

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

COMMISSIONERS: **Timothy J. Muris, Chairman**
 Sheila F. Anthony
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary

In the Matter of

OBSTETRICS AND GYNECOLOGY MEDICAL
CORPORATION OF NAPA VALLEY,
a corporation,

BRYAN HENRY, M.D.,
R. BRUCE SCARBOROUGH, M.D.,
ANTHONY KING, M.D.,
individually, and as officers of said corporation,

DARIO GAMBETTA, M.D.,
JEROME SOLOMON, M.D., and
CHERYL HENRY, M.D.,
individually.

Docket No. C-4048

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of respondents named in the caption hereof (“Respondents”), and Respondents having been furnished thereafter with a copy of the draft of Complaint that the Commission staff proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents 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 Respondents have 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 issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Obstetrics and Gynecology Medical Corporation of Napa Valley is a professional corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1100 Trancas Street, Suite # 209, Napa, CA 94558.
2. The other Respondents are, or have been, members of Obstetrics and Gynecology Medical Corporation of Napa Valley, are physicians licensed to practice medicine in the State of California, and are engaged in the private practice of obstetrics and gynecology for a fee in Napa Valley, California. Their respective business addresses are as follows:
 - a. Bryan Henry, M.D., 1530 Railroad Avenue, St. Helena, CA 94574;
 - b. R. Bruce Scarborough, M.D., 1100 Trancas Street, #209, Napa, CA 94558;
 - c. Anthony King, M.D., 980 Trancas Street, #11, Napa, CA 94558;
 - d. Dario Gambetta, M.D., 1530 Railroad Avenue, St. Helena, CA 94574;
 - e. Jerome Solomon, M.D., 1100 Trancas Street, #351, Napa, CA 94558;
 - f. Cheryl Henry, M.D., 975 Sereno Dr., Vallejo, CA 94589.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

I.

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

- A. "OGMC" means Obstetrics and Gynecology Medical Corporation of Napa Valley, its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by OGMC, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.
- B. "Physician Respondents" means Bryan Henry, M.D., R. Bruce Scarborough, M.D., Anthony King, M.D., Dario Gambetta, M.D., Jerome Solomon, M.D., and Cheryl Henry, M.D.
- C. "Respondents" means OGMC and the Physician Respondents.
- D. "Payor" means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person.
- E. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- F. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").
- G. "Participate" in an entity means (1) to be a shareholder, owner, or member 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 also applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation.")
- H. "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.
- I. "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 such participation and thereby create incentives for these physicians to jointly control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:
 - a. the provision of physician services to payors at a capitated rate,
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals, or

- d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where 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 reimbursement or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.
- J. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which:
1. all physicians who participate in the arrangement participate in active and ongoing programs to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, these physicians, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

IT IS FURTHER ORDERED that Respondents, 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:
1. To negotiate on behalf of any physician with any payor,
 2. To deal, refuse to deal, or threaten to refuse to deal with any payor, or
 3. Regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms;

- B. Attempting to engage in any action prohibited by Paragraph II.A. above; and
- C. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this Order.

PROVIDED HOWEVER that nothing in this Paragraph shall prohibit any agreement involving, or conduct by, Respondents that is reasonably necessary to form, participate in, or take any other action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement.

III.

IT IS FURTHER ORDERED that OGMC shall:

- A. Within ten (10) days after the date on which this Order becomes final, cease and desist from all business and all other activities of any nature whatsoever, except those activities that are required in order to comply with the terms of this Order or that are necessary to effect a winding up of OGMC's affairs and its dissolution;
- B. Within sixty (60) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.C. below, distribute by first-class mail a copy of this Order and the accompanying Complaint to:
 - 1. each physician who participates, or has participated, in OGMC;
 - 2. each officer, director, manager, and employee of OGMC;
 - 3. each payor who, at any time since January 1, 1999, has communicated to OGMC or to any Physician Respondent, or to whom OGMC or any Physician Respondent has communicated, with regard to any desire, willingness, or interest of such payor in contracting for physician services; and
 - 4. Queen of the Valley Hospital, Napa, California, and St. Helena Hospital, Deer Park, California; and
- C. Dissolve itself within one hundred twenty (120) days after the date on which this Order becomes final.

IV.

IT IS FURTHER ORDERED that, if OGMC fails to comply with all or any portion of Paragraph III.B. of this Order within sixty (60) days after the date on which this Order becomes final, then Physician Respondent Bryan Henry, M.D. shall, within ninety (90) days after the date on which this Order becomes final, comply with those portions of Paragraph III.B. of this Order with which OGMC did not comply.

V.

IT IS FURTHER ORDERED that each Physician Respondent shall:

- A. Within thirty (30) days after the date this Order becomes final, deliver to OGMC a list of the names, addresses, and telephone numbers of each payor who, at any time since January 1, 1999, has communicated to the Physician Respondent, or to whom the Physician Respondent has communicated, with regard to any desire, willingness, or interest of such payor in contracting for physician services; and
- B. Take all actions necessary to effect dissolution of OGMC as required by this Order.

VI.

IT IS FURTHER ORDERED that OGMC shall:

- A. Within ninety (90) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.C. above, file with the Commission a verified written report demonstrating how it has complied and is complying with this Order; and
- B. Notify the Commission at least thirty (30) days prior to any proposed change in OGMC, such as change of address, assignment, sale resulting in the emergence of a successor, or any other change in OGMC that may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that each Physician Respondent shall:

- A. Within sixty (60) days after the date this Order becomes final, every sixty (60) days thereafter in which OGMC is not dissolved, and within the thirty (30) days following dissolution of OGMC, file with the Commission a verified written report setting forth in detail the manner and form in which

the Physician Respondent intends to comply, is complying, and has complied with this Order, including, but not limited to, a full description of his or her efforts to comply with Paragraph V. above; and

- B. File verified written reports one (1) year after the date this Order becomes final, and annually thereafter for three (3) additional years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, setting forth:
 - 1. in detail, the manner and form in which the Physician Respondent has complied with this Order, including, but not limited to, any information necessary to demonstrate such compliance, and
 - 2. the name, address, and telephone number of each physician group in which the Physician Respondent has participated.
- C. Notify the Commission of any change in the Principal Address of the Physician Respondent within twenty (20) days of such change in address.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in their possession, or under their control, relating to any matter contained in this Order;
- B. Upon five (5) days' notice to OGMC and without restraint or interference from it, to interview officers, directors, or employees of OGMC; and

- C. Upon five (5) days' notice to any Physician Respondent, and without restraint or interference from such Physician Respondent, to interview the Physician Respondent or the employees of the Physician Respondent.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on May 14, 2022.

By the Commission.

Donald S. Clark
Secretary

ISSUED: May 14, 2002

SEAL: