

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.*

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For the *Respondents*: *James E. Hartley, Holland and Hart;*
and Thomas B. Leary and Robert Leibenluft, Hogan & Hartson,
L.L.P.

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 Boulder Valley Individual Practice Association, hereinafter referred to as "Respondent" or "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 action concerns horizontal agreements among approximately 365 competing independent physicians and physician practice groups ("physician members") acting through BVIPA to fix prices and engage in collective bargaining with payers offering coverage for health care services in the Boulder County, Colorado area. Respondent BVIPA orchestrated and carried out these illegal agreements, and its physician members participated in these illegal agreements, which have increased prices for consumers of physician services in the Boulder County area and have no legitimate justification.

THE RESPONDENT

2. Respondent BVIPA is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business at 6560 Gunpark Drive, Suite B, Boulder, Colorado 80301.

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3. BVIPA is a type of organization commonly referred to in the health care industry as an “independent practice association” because its members consist of independent physicians in solo and small group practices.

JURISDICTION

4. BVIPA is organized for the purpose, among others, of serving the interest 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.

5. BVIPA is a “corporation” within the meaning of Section 4 of the Federal Trade Commission Act.

6. At all times relevant to the Complaint, BVIPA has been engaged in the business of contracting with payers, on behalf of its physician members, for the provision of physician services to persons for a fee.

7. 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.

8. The general business practices of BVIPA and its physician members, including the acts and practices herein alleged, affect the interstate movement of patients, the interstate purchase of supplies and products, and the interstate flow of funds, and are in or affecting “commerce” as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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**OVERVIEW OF PHYSICIAN CONTRACTING WITH
PAYERS**

9. Physicians often contract with health plans and other third-party payers (“payers”) to establish the terms and conditions, including price terms, under which they render physician 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 may reduce payers’ costs and enable them to lower the price of insurance, and thereby result in lower medical-care costs for enrollees.

10. Absent agreements among competing physicians on the prices at which they will provide services to payers’ enrollees, competing physicians decide unilaterally whether to participate in the payers’ provider networks based on the price and other terms and conditions offered by the payers.

11. To be marketable and competitive in the Boulder County area, a payer’s health plan must include in its physician network a large number of primary care and specialist physicians offering services to customers in a sufficient number of practice fields at convenient or accessible locations and at affordable prices. Because a substantial number of the primary care and specialist physicians who practice in the Boulder County area are members of BVIPA, payers doing business in the Boulder County area have significant difficulty offering marketable and competitive health plans without having at least a substantial portion of BVIPA’s physician members in their provider networks.

ANTICOMPETITIVE CONDUCT

12. BVIPA, acting as a combination of its physician members, and in conspiracy with them, has acted to restrain competition by, among other things, facilitating, negotiating and entering into, and implementing agreements to fix the prices on which their physician members contract with payers; threatening to terminate

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contracts with payers who refuse to deal with BVIPA; and refraining from negotiating individually with payers.

**THE AGREEMENT AMONG BVIPA'S PHYSICIAN
MEMBERS TO COORDINATE PRICES**

13. BVIPA was formed in 1979 purportedly to coordinate the delivery of medical care and other health care services. Pursuant to BVIPA's Amended and Restated By-Laws, ten to 15 physician members sit on BVIPA's Board of Directors and manage the affairs of the IPA. Physician members elect Board members for three-year terms at BVIPA's annual meeting. The By-Laws also authorize the Board to appoint an executive director to supervise BVIPA activities, subject to the control of the Board.

14. Physicians agree to participate in the contracts that BVIPA signs with payers by joining BVIPA and signing a "Physician Provider Services Agreement." In accordance with the Physician Provider Services Agreement, physician members grant BVIPA the authority to contract with payers on their behalf and they agree to accept payment for their services according to the terms negotiated by BVIPA with payers.

15. Physician members may weigh in on BVIPA's contract negotiations through BVIPA's Finance Committee. The Finance Committee acts as a sounding board where physician members may state their views on the rate level under negotiation. The Finance Committee communicates the physician members' views on whether the rate level is acceptable to the Board and BVIPA's executive director, who actually conducts the negotiations with payers.

**BVIPA ENGAGED IN PRICE-FIXING AND
THREATENED TO TERMINATE CONTRACTS WITH
PAYERS**

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16. Between 2001 and 2006, BVIPA authorized its executive director to negotiate and sign agreements on behalf of its physician members with approximately 17 payers. After signing the contracts, BVIPA then conducted periodic renegotiations of its contracts with large payers to obtain rate increases. When renegotiating a rate, BVIPA's executive director signed an agreement only when the new rate was deemed to be sufficiently high. BVIPA threatened payers facing rate increases with termination of their contracts when they refused to negotiate or otherwise respond to BVIPA's demands.

17. BVIPA used the same *modus operandi* in all its contract renegotiations. The executive director initiated contact with the payer, usually proposed a fee increase of 4.5 to 5%, and rejected counterproposals that were deemed too low. After reaching agreement with a payer on an acceptable price level, the executive director signed a contract with the payer on behalf of BVIPA's physician members.

18. To give its executive director clout in the renegotiations, BVIPA newsletters discouraged members from contacting directly with payers. A 2002 newsletter reminded physician members that BVIPA's "strength will lie in contracting together, not separately" and reported that BVIPA was able to pressure a payer into signing its single-signature contract at the rate demanded by BVIPA because of the payer's "inability to get providers to sign individual contracts." A 2005 BVIPA newsletter reminded members that "BVIPA's negotiating strength lies with our members," and regarding contracting with payers, BVIPA "would like to emphasize that the IPA can do its best when we have maximum provider participation and support."

19. Some of BVIPA's physician members with specialties that are particularly important for the marketing of a provider network refused to contract with payers outside BVIPA. Consequently, payers had to negotiate and sign contracts with BVIPA to ensure that these physicians would participate in the payers' health plans.

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20. In 2004, BVIPA purported to begin offering payers three options for contracting with BVIPA. The executive director described the three options in a white paper that she drafted and gave to payers at the start of a renegotiation. The contracting options through BVIPA include a single-signature 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 with individual members outside the IPA.

21. Although BVIPA's white paper appeared to offer payers a choice of contracting methods, the method that BVIPA used was the single-signature contract. Despite purporting to offer a “modified messenger model,” BVIPA did not develop or use a messenger model at all times relevant to this complaint.

22. In those instances when a payer did not cooperate with BVIPA's demands to either begin a renegotiation or agree to certain price levels during a renegotiation, BVIPA's executive director would report that payer to the Board. The Board in turn would vote to threaten the payer with termination of its contract with BVIPA. Payers threatened by the Board with termination ultimately yielded to BVIPA's price demands.

23. By approximately June 2006, BVIPA had renegotiated physician rates 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.

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RESPONDENT'S CONDUCT IS NOT JUSTIFIED

24. 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 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.

**RESPONDENT'S ACTIONS HAVE HAD SUBSTANTIAL
ANTICOMPETITIVE EFFECTS**

25. Respondent's actions 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, Colorado area, in the following ways, among others:

- a. unreasonably restraining price and other forms of 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**

26. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 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.

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this second day of April, 2010, issues its Complaint against Respondent.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Boulder Valley Individual Practice Association, 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, its 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

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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 and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons, 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 is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its principal address at 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 the Respondents, and the proceeding is in the public interest.

ORDER**I.**

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

- A. "Respondent" 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.

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- B. "Medical Group Practice" means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, or employees, or in which only one physician practices medicine.
- C. "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 payors on an individual basis or through any other arrangement.
- D. "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 Payor 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."
- E. "Payor" 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.
- F. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- G. "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.").

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- H. “Preexisting Contract” means a contract for the provision of Physician services that was in effect on the date of the receipt by a Payor that is a party to such contract of notice sent by Respondent BVIPA pursuant to Paragraphs VII.2.b and VII.2.c of this Order of such Payor’s right to terminate such contract.
- 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 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

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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 Payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for Physicians who Participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by Physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, 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.

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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 Physicians with respect to their provision of Physician services:
 - 1. to negotiate on behalf of any Physician with any Payor;
 - 2. to refuse to deal, or threaten to refuse to deal with any Payor, 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 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 any Respondent(s);
- B. Exchanging or facilitating in any manner the exchange or transfer of information among Physicians concerning any Physician's willingness to deal with a Payor, or the terms or conditions, including price terms, on which the Physician is willing to deal with a Payor;

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- 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 V and VI of this 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 three (3) years from the date this Order becomes final, for any arrangement under which Respondent would act as an agent, or as a messenger, on behalf of any Physician or any Medical Group Practice with any Payor regarding contracts, Respondent shall notify the Commission in writing ("Paragraph III Notification") at least sixty (60) days prior to entering into the arrangement for which Paragraph III Notification is required. The Paragraph III 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.

IV.

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IT IS FURTHER ORDERED that:

- A. If, within sixty (60) days from the date of the Commission's receipt of the Paragraph III Notification, a representative of the Commission makes a written request to Respondent providing such notification for additional information, 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 III 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 III Notification shall not be required prior to Participating in any arrangement for which Paragraph III Notification has previously been given.

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V.

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, Respondent shall notify the Commission in writing ("Paragraph V 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 Payor; or
- B. Contacting a Payor, pursuant to a Qualified Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any Payor, on behalf of any Physician or Medical Group Practice in such Qualified Arrangement.

VI.

IT IS FURTHER ORDERED that:

- A. Paragraph V 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;
 - 2. a description of the Qualified Arrangement, including its purpose and geographic area of operation;

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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.
- B. If, within sixty (60) days from the Commission's receipt of the Paragraph V Notification, a representative of the Commission makes a written request to Respondent for additional information, then Respondent shall not Participate in any arrangement described in Paragraph V.A or Paragraph V.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;
- C. 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 Qualified

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Arrangement does or does not violate this Order or any law enforced by the Commission;

- D. 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;
- E. Receipt by the Commission of any Paragraph V 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
- F. Paragraph V Notification shall not be required prior to Participating in any Qualified Arrangement for which Paragraph V Notification has previously been given.

VII.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final:
 - 1. send a copy of this Order and the Complaint by first-class mail with delivery confirmation or electronic mail with return confirmation to:
 - a. every Physician who Participates, or has Participated, in Respondent at any time since January 1, 2001; and

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- b. each current officer, director, manager, and employee of Respondent;
 - 2. send by first-class mail, return receipt requested to the chief executive officer of each Payor with whom Respondent has record of being in contact since January 1, 2001, regarding contracting for the provision of Physician services:
 - a. a copy of this Order and the Complaint;
 - b. with the exception of those Payors identified at Confidential Appendix B to this Order, the letter attached as Appendix A to this Order; and
 - c. the letter attached as Appendix C to this Order to those Payors identified at Confidential Appendix B to this Order.
- B. Terminate, without penalty or charge, and in compliance with any applicable laws:
- 1. any Preexisting Contract with any Payor who is sent the letter attached as Appendix A to this Order, at the earlier of: (1) receipt by Respondent of a written request to terminate such contract from any Payor that is a party to the contract, or (2) the earliest termination date, renewal date (including any automatic renewal date), or the anniversary date of such contract; and
 - 2. any Preexisting Contract with any Payor who is sent the letter attached as Appendix C to this Order upon receipt by Respondent of a written request to terminate such contract from any Payor that is a party to the contract.

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Provided, however, a Preexisting Contract with a Payor to be terminated pursuant to Paragraph VII.B.1 may extend beyond any such termination or renewal date no later than one (1) year from the date that the Order becomes final if, prior to such termination or renewal date:

- a. the Payor submits to Respondent a written request to extend such contract to a specific date no later than one (1) year from the date that this Order becomes final, and
- b. Respondent has determined not to exercise any right to terminate.

Provided further, that any Payor making such request to extend a contract retains the right, pursuant to Paragraph VII.B.1 of this Order, to terminate the Preexisting Contract at any time.

- C. Within ten (10) days of receiving a written request to terminate from a Payor, pursuant to Paragraph VII.B of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each Physician Participating in such contract as of the date that Respondent receives such request to terminate; and
- D. For three (3) years from the date this Order becomes final:
 1. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each Physician who begins Participating in Respondent, and who did not previously

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receive a copy of this Order and the Complaint from Respondent within thirty (30) days of the time that such Participation begins;

- b. each Payor who contracts with Respondent for the provision of Physician services, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such Payor enters into such contract; and
 - c. each Person who becomes an officer, director, manager, or employee of Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that he or she assumes such position;
2. Annually publish in any official report or newsletter sent to all Physicians who Participate in Respondent a copy of this Order and the Complaint with such prominence as is given to regularly featured articles.

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VIII.

IT IS FURTHER ORDERED that Respondent shall file verified written reports 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, among other information that may be necessary:

- A. The name, address, and telephone number of each Payor with which Respondent has had any contact during the one (1) year period preceding the date for filing such report;
- B. The identity of each Payor sent a copy of the letter attached as Appendix A, the response of each Payor to that letter, and the status of each contract to be terminated pursuant to that letter;
- C. A copy of any request to terminate a contract from a Payor identified at Confidential Appendix B, and the status of each contract to be terminated pursuant to that letter;
- D. Copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph VII.A.1, and copies of the signed return receipts required by Paragraphs VII.A.2, VII.C, and VII.D; and
- E. A detailed description of the manner and form in which Respondent has complied and is complying with this Order.

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IX.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

- A. Of any change in its Principal Address within twenty (20) days of such change in address; and
- B. At least thirty (30) days prior to any proposed: (a) dissolution of Respondent; (b) acquisition, merger, or consolidation of Respondent; or (c) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

X.

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, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. 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 its expense; and
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

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XI.

IT IS FURTHER ORDERED that this Order shall terminate on April 2, 2030

By the Commission.

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APPENDIX A

[letterhead of BVIPA]

[name of payor's CEO]
[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order ("Order") issued by the Federal Trade Commission against BVIPA ("Boulder Valley").

Pursuant to Paragraph VIII.B.1 of the Order, BVIPA must allow you to terminate, upon your written request, without any penalty or charge, any contracts with BVIPA that are in effect as of the date you receive this letter.

If you do not make a written request to terminate the contract, Paragraph VIII.B. further provides that the contract will terminate on the earlier of the contract's termination date, renewal date (including any automatic renewal date), or anniversary date, which is [date].

You may, however, ask BVIPA to extend the contract beyond [date], the termination, renewal, or anniversary date, to any date no later than [date], one (1) year after the date the Order becomes final.

If you choose to extend the term of the contract, you may later terminate the contract at any time.

Any request either to terminate or to extend the contract should be made in writing, and sent to me at the following address: [address].

Sincerely,

[BVIPA to fill in information in brackets]

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CONFIDENTIAL APPENDIX B

**[Redacted From the Public Record Version
But Incorporated By Reference]**

APPENDIX C

[letterhead of BVIPA]

[name of payor's CEO]
[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order ("Order") issued by the Federal Trade Commission against BVIPA ("Boulder Valley").

Pursuant to Paragraph VIII.B.2 of the Order, BVIPA must allow you to terminate, upon your written request, without any penalty or charge, any contracts with BVIPA that are in effect as of the date you receive this letter.

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

Sincerely,

Decision and Order

[BVIPA to fill in information in brackets]

**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 Boulder Valley Individual Practice Association (“BVIPA”). The agreement settles charges that BVIPA 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 price at which BVIPA physicians contract with health plans.

The proposed consent Order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received and 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 consent Order has been entered into for settlement purposes only and does not constitute an admission by the proposed respondent that it 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.

BVIPA is a type of organization commonly referred to in the health care industry as an “independent practice association” because its members consist of independent physicians in solo and

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small group practices. BVIPA is controlled by its approximately 365 physician members in the Boulder County, Colorado area.

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 is governed by a board of directors consisting of physician members elected by the membership. Physicians joining BVIPA sign an agreement that gives BVIPA the authority to contract with health plans on their behalf, and they agree to accept the payment for their services that BVIPA negotiates. Members can provide input to BVIPA on whether a proposed rate level was acceptable.

Between 2001 and 2006, BVIPA, on behalf of its members, negotiated and signed agreements with approximately 17 payers and conducted periodic renegotiations of its contracts with large payers to obtain rate increases. BVIPA threatened payers facing rate increases with termination of their contracts when they refused to negotiate or otherwise respond to BVIPA's demands. Payers threatened with termination ultimately yielded to BVIPA's price demands.

BVIPA actively discouraged members from contracting directly with payers. Some payers attempted to contract with some of BVIPA's physician members with specialties that were important for the marketing of a provider network, and found that the providers refused to contract with payers outside BVIPA. Consequently, payers had to negotiate and sign contracts with BVIPA to ensure that these physicians would participate in the payers' health plans.

In 2004, BVIPA purported to offer payers 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

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direct contracting with individual members outside the IPA. Although BVIPA claimed to offer payers a choice of contracting methods, BVIPA did not develop or use a messenger model, and it continued to encourage its members not to contract outside the IPA.

BVIPA's 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 the its challenged conduct. Accordingly, the Complaint alleges that BVIPA violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed Order is designed to remedy the illegal conduct charged in the Complaint and prevent its recurrence, while leaving BVIPA free to engage in legitimate, potentially procompetitive conduct. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans.

The proposed Order's specific provisions are as follows:

Paragraph II.A 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 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.

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Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits BVIPA 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 BVIPA from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing providers' collective bargaining with health-care purchasers, Paragraph II excludes certain kinds of agreements from its prohibitions. First, 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.

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

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and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III, for three years, requires BVIPA to notify the Commission before it enters into any arrangements to act as a messenger or an agent on behalf of any physicians, with payers regarding contracts. Paragraph IV sets out the information necessary to make the notification complete.

Paragraph V, for three years, requires BVIPA 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 VI sets out the information necessary to satisfy the notification requirement.

Paragraph VII imposes other notification obligations on BVIPA and requires the termination of certain contracts that were entered into illegally. Paragraphs VII.A requires BVIPA to distribute the Complaint and the Order to (1) physicians who have participated in BVIPA since 2001; (2) to various past and current personnel of BVIPA; and (3) to payers with whom BVIPA has dealt since 2001. Paragraph VII.B requires BVIPA, at any payer's request and without penalty, to terminate its existing contracts with the payer for the provision of physician services. Paragraph VII.B. allows certain contracts currently in effect to be extended at the written request of the payer no longer than one year from the date that the Order becomes final. Paragraph VII.C requires BVIPA to distribute payer requests for contract termination to physicians who participate in the contract. Paragraph VII.D requires BVIPA, for three years, to provide new members, personnel, and payers not previously receiving a copy, a copy of the Order and the Complaint. Paragraph VII.D also requires BVIPA to publish annually a copy of the Order and the Complaint in its newsletter.

Analysis to Aid Public Comment

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

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

Complaint

IN THE MATTER OF

**THE M GROUP, INC ALSO DOING BUSINESS AS
BAMBOOSA
AND
MINDY JOHNSON, MICHAEL MOORE, AND
MORRIS SAINTSING**

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

*Docket No. 9340; File No. 082 3184
Filed, August 7, 2009 — Decision, April 2, 2010*

This consent order addresses The M Group, Inc., also doing business as Bamboosa, a corporation, and Mindy Johnson, Michael Moore, and Morris Saintsing's marketing and sale of textile fiber products purportedly made of bamboo fiber. Respondents made false claims that their textile fiber products are bamboo fiber; retain the anti-microbial properties of the bamboo plant; and will completely break down and return to the elements found in nature within a reasonably short period of time after customary disposal. The respondents also failed to have substantiation for the foregoing claims. The order prohibits respondents from failing to comply with the Textile Act or the Textile Rules. Respondents are specifically prohibited from representing that any textile fiber product (1) is made of bamboo or bamboo fiber; (2) is anti-microbial or retains the anti-microbial properties of any material from which it is made; or (3) is degradable, biodegradable, or photodegradable, unless such representations are true, not misleading, and substantiated by competent and reliable scientific evidence. The order also prohibits respondents from making claims about the benefits, performance, or efficacy of any textile fiber product, unless at the time the representation is made, it is truthful and not misleading, and is substantiated by competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Participants

For the *Commission*: Melinda Claybaugh and Korin Ewing.

For the *Respondents*: Philip G. Clarke, III, Esq., Charleston, SC.