

Complaint

IN THE MATTER OF

**COOPERATIVA DE FARMACIAS
PUERTORRIQUEÑAS**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4374; File No. 101 0079**Complaint, November 6, 2012 – Decision, November 6, 2012*

This consent order addresses Cooperativa de Farmacias Puertorriqueñas's ("Coopharma") negotiating, entering into, and implementing agreements among its member pharmacy owners to fix the prices on which they contract with third-party payers in Puerto Rico. The complaint alleges that Coopharma's member pharmacies restrained competition by jointly negotiating and entering into agreements with third-party payers. Coopharma achieved this result by encouraging its members: (1) to refuse to deal with third-party payers except through Coopharma; and (2) to threaten termination, or actually terminate, contracts with payers that refused to deal with Coopharma on the terms it demanded. The consent order prohibits Respondent from entering into or facilitating agreements between or among any pharmacies: (1) to negotiate on behalf of any pharmacy with any payer; (2) to refuse to deal or threaten to refuse to deal with any payer; (3) to include any term, condition, or requirement upon which any pharmacy deals, or is willing to deal, with any payer, 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 Respondent.

Participants

For the *Commission*: Linda Blumenreich and Randy David Marks.

For the *Respondent*: David Balto, Brendan Coffman, and Brad Wasser, Law Offices of David Balto.

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 Cooperativa de Farmacias Puertorriqueñas ("Coopharma") violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding

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by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges in that respect as follows:

I. NATURE OF THE CASE

1. This matter concerns an agreement among competing pharmacies in Puerto Rico, through their membership and participation in Coopharma, to fix prices in their negotiations with third-party payers. In furtherance of their conspiracy, the pharmacies collectively negotiated contracts, including price terms; contracted jointly with some payers; and organized boycotts to coerce payers to accept their demands. Coopharma has not undertaken any efficiency-enhancing integration sufficient to justify the challenged conduct. By collectively negotiating prices without any legitimate justification or state action or other defense, Coopharma has unreasonably restrained competition and engaged in unfair methods of competition in violation of the Federal Trade Commission Act.

II. RESPONDENT AND JURISDICTION

2. The Cooperativa de Farmacias Puertorriqueñas is a not-for-profit corporation that is organized, exists, and does business as a cooperative under and by virtue of the laws of the Commonwealth of Puerto Rico. Its principal address is 2 Calle Colon, Aguada, Puerto Rico 00602.

3. Coopharma has approximately 300 pharmacy owner members who together own approximately 360 community pharmacies that operate in Puerto Rico. Coopharma members control at least a third of all pharmacies in Puerto Rico and the organization has a particularly strong presence on the western side of the island.

4. At all times relevant to the Complaint, Coopharma has been engaged in the business of contracting with third-party payers, on behalf of its members, for the provision of pharmacy services. Except to the extent that competition has been restrained as alleged herein, Coopharma's members compete with one another for the provision of pharmacy services.

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5. Coopharma is organized for the purpose, in part, of fostering its members' material interests and acts to further those interests. By virtue of such purposes and activities, Respondent is a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. The general business practices of Coopharma, including the acts and practices alleged herein, affect the interstate purchase of supplies and products and the interstate flow of funds, and are in or affect "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. OVERVIEW OF PHARMACY CONTRACTING

7. Pharmacies often contract with third-party payers — including health insurers and managed care organizations — to establish the terms and conditions, including price and other competitively significant terms, under which they will provide services to subscribers of health plans. To negotiate for pharmacy services, payers often use pharmacy benefit managers (PBMs) to create networks of pharmacies and administer pharmacy benefit programs.

8. Pharmacies entering into payer contracts often agree to discount or lower their prices in exchange for access to additional patients made available by the payers' relationship with their subscribers. These contracts with pharmacies may reduce payers' costs and enable payers to lower the price of health insurance and reduce patients' out-of-pocket medical care expenditures.

9. Absent agreements among pharmacies on prices and other contract terms on which they will provide services to subscribers of health plans, competing pharmacies decide individually whether to enter into contracts with payers, and at what prices they will accept payment for services rendered pursuant to such contracts.

10. Third-party payers reimburse pharmacies for filling a prescription based on a formula consisting of an ingredient cost and a dispensing fee. For brand prescriptions, the ingredient cost

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traditionally has been a percentage of Average Wholesale Price or “AWP.”

IV. ANTICOMPETITIVE CONDUCT

11. Coopharma, acting as a combination of its members, and in conspiracy with them, has acted to restrain competition by, among other things:

- a. negotiating, entering into, and implementing agreements to fix the prices on which their members contract with third-party payers, and
- b. encouraging its members to (i) refuse to deal with third-party payers except through Coopharma and (ii) threaten to terminate, and terminate, contracts with payers who refuse to deal with Coopharma on the terms it demands.

Coopharma’s coercive activities have led some payers to enter into individual contracts with Coopharma members at higher rates than the payer would otherwise have paid.

A. Agreement to Negotiate and Contract Jointly

12. Pursuant to Coopharma’s By-Laws, Coopharma’s pharmacy owner members elect fellow members to serve on Coopharma’s Board of Directors and manage Coopharma’s operations. The Board oversees contract negotiations and approves contracts between Coopharma and third party payers.

13. Coopharma members, in joining Coopharma, agree to participate in Coopharma’s contracts with payers. Coopharma’s Rules (“Reglamento de Socios de Coopharma”) state that its members “shall comply with the agreements and contracts which are approved by the Member’s Assembly and the Board of Directors.”

14. Coopharma’s Medical Plans Committee was responsible for negotiating payer contracts from late 2002 until 2008 and supervised negotiations since then. Between 2008 and 2011, Coopharma hired consultants to negotiate contracts. The

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Committee has had between two and four members since its establishment in 2002.

15. Coopharma's Board Presidents and the Medical Plans Committee supervised the consultants in their consulting role when they negotiated with payers.

16. According to Coopharma's Board, Coopharma "was established with the principal purpose to be able to negotiate in representation of all of its members, of which include PBM [pharmacy benefit manager] and/or health insurance negotiations . . . and to establish master contracts which adhere and unite all of the Coopharma pharmacies." A "master contract" is a single-signature contract between Coopharma and a payer that binds all Coopharma pharmacies to its terms.

17. Coopharma believes "being able to get the best contract that is possible is something fundamental for pharmacies" and that the "best contract" includes the highest reimbursement rates. Coopharma's goal has been to obtain 90 percent of AWP plus a \$3.00 dispensing fee for brand pharmaceuticals. That is higher than many Coopharma pharmacies were receiving on most of their individual contracts with payers. Coopharma's contract with one negotiating consultant stated that he should seek to obtain 90 percent of AWP plus a \$3.00 dispensing fee in his negotiations with payers.

18. Since 2006, Coopharma negotiated with more than ten payers over reimbursement levels and reached agreements on behalf of its members with seven of them. These contracts set rates for brand pharmaceuticals ranging from 87 percent to 90 percent of AWP, with dispensing fees ranging from \$2.50 to \$5.00.

B. Collective Efforts Coerced CVS-Caremark to Contract with Coopharma

19. Through its members' collective action, Coopharma forced pharmacy benefits manager CVS-Caremark ("Caremark") to rescind a rate cut and to enter into a master contract at a higher rate.

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20. In 2008, Caremark paid all pharmacies in Puerto Rico, including Coopharma's members, a Medicare Part D reimbursement rate of 87 percent of AWP plus a dispensing fee of \$2.50 for each brand prescription. For commercial business, Caremark's reimbursement to Coopharma pharmacies ranged from 85-90 percent of AWP plus a dispensing fee of \$2.00-\$3.00.

21. To remain competitive with other PBMs, Caremark notified pharmacies throughout the country that, effective January 1, 2009, it was reducing the Medicare Part D reimbursement rate to 86 percent of AWP plus a \$2.00 dispensing fee. Pharmacies across the United States accepted these terms.

22. Coopharma organized its members to oppose the Caremark terms. It held regional meetings in December 2008 and communicated to members the status of the negotiations. Its contract negotiator co-signed a memorandum telling members of "the HISTORIC opportunity we have today to negotiate as one single [sic] institution, **'COOPHARMA THE BIGGEST CHAIN OF PHARMACIES IN ALL OF PUERTO RICO.'**" [Emphasis in original.] Coopharma provided members with a template letter to reject Caremark's rate change and demand that Caremark negotiate with Coopharma.

23. Many Coopharma member pharmacies responded by sending the form letter rejecting the new Medicare Part D and commercial contracts and telling Caremark to negotiate through Coopharma. Coopharma then told Caremark that its members would not accept Caremark's reimbursement offer and wanted 90 percent of AWP.

24. Coopharma also informed Caremark that it was telling Caremark clients that Caremark was threatening to terminate pharmacies that did not accept Caremark's rate change. This pressured Caremark to acquiesce to Coopharma's demands or face losing customers with a more limited pharmacy network.

25. Responding to the pressure, Caremark rescinded the Part D rate change for the pharmacies that sent letters rejecting the change.

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26. Coopharma also pressured Caremark to enter into a master contract on all lines of business, including Medicare Part D. Coopharma used three tactics: demanding to negotiate and contract collectively, threatening that its members would terminate their Caremark contracts, and contacting Caremark's clients.

27. First, Coopharma repeatedly asserted its "authority to represent the pharmacies" in its communications with Caremark. For example, its contract negotiator told Caremark that "effective immediately none of our members will negotiate independently." Coopharma also instructed its members **"TO NOT SIGN ANY CONTRACT SEPRATELY [sic] OR INDIVIDUALLY!"** and to tell Caremark that they would not negotiate directly and Caremark should call Coopharma to negotiate. [Emphasis in original.] More than 75 percent of Coopharma's members authorized Coopharma to negotiate with Caremark on their behalf.

28. Second, throughout the negotiations, Coopharma repeatedly threatened that its members would terminate their individual contracts with Caremark and individual members did so. After telling members that their responses to Caremark affirming their contract cancellations **"MUST BE CLEAR AND DIRECT,"** Coopharma said "[w]e maintain that this responsibility to maintain a united front is shared by all the Coopharma members. . . . [W]e remind you that this is the time to demonstrate that we are one: **WE ARE COOPHARMA.**" [Emphasis in original.] At one point, Coopharma hand-delivered a package to Caremark of virtually identical letters from members notifying Caremark of their terminations. Coopharma also placed a newspaper advertisement stating that negotiations with Caremark had failed and that, as of May 28, 2009, "we will not continue providing services" to Caremark plans. At an April 25, 2009 meeting, Coopharma's membership confirmed its united position and 91 percent of attendees voted to affirm the decision to terminate the contracts.

29. Third, Coopharma contacted Caremark clients American Health Medicare and MAPFRE Grupo PRAICO. Coopharma's contract negotiator and its Chair of the Medical Plans Committee told American Health Medicare that hundreds of Coopharma pharmacies would terminate their contracts with Caremark, thus making Coopharma pharmacies unavailable to American Health

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Medicare members. That led American Health Medicare to intervene in the Caremark-Coopharma negotiations to press Caremark to reach an agreement with Coopharma.

30. In August 2009, Caremark agreed to replace Coopharma's members' individual contracts with a master contract with Coopharma. The master contract continued the 2008 Medicare Part D reimbursement rate for 2009. The contract negotiator told the Board that the master contract was a "success." Without Coopharma members' collective action, Caremark would have paid all members the lower rates it pays to non-Coopharma independent pharmacies in Puerto Rico. Caremark's price concessions to Coopharma cost it approximately \$640,000 in 2009 alone.

C. Payer Concessions in Individual Contracts

31. The mere threat of collective terminations benefitted individual Coopharma pharmacies at a cost of millions of dollars to third-party payers. Coopharma pharmacies obtained higher reimbursement rates from Medco and Medicare Mucho Mas, through its PBM, even though negotiations with Coopharma did not result in a master contract with Coopharma.

32. Coopharma informed the Medco PBM in 2006 that Coopharma members would contract with Medco only through Coopharma. When Coopharma and Medco reached an impasse in negotiations, Coopharma threatened to pull all of its pharmacies out of Medco's network. In response, Medco raised the rates of all Coopharma members from 85-87 percent of AWP to 88 percent of AWP to encourage them to ignore Coopharma's orders. Despite Coopharma's efforts to persuade its members to hold out, Medco offered high enough rates to create a sufficient network without signing a master contract with Coopharma. Coopharma took credit for Medco's improved reimbursement terms, which cost Medco and/or its clients over \$2 million for 2007-2011.

33. Medicare Mucho Mas, a large Medicare Advantage payer in Puerto Rico, feared a disruption in its pharmacy network from Coopharma's activities. As a result, Medicare Mucho Mas, through its PBM, paid Coopharma members a reimbursement rate higher than it paid non-Coopharma members. A Medicare Mucho

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Mas document states that it “conceded and gave Coopharma better rates.”

D. Collective Efforts to Force Humana to Maintain Rates

34. While ultimately unsuccessful, Coopharma also threatened to terminate its members’ contracts with Humana Health Plans of Puerto Rico, Inc. and Humana Insurance of Puerto Rico, Inc. (“Humana”) for Medicare Part D and commercial health benefit programs to coerce Humana to maintain the reimbursement rates it was paying Coopharma pharmacies under individual contracts and to enter into a master contract.

35. Coopharma’s conduct arose from the settlement of a class action lawsuit against First Data Bank and Medi-Span and related decisions by them that resulted in a market-wide reduction in AWP benchmark drug prices they reported effective September 26, 2009. Making no changes in the terms of Humana’s AWP-based contracts with pharmacies would have resulted in reduced rates. Humana decided to propose amendments to its pharmacy contracts that mitigated the reduction in part, but would have still reduced net rates from what they had been previously. Outside Puerto Rico, Humana’s pharmacies generally accepted the revision.

36. At an October 25, 2009 meeting, Coopharma’s members agreed to terminate their contracts with any payer that failed to adjust reimbursement rates to maintain the existing level of reimbursement, which they called “AWP cost neutrality.”

37. Pursuant to their collective decision, Coopharma members resisted Humana’s amended rates and sought restoration of the pre-September 26, 2009 compensation levels. On December 7, 2009, Coopharma wrote Humana that it was terminating its members’ contracts, stating “as approved in an Extraordinary Assembly of the COOPHARMA membership held on October 25, 2009, . . . all members of COOPHARMA withdraw as pharmacy services providers to Humana and its policyholders. . . . This decision is final and is the end result of a deliberate process involving the entire membership.” Coopharma demanded that Humana agree to contract terms that would raise payment levels back to the pre-September 26, 2009 amounts.

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38. When Humana asserted that Coopharma lacked legal authority to terminate its members' contracts, Coopharma encouraged its members to terminate their contracts, and most did so. Although Humana was able to maintain enough of a network to continue to operate in Puerto Rico, Coopharma's conduct disrupted its business.

VI. NO LEGITIMATE JUSTIFICATION FOR THE CONDUCT

39. Coopharma did not undertake any activities to integrate the delivery of pharmacy services of its members and thus cannot justify its acts and practices described in the foregoing paragraphs. Its members neither shared financial risk in providing pharmacy services nor integrated their delivery of care to patients.

40. Coopharma's conduct has not been reasonably related to any efficiency-enhancing integration among its members.

VII. PUERTO RICO REGULATION OF HEALTH CARE COOPERATIVES

41. In 2004, Puerto Rico enacted Law 239 to provide for the establishment and regulation of cooperatives. (5 L.P.R.A. § 4381, *et seq.*) Law 239 declares that such cooperatives "shall not be considered conspiracies or cartels to restrict business...nor shall the contracts entered between the same and their members...be interpreted as illegal restrictions of business. . . ." Law 239 establishes the Corporacion para la Supervision y Seguro de Cooperativas de Puerto Rico, known as COSSEC, to regulate cooperatives.

42. COSSEC has no process for reviewing cooperatives' negotiations with purchasers or for approving or disapproving prices and other terms that result from such negotiations. A May 7, 2012 letter from COSSEC to Coopharma's counsel, stated that COSSEC was "currently drafting" regulations to "provide a set of procedures to review and approve the business activities and contracts of health care provider cooperatives on an ongoing basis." COSSEC does not have any regulations now, nor did they exist while Coopharma was engaging in the conduct alleged in Paragraphs 11-40.

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43. Neither COSSEC nor any other Puerto Rico agency or official has approved any Coopharma contract with any payer.

44. In 2008, four years after enacting Law 239, Puerto Rico enacted Law 203 (26 L.P.R.A. § 3101, *et seq.*) to regulate “collective bargaining” between providers of health care services, including pharmacies, and “third-party administrators and health services organizations.” Law 203 authorizes such collective bargaining, but only under specified conditions. Among other things, it requires that the group of health care providers comprise less than 20 percent of their specialty or service in each specified geographic area and that the group register with the Puerto Rico government before initiating any collective bargaining. Law 203 also bars “threats to boycott, go on strike, or other coordinated action” and requires the mandatory arbitration of any bargaining impasse.

45. In December 2008, the Commonwealth of Puerto Rico issued Regulation 91 to implement Law 203. Under Regulation 91, the threshold step for a health care provider group seeking to bargain collectively is to obtain certification from the Puerto Rico Department of Justice. To obtain this certification, the group must demonstrate that it represents less than 20 percent of the specialty or service in its specified geographic area(s).

46. Coopharma has neither sought nor received on behalf of its member pharmacies any determination that it has satisfied the 20 percent limit on providers or services in the geographic areas in which it operates, or any other requirements of Law 203 and its implementing regulations.

47. Under Law 203, Puerto Rico has not clearly articulated a policy to displace competition with respect to Coopharma’s challenged conduct. Moreover, Puerto Rico has not actively supervised that conduct. As a result, Coopharma’s conduct is not entitled to immunity under the state action doctrine.

VIII. ANTICOMPETITIVE EFFECTS

48. Coopharma’s actions have the purpose and had the effect of unreasonably restraining trade and hindering competition in the

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provision of pharmacy services in Puerto Rico in the following ways, among others:

- a. Unreasonably restraining prices of pharmacy services and other competition among Coopharma members;
- b. Increasing prices for pharmacy services; and
- c. Depriving third-party payers and consumers of the benefits of such competition.

IX. VIOLATION OF THE FTC ACT

49. The acts and practices described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such 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 has caused this Complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this sixth day of November, 2012.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the Cooperativa de Farmacias Puertorriqueñas (“Coopharma”), 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

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violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, 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 any 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 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 comment filed thereafter by an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. The Cooperativa de Farmacias Puertorriqueñas is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico with its principal address at 2 Calle Colon, Aguada, Puerto Rico 00602.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

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ORDER**I.**

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

- A. “Respondent” means the Cooperativa de Farmacias Puertorriqueñas (“Coopharma”); its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and subsidiaries, divisions (including, but not limited to, the PSAO Department), groups, and affiliates controlled by it; and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Distribute” means to provide a copy of the specified documents by (1) personal delivery, with a signed receipt of confirmation; (2) first-class mail with delivery confirmation or return receipt requested; (3) facsimile with return confirmation; or (4) electronic mail with electronic return confirmation.
- C. “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.”
- D. “Payer” means any person that pays or arranges for payment, for all or any part of any Pharmacy services to itself or any other Person, as well as any Person that develops, leases, or sells access to networks of Pharmacies.

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- E. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- F. “Pharmacy” means any Person licensed by the Commonwealth of Puerto Rico to dispense pharmaceuticals.
- G. “Preexisting Contract” means a contract for the provision of Pharmacy services that was in effect on the date of the receipt by a Payer that is a party to such contract of notice sent by Respondent pursuant to Paragraph III.A.2 of this Order of such Payer’s right to terminate such contract.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of Pharmacy 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 Pharmacies with respect to the provision of Pharmacy services:
 - 1. To negotiate on behalf of any Pharmacy 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 Pharmacy deals, or is willing to deal, with any Payer, including, but not limited to, price terms; or

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4. Not to deal individually with any Payer, or not to deal with any Payer other than through Respondent;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among Pharmacies concerning any Pharmacy's willingness to deal with a Payer, or the terms or conditions, including price terms, on which the Pharmacy is willing to deal with a Payer;
 - C. Attempting to engage in any action prohibited by Paragraphs II.A through 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.

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days from the date this Order becomes final:
 1. Distribute this Order and the Complaint to each current officer, director, member, or employee of Respondent; and
 2. Send by first-class mail, with return receipt requested, with the letter attached as the Appendix, to the chief executive officer of each Payer with which Respondent has contracted at any time since January 1, 2008.
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any Preexisting Contract with any Payer, at the earlier of: (1) receipt by Respondent of a written request from a Payer to terminate such contract, or (2) the earliest termination

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or renewal date (including any automatic renewal date) of such contract.

Provided, however, a Preexisting Contract may extend beyond any such termination or renewal date no later than one (1) year from the date that the Order becomes final if, prior to such termination or renewal date:

1. the Payer 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
2. Respondent has determined not to exercise any right to terminate.

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

- C. Within ten (10) days of receiving notification from a Payer to terminate, pursuant to Paragraph III.B of the Order, notify in writing, by first class mail with return receipt requested, each Pharmacy that provides services through that contract to be terminated.
- D. For three (3) years from the date this Order becomes final:
 1. Distribute this Order and the Complaint to each Person who becomes an officer, director, member, or employee of Respondent, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that he or she becomes an officer, director, member, or employee;
 2. send by first class mail, return receipt requested, a copy of this Order and the Complaint to each Payer who contracts with Respondent for the provision of Pharmacy services and who did not previously

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receive a copy of this Order and the Complaint, within thirty (30) days of the time that such Payer enters into such contract; and

3. post and maintain on Respondent's website and annually publish in an official annual report or newsletter sent to all Pharmacy members of Respondent, this Order and the Complaint with such prominence as is given to regularly featured articles.

IV.

IT IS FURTHER ORDERED that Respondent shall:

- A. 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:
 1. a detailed description of the manner and form in which Respondent has complied and is complying with this Order;
 2. the name, address, and telephone number of each Payer with which each Respondent has had any contact during the one (1) year period preceding the date for filing such report; and
 3. the status of each contract required to be terminated;
- B. In addition to the information required by Paragraph IV.A, the sixty day report shall include:
 1. the identity of each Payer sent a copy of the letter in the Appendix to the Order and the response of each Payer to that letter;
 2. a copy of each verification of Distribution required by Paragraph III.A.1; and

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3. a copy of each return receipt required by Paragraph III.A.2 and Paragraph III.C
- C. In addition to the information required by Paragraph IV.A, each annual report shall include:
1. a copy of each verification of Distribution required by Paragraph III.D.1;
 2. a copy of each return receipt required by Paragraph III.C that Respondent received subsequent to filing its 60 day report.
 3. a copy of each return receipt required by Paragraph III.D.2; and
 4. evidence that the copy of the Order and Complaint has been published, as required by Paragraph III.D.3.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

- A. Of any change in its primary business address within twenty (20) days of such change in address; and
- B. At least thirty (30) days prior to any proposed: (1) dissolution of Respondent; (2) acquisition, merger, or consolidation of Respondent; or (3) 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.

VI.

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,

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

VII.

IT IS FURTHER ORDERED that this Order shall terminate on November 6, 2032. By the Commission.

APPENDIX

[letterhead of Coopharma]
[name of Payer's CEO] [address]

Dear__:

Enclosed is a copy of a complaint and a consent order ("Order") issued by the Federal Trade Commission against Cooperativa de Farmacias Puertorriqueñas ("Coopharma").

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

Analysis to Aid Public Comment

If you do not make a written request to terminate the contract, Paragraph III.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 Coopharma 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,

[Coopharma to fill in information in brackets]

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Cooperativa de Farmacias Puertorriqueñas ("Coopharma" or "Respondent"). The agreement settles charges that Coopharma violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by negotiating, entering into, and implementing agreements among its member pharmacy owners to fix the prices on which they contract with third-party payers in Puerto Rico.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons.

Analysis to Aid Public Comment

Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed consent order final.

The purpose of this analysis is to facilitate public comment on the proposed consent order. The analysis is not intended to constitute an official interpretation of the agreement and proposed consent 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 Respondent that it violated the law or that the facts alleged in the proposed complaint (other than jurisdictional facts) are true.

The Proposed Complaint

Coopharma is a not-for-profit corporation organized and doing business as a cooperative under the laws of Puerto Rico. Coopharma consists of approximately 300 pharmacy owners who own roughly 360 community pharmacies in Puerto Rico. Coopharma members control at least a third of the pharmacies in Puerto Rico and the organization has a particularly strong presence on the western side of the main island.

Coopharma was established with the principal purpose of negotiating on behalf of its members and entering into single-signature “master contracts” with payers that bind all Coopharma pharmacies. The proposed complaint alleges that Coopharma members negotiated collectively through Coopharma to obtain higher reimbursement rates than its members were receiving in their individual contracts with payers, including pharmacy benefits managers and insurers.

The proposed complaint alleges that Coopharma’s member pharmacies restrained competition by jointly negotiating and entering into agreements with third-party payers. Coopharma achieved this result by encouraging its members: (1) to refuse to deal with third-party payers except through Coopharma; and (2) to threaten termination, or actually terminate, contracts with payers that refused to deal with Coopharma on the terms it demanded.

Analysis to Aid Public Comment

Coopharma collectively negotiated reimbursement rates with more than ten payers and has reached agreements on behalf of its members with seven of them. The mere threat of Coopharma members' collective action led two additional payers to pay higher rates. The proposed complaint alleges that Coopharma's actions caused payers to pay higher reimbursement rates to Coopharma members, and that this price increase ultimately may be passed along to consumers in the form of higher premium payments, diminished service, or reduced coverage. As a result, Coopharma's actions caused substantial harm to the consumers of Puerto Rico. Coopharma's conduct was unrelated to any efficiency-enhancing integration among its members.

Negotiations with CVS-Caremark

As a specific example of Coopharma's misconduct, the proposed complaint alleges that CVS-Caremark ("Caremark"), a pharmacy benefits manager operating in Puerto Rico, was forced to rescind a rate cut and to enter into a master contract at a higher rate because of the collective action of Coopharma members.

In 2008, Caremark notified pharmacies throughout the country that it was reducing reimbursement on its Medicare Part D contracts. Coopharma mobilized its members to collectively resist that rate change. Coopharma provided its members with a form letter, which many sent, rejecting the new Medicare Part D contracts and telling Caremark to negotiate rates through Coopharma. Coopharma then informed Caremark that its members would not accept Caremark's reimbursement offer and demanded higher rates. Coopharma also informed certain Caremark clients that Caremark was threatening to terminate pharmacies that did not accept Caremark's rate change. This pressure led Caremark to rescind the Part D rate change for the pharmacies that sent letters rejecting the change.

Coopharma continued to pressure Caremark to enter into a master contract on all lines of business, including Medicare Part D. Coopharma used the same basic tactics to accomplish this goal, by: (1) demanding that Caremark negotiate exclusively through Coopharma; (2) threatening that its members would terminate their Caremark contracts; and (3) contacting Caremark's clients. Indeed, Coopharma took the matter public by placing a

Analysis to Aid Public Comment

newspaper advertisement stating that negotiations with Caremark had failed and that, as of May 28, 2009, “we will not continue providing services” to Caremark patients.

In August 2009, Caremark agreed to replace Coopharma’s members’ individual contracts with a master contract with Coopharma. The proposed complaint alleges that Caremark’s price concessions cost it approximately \$640,000 in 2009 alone.

Other Coercive Conduct

In addition, the proposed complaint alleges that in at least two instances, the mere threat of collective terminations benefitted individual Coopharma pharmacies at a cost of millions of dollars to third-party payers. Coopharma pharmacies obtained higher reimbursement rates from third-party payers Medco and Medicare Mucho Mas even though negotiations with Coopharma did not result in a master contract. During its negotiations with Medco, Coopharma threatened to pull all Coopharma pharmacies out of Medco’s network. In an attempt to prevent such a disruption of its network, Medco raised the reimbursement rates it paid to individual Coopharma pharmacies, a concession that cost Medco and its clients over \$2 million between 2007 and 2011. Medicare Mucho Mas, a large Medicare Advantage payer, also feared that Coopharma could cause a similar disruption in its pharmacy network. As a result, Medicare Mucho Mas’ pharmacy benefits manager offered a higher reimbursement rate to Coopharma pharmacies.

Finally, the proposed complaint alleges that Coopharma attempted to use collective action to resist a reimbursement rate reduction by health insurer Humana. Coopharma attempted to coerce Humana into maintaining its reimbursement rates by threatening termination of the individual contracts and pressuring it into entering into a master contract. When Humana asserted that Coopharma lacked the legal authority to terminate its members’ contracts, Coopharma encouraged its members to terminate their contracts individually.

Analysis to Aid Public Comment

Coopharma Cannot Qualify for State Action Immunity

The proposed complaint alleges that Coopharma's anticompetitive conduct cannot be shielded by the state action doctrine. The state action doctrine provides that states are not subject to federal antitrust liability, and that by extension certain subordinate state entities and private parties exercising state-granted powers may be immunized as well.¹ Private parties claiming the protection of this immunity must meet two elements. First, private parties must demonstrate that the challenged conduct was undertaken pursuant to a clearly articulated state policy to displace competition with regulation. Second, private parties must show that the challenged conduct has been actively supervised by the state.² The proposed complaint alleges that neither requirement is satisfied here.

Puerto Rico has not clearly articulated a policy to replace competition with the challenged conduct. Law 203 regulates "collective bargaining" between providers of health care services, including pharmacies, on the one hand, and payers, on the other.³ However, Law 203 limits collective bargaining to situations where the providers obtain a certificate verifying that they constitute less than 20 percent of providers in a particular area, do not engage in boycotts, submit to mandatory arbitration in the case of an impasse, and comply with certain other requirements.⁴ Coopharma has not – and cannot – satisfy these requirements.⁵

¹ See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943).

² *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

³ 26 L.P.R.A. § 3101, *et seq.*

⁴ E.g., 26 L.P.R.A. §§ 31.040; 31.050; 31.060.

⁵ The Commission is aware that Law 239, which regulates cooperatives generally, declared that cooperatives "shall not be considered conspiracies or cartels to restrict business." 5 L.P.R.A. § 4516 (Law 239, § 20.5). The Commission and the Puerto Rico Department of Justice interpret Law 203 (which was passed after Law 239) to supersede Law 239. At the very least, Law 203 imposes additional requirements on health care cooperatives, which Coopharma cannot meet.

Analysis to Aid Public Comment

The proposed complaint also alleges that Puerto Rico has not actively supervised Coopharma's conduct because no Puerto Rican official has exercised the power to review, approve, or disapprove either the rates in Coopharma's contracts with payers or the coercive collective action it used to obtain them.⁶ Under Law 203, Coopharma has neither sought to comply with nor satisfied any of the law's requirements. Even under Law 239, the Puerto Rico agency charged with the general regulation of cooperatives, the Corporacion para la Supervision y Seguro de Cooperativas de Puerto Rico ("COSSEC"), has no process in place for reviewing cooperatives' negotiations with payers or for approving or disapproving prices and other terms that result from such negotiations.

The Proposed Consent Order

The proposed consent order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the proposed complaint, while allowing Coopharma to engage in legitimate joint conduct.

Paragraph II prevents Coopharma from continuing the challenged conduct. Paragraph II.A prohibits Respondent from entering into or facilitating agreements between or among any pharmacies: (1) to negotiate on behalf of any pharmacy with any payer; (2) to refuse to deal or threaten to refuse to deal with any payer; (3) to include any term, condition, or requirement upon which any pharmacy deals, or is willing to deal, with any payer, 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 Respondent.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Respondent from facilitating exchanges of information between pharmacies concerning whether, and on what terms, to contract with a payer. Paragraph II.C bars attempts to engage in any action prohibited by

⁶ Cf. *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.").

Analysis to Aid Public Comment

Paragraph II.A or II.B, and Paragraph II.D proscribes 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.

Paragraph III is designed to prevent the challenged conduct from reoccurring. Paragraph III.A requires Coopharma to send a copy of the complaint and consent order to its members, its management and staff, and any payers with whom Coopharma has contracted at any time since January 1, 2008. Paragraph III.B allows for contract termination if a payer voluntarily submits a request to Coopharma to terminate its contract. Pursuant to such a request, Paragraph III.B requires Coopharma to terminate, without penalty, any pre-existing payer contracts. Upon receiving such request, Paragraph III.C requires that Coopharma notify in writing each pharmacy that provides services through that contract to be terminated. Paragraph III.D requires Coopharma, for three years, to distribute a copy of the complaint and consent order to new members, officers, directors, and employees, and to payers who begin contracting with Coopharma and to post them on its website.

Paragraphs IV, V, and VI impose various obligations on Coopharma to report or to provide access to information to the Commission to facilitate its compliance with the consent order. Finally, Paragraph VII provides that the proposed consent order will expire 20 years from the date it is issued.

Complaint

IN THE MATTER OF

BRAIN-PAD, INC.**AND****JOSEPH MANZO**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4375; File No. 122 3073**Complaint, November 15, 2012 – Decision, November 15, 2012*

This consent order addresses Brain-Pad, Inc.'s advertising and promotion of mouth guards. The complaint alleges that respondents did not have a reasonable basis to represent in advertising and on packaging for their mouth guards that they reduced the risk of concussions. The complaint further alleges that the respondents made the false and misleading claim that they possessed scientific studies that proved their concussion-reduction risk claims because, in fact, they did not have such evidence. The consent order prohibits the respondents from misrepresenting that any product will reduce the risk of concussions or reduce the risk of concussions from lower jaw impacts.

Participants

For the *Commission*: Victor DeFrancis and Andrew Wone.

For the *Respondents*: Patrick Wolfe, Jr., Zarwin, Baum, DeVito, Kaplan, Schaer & Toddy P.C.; Bridget Calhoun, Crowell & Moring LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Brain-Pad, Inc., a corporation, and Joseph Manzo, an individual ("Respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Brain-Pad, Inc. ("BPI") is a Pennsylvania corporation with its principal office or place of business at 322 Fayette Street, Conshohocken, Pennsylvania 19428.
2. Respondent Joseph Manzo is the President of BPI. Individually or in concert with others, he formulates, directs,