

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch**

_____)
In the Matter of)
)
)
M. Catherine Higgins,)
)
)
an individual.)
_____)

Docket No. C-4286

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of M. Catherine Higgins, hereinafter referred to as Respondent, and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, her attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

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

1. Respondent M. Catherine Higgins is Executive Director of Boulder Valley Individual Practice Association. Her principal address is 6676 Gunpark Drive, Suite B, Boulder Valley, CO 80301.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

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

- A. “BVIPA” means Boulder Valley Individual Practice Association, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Limited Messenger” means a Person who acts as an agent, or as a messenger, on behalf of any Physician or any Medical Group Practice to receive a contract offer from a Payer, timely conveys without comment or analysis such offer to some or all of the Participating Physicians and Medical Group Practices as directed by the Payer, receives from each Participant his, her or its independent, unilateral decision to accept or reject the Payer’s contract offer, and timely conveys each such response without comment or analysis to the Payer.
- C. “Medical Group Practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, or employees, or in which only one physician practices medicine.
- E. “Non-exclusive Arrangement” means an arrangement that does not restrict the ability of, or facilitate the refusal of, physicians who participate in it to deal with payers on an individual basis or through any other arrangement.
- F. “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.”
- G. “Payer” means any person that pays, or arranges for payment, for all or any part of any Physician services for itself or for any other person, as well as any person that develops, leases, or sells access to networks of Physicians.

- H. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- I. “Physician” means a doctor of allopathic medicine (“M.D.”), a doctor of osteopathic medicine (“D.O.”), or a doctor of podiatric medicine (“D.P.M.”).
- K. “Principal Address” means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.
- L. “Qualified Clinically-Integrated Joint Arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who participate in the arrangement Participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the Physicians who Participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.
- M. “Qualified Risk-Sharing Joint Arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who Participate in the arrangement share substantial financial risk through their Participation in the arrangement and thereby create incentives for the Physicians who Participate jointly to control costs and improve quality by managing the provision of Physician services such as risk-sharing involving:
 - a. the provision of Physician services at a capitated rate,
 - b. the provision of Physician services for a predetermined percentage of premium or revenue from Payers,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for Physicians who Participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by Physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, when the costs of that course of treatment for any individual patient can vary greatly due to the individual patient’s condition, the choice, complexity, or length of treatment, or other factors; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.
- N. “Qualified Arrangement” means a Qualified Clinically-Integrated Joint Arrangement or a Qualified Risk-Sharing Joint Arrangement.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of Physician services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

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

PROVIDED, HOWEVER, that nothing in this Paragraph II shall prohibit any agreement or conduct involving Respondent that, subject to the requirements of Paragraphs VII and VIII of this Order, is reasonably necessary to form, Participate in, or take any action in

furtherance of, a Qualified Arrangement, so long as such Qualified Arrangement is a Non-exclusive Arrangement.

III.

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

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

IV.

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

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

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

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

V.

IT IS FURTHER ORDERED that Respondent: (a) for one (1) year from the date this Order becomes final, at least sixty (60) days prior to acting as a Limited Messenger; and (b) beginning one (1) year from the date this Order becomes final, for an additional two (2) years, at least sixty (60) days prior to acting as an agent, or as a messenger on behalf of any Physician or

any Medical Group Practice with any Payer regarding contracts, shall notify the Commission in writing (“Paragraph V Notification”) of the arrangement for which Paragraph V Notification is required. The Paragraph V Notification shall include the number of proposed Physician Participants in the proposed arrangement; the proposed geographic area in which the proposed arrangement would operate; a copy of any proposed Physician Participation agreement; a description of the proposed arrangement’s purpose and function; a description of any resulting efficiencies expected to be obtained through the proposed arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects of the proposed arrangement, such as those prohibited by this Order.

VI.

IT IS FURTHER ORDERED that:

- A. If, within sixty (60) days from the date of the Commission’s receipt of the Paragraph V Notification, a representative of the Commission makes a written request to Respondent, then Respondent shall not Participate in the proposed arrangement prior to the expiration of thirty (30) days after substantially complying with such request, or such shorter waiting period as may be granted in writing from the Bureau of Competition;
- B. The expiration of any waiting period described herein without a request for additional information, or without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission;
- C. The absence of notice that the proposed arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement has been approved;
- D. Receipt by the Commission of any Paragraph V Notification is not to be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission; and
- E. Paragraph V Notification shall not be required prior to Participating in any arrangement for which Paragraph V Notification has previously been given.

VII.

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

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

VIII.

IT IS FURTHER ORDERED that:

- A. Paragraph VII Notification shall include the following information regarding the Qualified Arrangement pursuant to which Respondent intends to engage in the above identified conduct:
 - 1. the total number of Physicians and the number of Physicians in each specialty Participating in the Qualified Arrangement;
 - 2. a description of the Qualified Arrangement, including its purpose and geographic area of operation;
 - 3. a description of the nature and extent of the integration and the efficiencies resulting from the Qualified Arrangement;
 - 4. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the Qualified Arrangement;
 - 5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Qualified Arrangement or its activities; and
 - 6. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for Physician services in any relevant market, including, but not limited to, the market share of Physician services in any relevant market.
- B. If, within sixty (60) days from the Commission's receipt of the Paragraph VII Notification, a representative of the Commission makes a written request for additional information, then Respondent shall not Participate in any arrangement described in Paragraph VII.A or Paragraph VII.B of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition;

- C. The expiration of any waiting period described herein without a request for additional information, or without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission;
- D. The absence of notice that the proposed Qualified Arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement has been approved;
- E. Receipt by the Commission of any Paragraph VII Notification regarding Participation pursuant to a proposed Qualified Arrangement is not to be construed as a determination by the Commission that any such proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission; and
- F. Paragraph VII Notification shall not be required prior to Participating in any Qualified Arrangement for which Paragraph VII Notification has previously been given.

IX.

IT IS FURTHER ORDERED that Respondent shall file a verified written report within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include:

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

X.

IT IS FURTHER ORDERED that:

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

XI.

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

XII.

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

By the Commission, Commissioner Rosch dissenting.

Donald S. Clark
Secretary

SEAL
ISSUED: March 30, 2010