. “Medical Group Practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, or

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employees, or in which only one physician practices medicine.

- D. “Non-exclusive Arrangement” means an arrangement that does not restrict the ability of, or facilitate the refusal of, physicians who participate in it to deal with payers on an individual basis or through any other arrangement.
- E. “Participate” in an entity or an arrangement means (1) to be a partner, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services to a Payer through such entity or arrangement. This definition applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- F. “Payer” means any person that pays, or arranges for payment, for all or any part of any Physician services for itself or for any other person, as well as any person that develops, leases, or sells access to networks of Physicians.
- G. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- H. “Physician” means a doctor of allopathic medicine (“M.D.”), a doctor of osteopathic medicine (“D.O.”), or a doctor of podiatric medicine (“D.P.M.”).
- 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.

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- J. “Qualified Clinically-Integrated Joint Arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who participate in the arrangement Participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the Physicians who Participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.
- K. “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 at a capitated rate,
 - b. the provision of Physician services for a predetermined percentage of premium or revenue from Payers,

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- c. the use of significant financial incentives (*e.g.*, substantial withholds) for Physicians who Participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by Physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, when the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and
- 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.
- L. "Qualified Arrangement" means a Qualified Clinically-Integrated Joint Arrangement or a Qualified Risk-Sharing Joint Arrangement.

II.

IT IS FURTHER ORDERED that Respondent, 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

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Physicians with respect to their provision of Physician services:

1. to negotiate on behalf of any Physician with any Payer;
 2. to refuse to deal, or threaten to refuse to deal with any Payer, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;
 3. regarding any term, condition, or requirement upon which any Physician deals, or is willing to deal, with any Payer, including, but not limited to, price terms; or
 4. not to deal individually with any Payer, or not to deal with any Payer other than through BVIPA;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among Physicians concerning any Physician's willingness to deal with a Payer, or the terms or conditions, including price terms, on which the Physician is willing to deal with a Payer;
- C. Attempting to engage in any action prohibited by Paragraphs II.A or II.B above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any Person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

Provided, however, that nothing in this Paragraph II shall prohibit any agreement or conduct involving Respondent that, subject to the requirements of Paragraphs VII and VIII of this

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Order, is reasonably necessary to form, Participate in, or take any action in furtherance of, a Qualified Arrangement, so long as such Qualified Arrangement is a Non-exclusive Arrangement.

III.

IT IS FURTHER ORDERED that for one (1) year from the date this Order becomes final, Respondent cease and desist from acting as an agent, or as a messenger, except, subject to the requirements of Paragraphs V and VI, acting as a Limited Messenger, on behalf of any Physician or any Medical Group Practice with any Payer regarding contracts.

Provided, however, that nothing in this Paragraph III shall prohibit Respondent from informing any Physician, Medical Group Practice, or Payer that a contract for the provision of Physician services includes or does not include terms required by Colorado state law.

IV.

IT IS FURTHER ORDERED that, for two (2) years from the date the Order becomes final, Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of Physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Negotiating on behalf of any Physician that Participates or has Participated in BVIPA with any Payer, notwithstanding whether such conduct also is prohibited by Paragraph II of this Order; and
- B. Advising any Physician that Participates, or has Participated, in BVIPA to accept or reject any contract, offer, contract term, condition, or requirement of dealing with any Payer, notwithstanding whether such

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conduct also is prohibited by Paragraph II of this Order.

Provided, however, that nothing in this Paragraph IV shall prohibit Respondent from informing any Physician, Medical Group Practice, or Payer that a contract for the provision of Physician services includes or does not include terms required by Colorado state law.

Provided further, however, that, if Respondent ceases to be employed by BVIPA, nothing in this Paragraph IV shall prohibit Respondent, once each calendar year, from becoming an employee of any one Physician or of any one Medical Group Practice and from negotiating on behalf of only that employer with any Payer regarding contracts.

V.

IT IS FURTHER ORDERED that Respondent: (a) for one (1) year from the date this Order becomes final, at least sixty (60) days prior to acting as a Limited Messenger; and (b) beginning one (1) year from the date this Order becomes final, for an additional two (2) years, at least sixty (60) days prior to acting as an agent, or as a messenger on behalf of any Physician or any Medical Group Practice with any Payer regarding contracts, shall notify the Commission in writing ("Paragraph V Notification") of the arrangement for which Paragraph V Notification is required. The Paragraph V Notification shall include the number of proposed Physician Participants in the proposed arrangement; the proposed geographic area in which the proposed arrangement would 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 proposed arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects of the proposed arrangement, such as those prohibited by this Order.

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VI.**IT IS FURTHER ORDERED** that:

- A. If, within sixty (60) days from the date of the Commission's receipt of the Paragraph V Notification, a representative of the Commission makes a written request to Respondent, then Respondent shall not Participate in the proposed arrangement prior to the expiration of thirty (30) days after substantially complying with such request, 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, or without the initiation of an enforcement proceeding, 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 proposed 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 proposed arrangement has been approved;
- D. Receipt by the Commission of any Paragraph V Notification is not to 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; and
- E. Paragraph V Notification shall not be required prior to Participating in any arrangement for which Paragraph V Notification has previously been given.

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VII.

IT IS FURTHER ORDERED that for three (3) years from the date this Order becomes final, pursuant to each Qualified Arrangement in which Respondent is a Participant, that Respondent shall notify the Commission in writing ("Paragraph VII Notification") at least sixty (60) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any Physicians or Medical Group Practices in such Qualified Arrangement relating to price or other terms or conditions of dealing with any Payer; or
- B. Contacting a Payer, pursuant to a Qualified Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any Payer, on behalf of any Physician or Medical Group Practice in such Qualified Arrangement.

VIII.

IT IS FURTHER ORDERED that:

- A. Paragraph VII Notification shall include the following information regarding the Qualified Arrangement pursuant to which Respondent intends to engage in the above identified conduct:
 - 1. the total number of Physicians and the number of Physicians in each specialty Participating in the Qualified Arrangement;

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2. a description of the Qualified Arrangement, including its purpose and geographic area of operation;
 3. a description of the nature and extent of the integration and the efficiencies resulting from the Qualified Arrangement;
 4. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the Qualified Arrangement;
 5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Qualified Arrangement or its activities; and
 6. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for Physician services in any relevant market, including, but not limited to, the market share of Physician services in any relevant market.
- A. If, within sixty (60) days from the Commission's receipt of the Paragraph VII Notification, a representative of the Commission makes a written request for additional information, then Respondent shall not Participate in any arrangement described in Paragraph VII.A or Paragraph VII.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, or

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without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission;

- C. The absence of notice that the proposed Qualified 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 proposed Qualified Arrangement has been approved;
- D. Receipt by the Commission of any Paragraph VII Notification regarding Participation pursuant to a proposed Qualified Arrangement is not to be construed as a determination by the Commission that any such proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission; and
- E. Paragraph VII Notification shall not be required prior to Participating in any Qualified Arrangement for which Paragraph VII Notification has previously been given.

IX.

IT IS FURTHER ORDERED that Respondent shall file a verified written report within sixty (60) days from 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:

- A. A detailed description of the manner and form in which Respondent has complied and is complying with the Order; and

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- B. If Respondent no longer is an employee of BVIPA, then with regard to each request made by a Payer to her to act as a Limited Messenger, or as an agent or messenger, on behalf of her then current employer regarding a contract with that Payer, and in accordance with Paragraph III of this Order:
1. A copy of all communications with the Payer regarding that request; and
 2. A copy of all communications with any Physician or any Medical Group Practice regarding that request.

X.**IT IS FURTHER ORDERED** that:

Respondent shall notify the Commission of any change in her Principal Address within twenty (20) days of such change in address.

XI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at her expense.

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XII.

IT IS FURTHER ORDERED that this Order shall terminate on March 30, 2030.

By the Commission, Commissioner Rosch dissenting.

Analysis to Aid Public Comment

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 M. Catherine Higgins (“Ms. Higgins”), the eExecutive dDirector of the Boulder Valley Individual Practice Association (“BVIPA”). The agreement settles charges that Ms. Higgins violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, among other things, orchestrating and implementing agreements among competing physician members of BVIPA to fix the prices at which BVIPA physicians contract with health plans.

This matter relates to the Commission’s prior actions against BVIPA. In December 2008, the Commission accepted for public comment a proposed consent order to settle charges that BVIPA orchestrated and carried out illegal agreements to set prices and other terms that BVIPA physicians would accept from health plans. The accompanying complaint against BVIPA alleged that the IPA’s executive director, Ms. Higgins, played a key role in the challenged conduct; the complaint but did not, however, name her as a respondent. The order against BVIPA, by its terms, applies to Ms. Higgins’ conduct as the executive director of BVIPA but does not apply to her actions in her individual capacity.

Based on Ms. Higgins’ conduct after BVIPA signed its consent order, the Commission has reason to believe that Ms. Higgins may attempt to evade the order’s prohibitions by acting in her individual capacity. There is evidence, that – shortly after the BVIPA signed the consent agreement – Ms. Higgins represented physicians in her individual capacity. As alleged in today’s complaint (“Complaint”), Ms. Higgins told an insurer that she could continue to negotiate fees on behalf of BVIPA physicians, declaring:

I could do this as an individual, not with my BVIPA hat,
but as an individual. I’m not named in the settlement.

Analysis to Aid Public Comment

There's nothing that precludes me from doing my own work. I could just do it outside.

Absent an order against Ms. Higgins in her individual capacity, there is a substantial danger that she will continue to orchestrate unlawful price fixing agreements among physicians in the Boulder County area and that consumers will continue to suffer the adverse effects of her conduct.¹

The proposed consent order ("Proposed 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 decide whether to 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 Order has been entered into for the settlement purposes only and does not constitute an admission by Ms. Higgins that she violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

¹ The U.S. Supreme Court has clearly held that it is appropriate for the Commission to name individuals, as well as organizations, where evidence exists that an individual otherwise would be likely to "evade orders by the Commission." *Federal Trade Comm'ission v. Standard Education Soc.*, 302 U.S. 112, 119 (1937).

Analysis to Aid Public Comment

The Complaint

The allegations of the Complaint are summarized below.

Ms. Higgins is the Executive Director of BVIPA, an association of approximately 365 independent primary care and specialist physicians in solo or small group practices in the Boulder County area that contracts with payers on behalf of its physician members. As part of her Ms. Higgins' duties, BVIPA's Board granted her Ms. Higgins blanket authority to negotiate contracts with payers on behalf of BVIPA and its physician members, including the authority to enter into contracts without obtaining approval from the BVIPA Board, Finance Committee, or any of its members.

The Complaint challenges Ms. Higgins' conduct starting in 2001, when she began negotiating the prices and other terms at which that BVIPA's otherwise competing physicians would deal with payers. From approximately 2001 through 2006, Ms. Higgins negotiated with numerous payers on behalf of BVIPA physicians and successfully extracted higher fees from them. In order to maximize BVIPA's bargaining leverage, Ms. Higgins exhorted BVIPA members to contract jointly through BVIPA, rather than individually. For example, in a 2002 BVIPA newsletter, Ms. Higgins reminded BVIPA members that "our strength will lie in contracting together, not separately." In reporting that BVIPA had signed a new contract at a favorable rate, Ms. Higgins noted that "[t]his is due to your support of our efforts and [the payer's] inability to get providers to sign individual contracts. Thank you for your support!!"

Beginning in late in 2007 and continuing until early 2009, Ms. Higgins, as BVIPA's executive director, negotiated and consulted for some of BVIPA's physician members who sought to contract individually with a payer, thereby facilitating the exchange of rate information among them, and facilitating the coordination of rates during the individual negotiations.

Analysis to Aid Public Comment

As a result of Ms. Higgins' collective negotiations of physician fees for BVIPA members, payers contracted with and reimbursed BVIPA members for physician services in Boulder County at rates approximately 15 to 27 percentage points higher than those paid in individual contracts with non-member physicians in Boulder County.

In 2004, Ms. Higgins drafted and gave a "white paper" to payers at the start of a renegotiation, which purported to offer three options for contracting with BVIPA members: a single-signature contract that "delivered the entire BVIPA network";,," a "modified messenger model" that "may or may not deliver our entire network"; ," and direct contracting with individual members outside the IPA. BVIPA's contracting practices and Ms. Higgins' conduct, however, did not change. BVIPA still sent proposals to BVIPA's individual members for review only after Ms. Higgins deemed the prices acceptable. Further, many BVIPA physicians have refused to discuss contracting on an individual basis, instead, referring the payers to BVIPA, and others have offered to negotiate individual contracts with Ms. Higgins representing them in their individual capacity.

Ms. Higgins' conduct had the effect of unreasonably restraining trade and hindering competition in the provision of physician services by unreasonably restraining price and other forms of competition among physicians; increasing prices for physician services; and depriving health plans, employers, and individual consumers of the benefits of competition among physicians. BVIPA members did not engage in any efficiency-enhancing integration of their practices sufficient to justify Ms. Higgins' challenged conduct. Accordingly, the Complaint alleges that Ms. Higgins violated Section 5 of the FTC Act.

The Proposed Consent Order

The Proposed Order is designed to remedy the illegal conduct charged in the Complaint and to prevent its recurrence. To

Analysis to Aid Public Comment

preserve the ability to engage in potentially procompetitive conduct while ensuring that physicians reach contracting decisions independently, the Proposed Order also includes certain “fencing-in” limitations on Ms. Higgins’ activities. The Proposed Order is otherwise similar to prior those consent orders that the Commission has issued to settle charges that individuals, as well as physician groups, engaged in unlawful agreements to raise the fees that physician groups receive from health plans.

The Proposed Order’s specific provisions are as follows:

Paragraph II.A prohibits Ms. Higgins from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician’s behalf; (2) to refuse to deal, or threaten to refuse to deal, with payers in furtherance of any conduct or agreement prohibited by any other provision of Paragraph II; (3) on any terms on which a physician is willing to deal with any payer; or, (4) not to deal individually with any payer, or not to deal with any payer other than through BVIPA.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Ms. Higgins from facilitating exchanges of information between physicians concerning any physician’s willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D. proscribes Ms. Higgins from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing collective bargaining on behalf of providers with health -care purchasers, Paragraph II excludes certain kinds of agreements from its prohibitions. Thus, Ms. Higgins is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a “Qualified Risk-Sharing Joint Arrangement” or a “Qualified Clinically-Integrated Joint Arrangement.” The

Analysis to Aid Public Comment

arrangement, however, must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

As defined in the Proposed Order, a “Qualified Risk-Sharing Joint Arrangement” possesses two characteristics. First, all physician participants must share substantial financial risks 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 prices or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III, one of the fencing-in prohibitions, limits for one year Ms. Higgins’ activities as an agent or messenger with regard to payer contracts. Subject to the notification requirement of Paragraph V, Ms. Higgins may only receive and transmit offers and responses to those offers between payers and physicians. Paragraph VI sets out the information necessary to make the notification complete.

Paragraph IV, another fencing-in provision, for two years prohibits Ms. Higgins for two years from negotiating on behalf of or advising any physician member of BVIPA with regard to any

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payer contract offer or term. Both Paragraphs III and Paragraph IV exclude from their prohibitions, however, information Ms. Higgins may provide regarding whether any contract for proposed physician services includes terms required by Colorado state law. Paragraph IV further excludes from its prohibition certain negotiations should Ms. Higgins cease to be employed by BVIPA.

Paragraph V requires Ms. Higgins to notify the Commission, for one year before acting as a Limited Messenger, and for an additional two years before acting as a messenger or agent, with payers regarding contracts. Paragraph VI sets out the information necessary to make the notification complete.

Paragraph VII, for three years, requires Ms. Higgins for three years to notify the Commission before participating in contracting with health plans on behalf of either a Qualified Risk-Sharing or a Qualified Clinically-Integrated Joint Arrangement. Paragraph VIII sets out the information necessary to satisfy the notification requirement.

Paragraphs IX, X, and XI impose various obligations on Ms. Higgins to report or provide access to information to the Commission to facilitate the monitoring of compliance with the Order. Finally, Paragraph XII provides that the Proposed Order will expire in 20 years.

Complaint

IN THE MATTER OF

**BOULDER VALLEY INDIVIDUAL PRACTICE
ASSOCIATION**

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

*Docket No. C-4285; File No. 051 0252
Filed, April 2, 2010 — Decision, April 2, 2010*

This consent order addresses Boulder Valley Individual Practice Association's orchestrating and implementing agreements among competing physician members of BVIPA to fix the price at which BVIPA physicians contract with health plans. The Complaint challenges BVIPA's conduct starting in 2001, when BVIPA, on behalf of its members, began to negotiate the prices and terms in payer contracts at which its otherwise competing physician members would provide services to subscribers of health plans. BVIPA actively discouraged members from contracting directly with payers and threatened payers facing rate increases with termination of their contracts when they refused to negotiate or otherwise respond to BVIPA's demands. BVIPA members did not engage in any efficiency-enhancing integration of their practices sufficient to justify the its challenged conduct. The order prohibits BVIPA from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician's behalf; (2) to refuse to deal, or threaten to refuse to deal, with payers in furtherance of any prohibited conduct or agreement (3) on any terms on which a physician is willing to deal with any payer; or (4) not to deal individually with any payer, or not to deal with any payer other than through BVIPA. However, BVIPA is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The arrangement, however, must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

Participants

For the *Commission*: *Robert Canterman and Constance Salemi.*