

Complaint

IN THE MATTER OF

**COOPERATIVA DE MÉDICOS
OFTALMÓLOGOS DE PUERTO RICO**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4603; File No. 141 0194**Complaint, February 27, 2017 – Decision, February 27, 2017*

This consent order addresses Cooperativa de Médicos Oftalmólogos de Puerto Rico's agreement among competing ophthalmologists to refuse to deal with MCS Advantage, Inc., a payor, and Eye Management of Puerto Rico, MCS's network administrator. The complaint alleges that Cooperativa de Médicos Oftalmólogos de Puerto Rico violated Section 5 of the Federal Trade Commission Act by orchestrating a concerted refusal to deal by ophthalmologists in Puerto Rico to preclude a third-party payor and its network administrator from implementing a cost-savings program to manage ophthalmology services and reduce reimbursement rates. The consent order prohibits Cooperativa de Médicos Oftalmólogos de Puerto Rico from organizing or implementing agreements to refuse to deal, or to threaten to refuse to deal, with a payor over contract terms, as well as agreements not to deal individually with payors, or to deal only through Cooperativa de Médicos Oftalmólogos de Puerto Rico.

Participants

For the *Commission*: Robert S. Canterman, Synda Mark, Gary H. Schorr, and Steve Vieux.

For the *Respondent*: Omar Martinez, Martinez & Martinez; Luis Martinez; Veronica Ferraiuoli, Estudio Legal Ferraiuoli; David Balto and Bradley A Wasser, Law Offices of David A. Balto.

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Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Cooperativa de Médicos Oftalmólogos de Puerto Rico ("OFTACOOP"), hereinafter referred to as "Respondent," has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it

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

NATURE OF THE CASE

1. This matter concerns an agreement among competing ophthalmologists to refuse to deal with a health plan that tried to establish a lower-cost provider network for its members who sought medical treatment for eye problems in the Commonwealth of Puerto Rico.

2. Respondent OFTACOOOP is a healthcare cooperative in Puerto Rico composed of about 100 member ophthalmologists. Respondent orchestrated an agreement among competing ophthalmologists not to deal with a health plan, MCS Advantage, Inc. ("MCS"), and its network administrator Eye Management of Puerto Rico ("Eye Management"). Respondent's concerted refusal to deal succeeded. MCS had to abandon its plans to have Eye Management create a lower-cost network of ophthalmologists.

3. OFTACOOOP has not undertaken any efficiency-enhancing integration among its members sufficient to justify the challenged conduct.

4. The Respondent's illegal conduct unreasonably restrained prices and other forms of competition among otherwise-independent ophthalmologists in Puerto Rico.

RESPONDENT

5. OFTACOOOP is a not-for-profit corporation organized, existing, and doing business as a cooperative under and by virtue of the laws of the Commonwealth of Puerto Rico with its principal address at 1250 Ponce de Leon Avenue, Suite #906, San Juan, Puerto Rico 00907. OFTACOOOP is a healthcare cooperative of composed of more than 50% of the physicians practicing ophthalmology throughout Puerto Rico.

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JURISDICTION

6. OFTACOOOP is organized for the purpose of serving the interests of its members. OFTACOOOP exists and operates, and at all times relevant to this Complaint, has existed and operated, for the pecuniary benefits of its members.

7. At all times relevant herein, OFTACOOOP's members have provided ophthalmology services to people for a fee. Except to the extent that Respondent has restrained competition as alleged herein, OFTACOOOP's members have competed with one another to provide ophthalmology services to patients for a fee.

8. Respondent is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

9. The acts and practices of Respondent, including the acts and practices alleged herein, are in commerce or affect commerce, as "Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, defines "commerce".

**OVERVIEW OF CONTRACTING AMONG PHYSICIANS,
PAYORS, AND NETWORK ADMINISTRATORS**

10. Individual physicians and physician group practices, including ophthalmologists and ophthalmologist group practices, often contract with payors of healthcare services and benefits, including health insurers, managed care organizations, and others to establish the terms and conditions, including price and other competitively significant terms, under which they will provide services to the payors' enrollees.

11. Physicians entering into a payor contract often agree to discount or lower their reimbursement rates in exchange for access to additional patients made available by that payor's relationship with its subscribers. The contract with physicians may reduce the payor's costs and enable it to lower the price of health insurance and reduce patients' out-of-pocket medical care expenditures.

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12. Absent anticompetitive agreements among them, otherwise-competing physicians unilaterally decide whether to contract with a payor to provide services to individuals covered by that payor's health plan(s), and what prices and other terms they will accept as payment for their services pursuant to such contracts.

13. In some instances, physicians and payors contract with network administrators. Network administrators provide various services to payors, including assembling provider panels, assuming financial risk, and offering administrative services such as credentialing, utilization management, and claims processing services. While many payors conduct these functions in-house, they may also contract with a network administrator to perform some or all of these services in exchange for a fee. These contracts with a network administrator may reduce payors' costs and may enable payors to lower the price of health insurance and reduce patients' out-of-pocket medical care expenses.

14. Physicians contracting with a network administrator often agree to discount or lower their reimbursement rates in exchange for access to additional patients made available by that network administrator's relationship with health-plan subscribers. These contracts with physicians may reduce a network administrator's costs and enable it to provide services to individuals covered by a payor's health plan at a lower cost than the health plan is able to provide on its own.

ANTICOMPETITIVE CONDUCT

Payor MCS Retained Network Administrator Eye Management to Help Lower Costs of Ophthalmology Services

15. MCS, a payor, provides healthcare services to enrollees of its Medicare Advantage plans pursuant to a contract with Medicare. Medicare pays MCS a premium; in exchange, MCS arranges and pays for healthcare services for its enrollees.

16. To participate in the Medicare Advantage program, MCS must offer a network with a sufficient number of physicians because the network must comply with the program's requirement of providing adequate access to healthcare services for its

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Medicare Advantage enrollees. In 2014, MCS therefore needed a certain number of ophthalmologists in its network to meet the program's requirement of adequate access.

17. As of April 2014, MCS contracted directly with approximately 200 ophthalmologists in Puerto Rico to provide ophthalmology services to its Medicare Advantage enrollees.

18. MCS sought to lower its costs after Medicare reduced the premiums it was paying to MCS. In April 2014, MCS asked Eye Management, a network administrator, to create and manage a network of ophthalmologists in Puerto Rico to help lower costs and better manage ophthalmology services provided to its Medicare Advantage enrollees. Eye Management is part of a group of privately owned, affiliated companies that create provider networks and offer credentialing, utilization management, and claims processing services in Puerto Rico, Florida, Georgia, and New Jersey to help improve the efficiency and reduce the costs of providing healthcare services to health-plan enrollees.

19. Under its arrangement with Eye Management, MCS would pay Eye Management a capitated rate (i.e., a set dollar amount per MCS enrollee per month) in exchange for Eye Management assuming financial and operational responsibility for managing ophthalmology services and benefits for MCS Medicare Advantage enrollees. Specifically, Eye Management would enter into new contracts directly with ophthalmologists to replace MCS's existing contracts with each ophthalmologist. In addition, Eye Management would administer ophthalmology services and benefits provided to MCS enrollees, including credentialing, utilization review, claims processing, and other management services.

20. On or about June 4, 2014, MCS sent a letter to OFTACOOOP members and other ophthalmologists in its network explaining its arrangement with Eye Management. On or about June 8, 2014, Eye Management sent a proposed contract to each ophthalmologist under which Eye Management offered to pay the ophthalmologist at rates that were about 10% lower, on average, than the rates under the existing contracts between MCS and each ophthalmologist.

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**Collective Refusal to Deal Defeated the Eye Management
Network and Forced MCS to Maintain Higher Rates**

21. In response to the letters from MCS and Eye Management, OFTACOOOP convened a meeting on June 14, 2014. Under the leadership of OFTACOOOP's president, a number of OFTACOOOP member and non-member ophthalmologists, including a former secretary of the Board of Directors, attended the meeting. At the meeting, the ophthalmologists discussed their dissatisfaction with Eye Management and MCS, and their refusal to accept Eye Management's proposed contract.

22. The ophthalmologists who attended the meeting agreed not to sign new contracts with Eye Management in order to prevent Eye Management from creating the new network.

23. Within hours after the meeting, the former secretary of the Board, with the assistance of OFTACOOOP's president, drafted and sent an email to more than 100 OFTACOOOP member and non-member ophthalmologists with the subject line "**DO NOT SIGN THE MCS/EYE MANAGEMENT CONTRACT.**" The email was signed "**Board of Directors OFTACOOOP**" and sent from the email account "oftacoop@gmail.com." The email informed the recipients that the ophthalmologists reached an agreement "**of NOT SIGNING the contract**" at the June 14, 2014 meeting and that they "**ALL NEEDED TO BE UNITED TO STOP THE TRAMPLING FROM THE MEDICAL PLANS.**" The email also urged the ophthalmologists not to sign the contract with Eye Management so they could collectively negotiate with payors through OFTACOOOP.

24. Eye Management's medical director was one of the recipients of the email. Eye Management believed that OFTACOOOP was directly interfering with Eye Management's plans to develop an ophthalmology network in Puerto Rico. In response, on June 19, 2014, Eye Management's counsel sent OFTACOOOP a cease-and-desist letter urging OFTACOOOP to stop interfering with negotiations between Eye Management and individual ophthalmologists. The letter also notified OFTACOOOP that any agreement among competing ophthalmologists to jointly refuse to contract with Eye Management was illegal under the antitrust laws.

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25. OFTACOOOP next met on June 22, 2014. The stated purpose of that meeting, according to the June 14, 2014 email, was “to turn this around and for us to trample over MCS.” At the meeting, OFTACOOOP’s president told the attendees they should make their own decisions. But he did not tell them that a collective refusal to deal with Eye Management violated the antitrust laws. Indeed, despite the cease-and-desist letter from Eye Management, the former secretary of the Board told the attendees that they had to be united against Eye Management.

26. Respondent’s efforts to unite the ophthalmologists against Eye Management had the desired effect. While some ophthalmologists initially told Eye Management they would sign a contract with Eye Management, the positive response quickly came to a halt after the June 14, 2014 OFTACOOOP meeting and email. Some ophthalmologists told Eye Management that they would not accept the proposed contract until they received further instructions from OFTACOOOP. Another ophthalmologist told Eye Management he would not sign the Eye Management contract because that was the agreement reached among OFTACOOOP members and others. In the end, only a few ophthalmologists joined the Eye Management network. The final number of contracting ophthalmologists was well below what MCS needed in its network to meet network adequacy requirements under the Medicare Advantage program.

27. This was the first time Eye Management and its affiliates had encountered a widespread unwillingness by providers to join their networks. In fact, Eye Management and its affiliates have successfully created provider networks for at least six different medical specialties in several states, even when offering providers lower reimbursement than they had previously received under their contracts with health plans. In fact, the same year Eye Management was unable to contract with ophthalmologists because of Respondent’s conduct, it successfully assembled a network of 350 optometrists in Puerto Rico.

28. The collective refusal to deal thwarted Eye Management’s efforts to create a lower-cost network of ophthalmologists on behalf of MCS. In early August 2014, Eye Management informed MCS that it had been unable to form a viable network of

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ophthalmologists. MCS directed Eye Management to suspend further efforts to do so.

29. Having no choice but to abandon its cost-savings arrangement with Eye Management, MCS tried another approach to lower costs and better manage care. In early August 2014, MCS sent a letter to each ophthalmologist agreeing to continue contracting directly with the ophthalmologist. MCS informed the ophthalmologists that it would delegate only certain administrative functions to Eye Management. Faced with declining premium payments from the Medicare program to provide services to Medicare Advantage enrollees, MCS offered rates about 10% below the rates under its existing contracts with the ophthalmologists.

30. Just as they had rejected Eye Management's proposed contracts, many ophthalmologists refused to accept MCS's offer and cancelled, or threatened to cancel, their contracts with MCS. Out of approximately 200 contracted ophthalmologists, more than half cancelled their contracts with MCS between July 2014 and August 2014. Almost all of the ophthalmologists who sent cancellation letters were OFTACOOP members.

31. The contract cancellations jeopardized MCS's ability to include a sufficient number of ophthalmologists in its network needed to meet adequate access requirements for its Medicare Advantage enrollees. It also threatened to imperil patient care: MCS received hundreds of phone calls from its enrollees complaining that some ophthalmologists were either not offering appointments or cancelling previously scheduled surgeries.

32. With the ophthalmologists standing firm in their agreement not to participate in any lower-cost arrangement with MCS, MCS met with OFTACOOP's president, the former secretary of the Board, and other ophthalmologists to try to resolve the impasse. During a meeting in September 2014, the ophthalmologists made clear that OFTACOOP remained united in opposing MCS's efforts to contract at lower rates. MCS therefore had no choice but to abandon its plan to reduce rates and instead continued paying the higher rates to the ophthalmologists to retain its provider network for its Medicare Advantage members. Had MCS been able to lower the rates it paid to ophthalmologists, it

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may have been able to benefit consumers in two ways: (i) pass savings along to its members in the form of lower out-of-pocket medical expenditures, or (ii) refrain from potentially decreasing benefits or increasing out-of-pocket expenditures.

33. Through its concerted conduct, Respondent restrained competition by collectively refusing to deal with Eye Management and MCS. The purpose and effect of the concerted refusal to deal was to prevent Eye Management from creating a network of ophthalmologists on behalf of MCS and to defeat MCS's attempt to lower the costs of ophthalmology services provided to Medicare Advantage enrollees.

**RESPONDENT'S CONDUCT IS NOT LEGALLY
JUSTIFIED**

34. Respondent's conduct described above has not been, and is not, reasonably related to achieving any efficiency-enhancing integration. Respondent has not undertaken any activities to create any integration among OFTACOOOP members in their delivery of ophthalmology services and thus cannot justify the conduct described above.

ANTICOMPETITIVE EFFECTS

35. Respondent's actions described in paragraphs 23 through 34 have had the purpose and effect of unreasonably restraining trade and hindering competition in the provision of ophthalmology services in the Commonwealth of Puerto Rico in the following ways, among others:

- a. unreasonably restraining price and other forms of competition among ophthalmologists;
- b. increasing costs for ophthalmology services;
- c. depriving payors and individual consumers access to a lower-cost network of ophthalmologists; and
- d. depriving consumers of the benefits of competition among ophthalmologists.

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VIOLATION CHARGED

36. The acts and practices described above constitute unfair methods of competition 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, will recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of February, 2017, issues its Complaint against the Cooperativa de Médicos Oftalmólogos de Puerto Rico.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Cooperativa de Médicos Oftalmólogos de Puerto Rico, hereafter referred to as “Respondent OFTACOO,” and Respondent OFTACOO having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent OFTACOO with violating Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent OFTACOO, its attorneys and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent OFTACOO 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 OFTACOO that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts,

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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 OFTACOOP has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent OFTACOOP is a not-for-profit cooperative association organized, existing and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business located at 1250 Ponce de León Ave., Suite #906, San Juan, Puerto Rico 00907.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent OFTACOOP, 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 OFTACOOP" means Cooperativa de Médicos Oftalmólogos de Puerto Rico, its directors, officers, employees, agents, attorneys, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Respondent OFTACOOP, and the respective directors, officers, employees, agents, attorneys, representatives, successors and assigns of each.

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- B. “Commission” means the Federal Trade Commission.
- C. “Committee” means the Committee for the Supervision and Inspection of the Proceedings of Collective Negotiation established pursuant to Act 228, and includes additional or successor entities established pursuant to Act 228.
- D. “Communicate” means to transfer or disseminate any information, regardless of the means by which it is accomplished, including without limitation orally, by letter, e-mail, notice, or memorandum. This definition applies to all tenses and forms of the word “communicate,” including, but not limited to, “communicating,” “communicated” and “communication.”
- E. “COSSEC” means the Public Corporation for the Supervision and Insurance of Cooperatives in Puerto Rico.
- F. “Ophthalmologist” means a Physician who performs surgery and provides medical and surgical treatment and care of the eyes and visual system.
- G. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services to a Payor through such entity. This definition applies to all tenses and forms of the word “Participate,” including, but not limited to, “Participating,” “Participated” and “Participation.”
- H. “Payor” means any Person that pays, or arranges for the payment, for all or any part of any Physician services or hospital services for itself or for any other Person. Payor includes any Person that develops, leases, or sells access to networks of Physicians or hospitals.

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- I. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities and governments.
- J. “Physician” means a doctor of allopathic medicine (“M.D.”), a doctor of osteopathic medicine (“D.O.”), a doctor of chiropractic medicine (“D.C.”), or a doctor of podiatric medicine (“D.P.M.”)
- K. “Act 228” means Puerto Rico Act 228 of December 15, 2015 and includes any implementing regulations subsequently promulgated.

II.

IT IS FURTHER ORDERED that Respondent OFTACOOP, directly or indirectly, or through any corporate or other device, in connection with the provision of ophthalmological 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 Ophthalmologists:
 - 1. To refuse to deal or threaten to refuse to deal with any Payor regarding any term, condition, or requirement upon which any Ophthalmologist deals, or is willing to deal, with any Payor, including, but not limited to, price terms; or
 - 2. Not to deal individually with any Payor or not to deal with any Payor other than through Respondent OFTACOOP;
- B. Submitting for approval to COSSEC, the Committee, including any Committee member, or any other entity established pursuant to Act 228, any agreement with any Payor if Respondent OFTACOOP, or any of its

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members, engaged in any acts of coercion, intimidation, or boycott of, or concerted refusal to deal with any Payor seeking to contract with Respondent OFTACOOOP.

- C. Exchanging or facilitating in any manner the exchange or transfer of information to facilitate any action prohibited by Paragraph II.A. of this Order;
- D. Attempting to engage in any action prohibited by Paragraphs II.A. and II.B. of this Order; and
- E. 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 of this Order.

Provided, however, that it shall not of itself constitute a violation of Paragraph II. of this Order for Respondent OFTACOOOP, when negotiating with any Payor in compliance with Act 228, to:

- 1. reject any offer or counter-offer or refuse to contract; or
- 2. exchange such information as is reasonably necessary to contract pursuant to negotiating or contracting with any Payor.

III.

IT IS FURTHER ORDERED that Respondent OFTACOOOP shall:

- A. Within thirty (30) days after the date this Order issues, send by first-class mail, with return receipt or delivery confirmation, or by facsimile or electronic mail with return confirmation, a copy of this Order, the Complaint and the Analysis of the Proposed Order to Aid Public Comment to each:

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1. Ophthalmologist who Participates, or has Participated, in Respondent OFTACOOP; and
 2. Officer, director, manager and employee of Respondent OFTACOOP.
- B. For five (5) years after the date on which this Order is issued, send by first-class mail, with return receipt or delivery confirmation, or by facsimile or electronic mail with return confirmation a copy of this order and the Complaint to each:
1. Ophthalmologist who begins Participating in Respondent as a provider of ophthalmological services, and who did not previously receive a copy of the Order and the Complaint, within thirty (30) days of the date that such Participation begins;
 2. Person who becomes an officer, director, manager, or employee of Respondent OFTACOOP, and who did not previously receive a copy of the Order and the Complaint, within thirty (30) days of the date that he or she assumes such status with Respondent.
 3. Post and maintain on Respondent OFTACOOP's website, if any, and annually publish in any official annual report or newsletter sent to all ophthalmologists who Participate in Respondent OFTACOOP, this Order and the Complaint, in English and in Spanish, with such prominence as is given to regularly featured articles.

IV.

IT IS FURTHER ORDERED that Respondent OFTACOOP shall file a verified written report within sixty (60) days after the date this Order is issued, annually thereafter for five (5) years on the anniversary of the date this Order is issued, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

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- A. A detailed description of the manner and form in which Respondent OFTACOOOP has complied and is complying with the Order;
- B. A copy of each confirmation required by Paragraphs III.A. and B. of this Order.

V.

IT IS FURTHER ORDERED that Respondent OFTACOOOP shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent OFTACOOOP;
- B. Any proposed acquisition, merger or consolidation of Respondent OFTACOOOP; or
- C. Any other change in Respondent OFTACOOOP, 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 with reasonable notice to Respondent OFTACOOOP, Respondent OFTACOOOP shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent OFTACOOOP 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 OFTACOOOP related to compliance with this Order, which copying services shall be provided by Respondent OFTACOOOP at the request of the authorized representative(s) of the

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Commission and at the expense of Respondent OFTACOOP; and

- B. Upon five (5) days' notice to Respondent OFTACOOP and without restraint or interference from Respondent OFTACOOP, to interview officers, directors, or employees of Respondent OFTACOOP, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on February 27, 2037.

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT****I. Overview**

The Federal Trade Commission (Commission), has accepted, subject to final approval, an agreement containing a proposed consent order with the Cooperativa de Médicos Oftalmólogos de Puerto Rico (Respondent or OftaCoop). The agreement settles charges that OftaCoop violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by orchestrating a concerted refusal to deal by ophthalmologists in Puerto Rico to preclude a third-party payor and its network administrator from implementing a cost-savings program to manage ophthalmology services and reduce reimbursement rates.

The proposed consent order has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed consent order along with the comments received,

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and decide whether it should withdraw from the consent agreement, modify it, or make final the proposed consent order.

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 proposed consent order or to modify its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

II. The Complaint

OftaCoop is a healthcare cooperative with about 100 ophthalmologists organized under the laws of the Commonwealth of Puerto Rico. The proposed complaint charges that OftaCoop facilitated an agreement among competing ophthalmologists to refuse to deal with MCS Advantage, Inc. (MCS), a payor, and Eye Management of Puerto Rico (Eye Management), MCS's network administrator. The allegations of the proposed complaint are summarized below.

MCS provides healthcare coverage to enrollees of its Medicare Advantage plans pursuant to a contract with Medicare. Medicare pays MCS a premium; in exchange, MCS arranges and pays for healthcare services for its enrollees. To participate in the Medicare Advantage program, MCS must offer a provider network with a sufficient number of physicians to comply with the program's network adequacy requirement designed to ensure enrollees have adequate access to healthcare services. MCS sought to lower its costs after Medicare reduced the premiums it was paying to MCS.

In April 2014, MCS asked Eye Management to create and manage a network of ophthalmologists in Puerto Rico to help lower costs and better manage ophthalmology services provided to its Medicare Advantage enrollees. Eye Management would administer ophthalmology services and benefits provided to MCS enrollees, including credentialing, utilization review, claims processing, and other management services. Under the arrangement, Eye Management would enter into contracts directly

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with each ophthalmologist to replace MCS's existing contracts with each ophthalmologist. In early June 2014, Eye Management sent a proposed contract to every ophthalmologist contracted with MCS at the time. These contracts offered payments at rates that were about 10% lower, on average, than the rates under the existing contracts between MCS and each ophthalmologist.

OftaCoop convened a meeting on June 14, 2014 with OftaCoop members and non-member ophthalmologists to discuss their dissatisfaction with Eye Management. The attendees agreed not to sign a new contract with Eye Management in order to prevent Eye Management from creating a network on behalf of MCS. After the meeting, OftaCoop's former Secretary of the Board of Directors, with help from OftaCoop's president, sent an email to OftaCoop member and non-member ophthalmologists with the subject line "DO NOT SIGN THE MCS/EYE MANAGEMENT AGREEMENT." The email was signed "Board of Directors OFTACOOP" and sent from OftaCoop's official email account. The email urged the ophthalmologists not to sign the contract with Eye Management so they could collectively negotiate with payors through OftaCoop.

Eye Management's medical director was one of the recipients of the email. In response to the email, Eye Management's counsel sent OftaCoop a cease-and-desist letter on June 19, 2014, asking OftaCoop to stop interfering with negotiations between Eye Management and individual ophthalmologists. The letter also notified OftaCoop that any agreement among competing ophthalmologists to jointly refuse to contract with Eye Management was illegal under the antitrust laws.

OftaCoop next met on June 22, 2014. The stated purpose of that meeting, according to the June 14, 2014 email, was "to turn this around and for us to trample over MCS." At the meeting, OftaCoop's president told the attendees they should make their own decision about payor contracting. Notwithstanding Eye Management's cease-and-desist letter, the former Secretary of the Board told the meeting attendees that they had to be united against Eye Management.

The collective refusal to deal among the ophthalmologists prevented Eye Management from creating a lower-cost network.

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Few ophthalmologists joined the Eye Management network. In early August 2014, Eye Management informed MCS of its inability to form a viable network of ophthalmologists. MCS directed Eye Management to suspend further efforts to develop a network.

MCS next tried to lower costs through its direct contracts with the ophthalmologists. In early August 2014, MCS offered to continue contracting directly with the ophthalmologists at rates about 10% below rates under its existing contracts with the ophthalmologists. Just as they had rejected Eye Management's proposed contracts, many ophthalmologists refused to accept MCS's offer and cancelled, or threatened to cancel, their existing contracts with MCS. The contract cancellations jeopardized MCS's ability to meet network adequacy requirements for its Medicare Advantage enrollees. It also threatened to imperil patient care: MCS received hundreds of phone calls from its enrollees complaining that ophthalmologists were not offering appointments or cancelling previously scheduled surgeries. MCS had no choice but to abandon its plan to lower rates and instead continued paying ophthalmologists the higher rates to retain its network.

Finally, the complaint alleges that OftaCoop has not undertaken any activities to create any integration among OftaCoop members in their delivery of ophthalmology services and thus cannot justify the alleged conduct.

III. The Proposed Consent Order

The proposed consent order is designed to prevent recurrence of the illegal conduct alleged in the complaint. The key provisions are aimed at preventing OftaCoop from using concerted refusals to deal or other coercive tactics to extract favorable contract terms from payors. The proposed consent order also takes into account a change in Puerto Rico law that authorizes healthcare cooperatives to jointly negotiate with payors. Therefore, the proposed consent order does not prohibit OftaCoop from jointly contracting with payors.

Analysis to Aid Public Comment

A. Proposed consent order provisions

Paragraph II.A bars OftaCoop from organizing or implementing agreements to refuse to deal, or to threaten to refuse to deal, with a payor over contract terms, as well as agreements not to deal individually with payors, or to deal only through OftaCoop. Paragraph II.B prohibits OftaCoop from submitting for state approval any payor contract that it negotiated using acts of coercion, intimidation, boycott, or concerted refusal to deal.

The remaining portions of Paragraph II prohibit conduct that would facilitate a violation of Paragraph II.A. Paragraph II.C bars information exchanges to further conduct that violates the core prohibitions of Paragraph II. Paragraphs II.D and II.E. ban attempts and encouragement of such violations.

Paragraph III.A requires OftaCoop to send a copy of the complaint and consent order to its members, officers, directors, managers, and employees. Paragraph III.B contains notification provisions relating to future contact with its members, officers, directors, managers and employees. For five years after the date on which the consent order is issued, OftaCoop is required to distribute a copy of the consent order and complaint to each member who begins participating in OftaCoop and each person who becomes an officer director, manager, or employee. Paragraph III.B also requires OftaCoop to publish a copy of the consent order and complaint, annually for five years, on its web site, if any, or any official publication it sends to its members.

Paragraphs IV, V, and VI impose various obligations on OftaCoop to report or provide access to information to the Commission to facilitate monitoring of compliance with the consent order.

Finally, paragraph VII provides that the consent order will expire in 20 years.

B. Impact of new Puerto Rico law on the proposed consent order and inclusion of a proviso

During the investigation, Puerto Rico passed a new law (Act 228 of December 15, 2015) permitting healthcare cooperatives

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such as OftaCoop to jointly negotiate contracts with payors. Under this new law, healthcare cooperatives must file their payor agreements with the Puerto Rico Public Corporation for the Supervision and Insurance of Cooperatives (COSSEC). A committee whose members are not competitors in the market will oversee the negotiations, and must approve or disapprove each agreement.

Puerto Rico has neither issued any regulations nor do we have any record to evaluate how Puerto Rico will supervise negotiations. Therefore, the Commission is unable to assess to whether Act 228 complies with state action requirements.² Although it is too early to assess Puerto Rico's implementation of the new law, the Commission believes the circumstances here make it appropriate to defer to Puerto Rico's expressed intention to actively supervise joint negotiations between healthcare cooperatives and payors. Puerto Rico officials have only been recently granted that authority, and it is appropriate to allow them an opportunity to utilize that authority. As a result, the proposed consent order does not bar collective price negotiations. This is consistent with the consent order in another matter involving healthcare providers where state officials had authority to actively supervise private conduct but had not exercised it.³

In light of Act 228, the order also includes a proviso designed to clarify the scope of the prohibitions in Paragraph II. First, it provides that the provisions of Paragraph II do not prohibit OftaCoop, in exercising its business judgment, from rejecting a contract on behalf of its members, so long as there is no agreement between OftaCoop and any of its members that the member will refuse to deal individually (or will deal only through OftaCoop). Second, the proposed consent order does not prevent OftaCoop from exchanging information when necessary to

² The state action doctrine shields certain anticompetitive conduct by the states from federal antitrust scrutiny. *See Parker v. Brown*, 317 U.S. 341 (1943).

³ *See Minnesota Rural Health Cooperative*, C-4311 (Jan. 4, 2011) (consent order, in settling charges that a group of doctors and hospitals used coercive tactics in negotiations with payors, prohibited using coercion in negotiations, but did not bar joint negotiations), available at <https://www.ftc.gov/news-events/press-releases/2010/06/minnesota-health-care-provider-group-settles-ftc-price-fixing>.

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conduct joint payor contract negotiations on behalf of its members. Such information would not, however, ordinarily include whether an individual member is participating in a particular contract or the terms on which it is negotiating with a payor independently of OftaCoop.

Complaint

IN THE MATTER OF

**ADVOCATE HEALTH CARE NETWORK,
ADVOCATE HEALTH AND HOSPITALS
CORPORATION,
AND
NORTHSHORE UNIVERSITY HEALTHSYSTEM**

ADMINISTRATIVE COMPLAINT, ETC. IN REGARD TO ALLEGED
VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION
ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9369; File No. 141 0231

Complaint, December 17, 2015 – Decision, March 20, 2017

This case addresses the \$2.2 billion acquisition by Advocate Healthcare Network of certain assets of NorthShore University HealthSystem. The complaint alleges that the acquisition would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for general acute care inpatient hospital services in the North Shore Area, in northern Cook County and southern Lake County, in Illinois. The Order dismisses the Complaint because the respondents abandoned the proposed merger.

Participants

For the *Commission*: Emily Bowne, Alex Bryson, Timothy Carson, Christopher Caputo, Charles Dickinson, Jamie France, Sean Pugh, Anthony Saunders, Sophia Vandergrift, and Michelle Yost Hale.

For the *Respondents*: Robert McCann and Kenneth Vorrasi, Drinker Biddle & Reath LLP; David Dahlquist, Winston & Strawn LLP.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (“FTC Act”), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission (“FTC” or “Commission”), having reason to believe that Respondents Advocate Health Care Network (“AHCN”), Advocate Health and Hospitals Corporation (“AHC,” and together with AHCN,