021 0119

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
TENET HEALTHCARE CORPORATION, a corporation, and	)	**Docket No.**
FRYE REGIONAL MEDICAL CENTER, INC., a corporation.	)	

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 Tenet Healthcare Corporation ("Tenet") and Frye Regional Medical Center, Inc. ("Frye"), herein collectively referred to as "Respondents," have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This action concerns a horizontal agreement among approximately 450 physician shareholders and non-shareholder subcontracted physicians (collectively, "physician members") of Piedmont Health Alliance, Inc. ("PHA"), to agree collectively on the prices they demand for physician services from payors, including health insurance plans, health maintenance organizations, preferred provider organizations, employers directly providing self-funded health care benefits to their employees and their employees' dependents, and other third-party purchasers of health care benefits. The physicians, in conspiracy with Frye and with and through PHA, have eliminated price competition to the detriment of payors and consumers in the "Unifour area" of North Carolina, which comprises Alexander, Burke, Caldwell, and Catawba Counties.

THE RESPONDENTS AND OTHER PARTIES

2. PHA, a physician-hospital organization ("PHO"), is a for-profit corporation based in Hickory, North Carolina.

3. PHA's three hospital members are Frye, Caldwell Memorial Hospital ("Caldwell Memorial"), and Grace Hospital ("Grace"). Caldwell Memorial and Grace are organized as nonprofit corporations.

4. Tenet is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its principal address at 3820 State Street, Santa Barbara, California 93105.

5. Frye is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal address at 420 North Center Street, Hickory, North Carolina 28601. Tenet controls Frye, an acute care hospital with 338 staffed acute care beds. Frye is the largest hospital in the Unifour area.

6. PHA's 450 physician members include both primary care and specialist physicians. A substantial majority of these physicians practice in small group practices on a for-profit basis. A small number of PHA physician members are salaried employees of a PHA member hospital.

7. Tenet owns one or more medical group practices that provide physician services to patients in the Unifour area and employ physicians who are members of PHA.

JURISDICTION AND INTERSTATE COMMERCE

8. Tenet, through its subsidiaries, including Frye, has been engaged in the business of providing physician and hospital services in the Unifour area for a fee.

9. The general business practices of Tenet and Frye, including the acts and practices herein alleged, are in or affecting "commerce," as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

BACKGROUND

10. Payors often contract with physicians, hospitals, and other providers of health care services in a geographic area to create a network of health care providers ("provider network") that have agreed to provide health care services to enrollees covered under the payors' programs. Those providers may enter into contracts individually and directly with the payor, or through a provider organization, such as a PHO.

11. To become members of payors' provider networks, physicians often enter into contracts with payors that establish the terms and conditions, including fees and other competitively significant terms, for providing health care services to enrollees under the payors' programs. Physicians entering into such contracts often agree to reductions in their usual compensation in order to obtain access to additional patients made available to them by the payors' contractual relationships with their enrollees. Such reductions in physician fees may permit payors to constrain increases in, or reduce, the premiums they charge to their customers,

or to offer broader benefits coverage without increasing premium levels or out-of-pocket expenditures by enrollees.

12. Medicare's Resource Based Relative Value Scale ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, payors in the Unifour area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fees for a particular year (*e.g.*, "110% of 2003 RBRVS").

13. Absent agreements among competing physicians on the prices and other contract terms on which they will provide services to the payor's enrollees, competing physicians or medical group practices decide unilaterally whether to enter a contract to participate in the payor's provider network on the terms and conditions, including price, offered by the payor.

14. Some self-insured employers contract with other payors to gain access to established provider networks. Payors who are not self-insured employers typically sell their programs to various customers, including employers or other entities that purchase or arrange for (and sometimes pay all or part of the cost of) programs providing health care benefits to their employees and their employees' dependents.

15. To be marketable and competitive in the Unifour area, a payor's health plan generally must include in its physician network a large number of primary care and specialist physicians, offering services in a sufficient number of practice fields, who are available to customers at convenient or accessible locations, and at affordable prices. Because the substantial majority of the primary care and specialist physicians who practice in the Unifour area are members of PHA, many payors doing business in the Unifour area cannot offer marketable and competitive health plans without having at least a substantial portion of PHA's physician members in their provider networks.

FRYE WAS INSTRUMENTAL IN PHA'S FORMATION AND EXPANSION

16. In 1993, Frye's Chief Executive Officer ("CEO") formulated a plan to create a PHO that would include Frye and physicians who practiced at Frye. Frye paid a health care consultant to conduct surveys of physicians practicing at Frye to determine their level of interest in forming a PHO, and the services they would expect the PHO to offer. The consultant told Frye that the surveyed physicians "stated a need to form the group to negotiate with group clout and power" and "maintain[] their income" in anticipation of the arrival of managed care organizations to the Unifour area.

17. At the request of Frye's CEO, the chief of Frye's medical staff recruited eight physicians practicing at Frye to serve on a PHO "steering committee" with Frye's CEO and Chief Operating Officer ("COO"). This committee met periodically, for more than a year, to make decisions about the purpose, form, and organization of the PHO.

18. Frye's Board of Directors authorized Frye's CEO to use Frye funds to develop the PHO. Some of this money was used to pay a health care consultant and others who assisted the steering committee in establishing the PHO.

19. In 1994, PHA was incorporated and its shareholders elected a Board of Directors, made up of physician and hospital representatives from among the PHA membership. Frye's COO initially directed PHA's operations. Frye's CEO conducted a management search, which led to PHA hiring a full-time CEO in 1995. PHA's CEO was charged with overseeing the day-to-day operations of PHA, subject to approval by the PHA Board.

20. In early 1995, Frye's CEO and other representatives of PHA participated in discussions with Caldwell Memorial, Grace, and their medical staffs about the possibility of joining PHA to form a "super PHO." In 1996, PHA amended its Articles of Incorporation, Bylaws, and Policies and Procedures to permit Grace, Caldwell Memorial, and their respective medical staffs to join PHA and share equally in its governance.

21. Frye has invested substantial funds to further PHA's formation and expansion. PHA's other hospital members and its physician members likewise have paid substantial money to PHA to further PHA's formation and expansion.

RESPONDENTS HAVE ENGAGED IN PRICE-FIXING AND OTHER ANTICOMPETITIVE ACTS

22. According to its records, PHA was "created to be a contracting entity for its members and serves to negotiate managed health care contracts with [payors]." In 1994, PHA informed potential physician members that "[e]ach [payor] contract will be carefully reviewed to determine advantages and disadvantages (including but not limited to reimbursement issues) to Piedmont Health Alliance participants and only those [contracts] which the directors determine to be favorable on balance to our participants as a whole will be signed."

23. PHA's physician members signed agreements that bound them to participate in all contracts that PHA entered, to accept PHA-negotiated prices, and to agree that if PHA entered into a contract with a payor with which the physician had an individual contract, then that physician would terminate the individual contract. PHA agreed to attempt to negotiate contracts with payors that included all PHA physician members.

24. In early 1994, the PHA steering committee established a Contracts Committee to negotiate contracts with payors on behalf of PHA and its physician and hospital members. The PHA Bylaws authorized the Contracts Committee to evaluate and negotiate proposed contracts with payors on behalf of PHA and its members. Until 2001, the Contracts Committee met regularly and was actively involved in PHA's contracting activities. Frye's COO and Chief Financial Officer ("CFO") participated in the activities of the Contracts Committee during this period. Over that period, PHA negotiated and entered into more than 50 payor contracts.

25. From 1994 through 1996, Frye's CFO and COO served as PHA's principal contract negotiators with payors. Beginning in 1996, PHA's CEO and her staff assumed the responsibility for negotiating PHA's payor contracts, and PHA's Board and Contracts Committee advised PHA's CEO regarding the price and other contract terms to demand from payors.

26. PHA's Board must approve PHA contracts with payors before they can take effect. PHA's Board is composed of 14 physician directors and six hospital directors, two representing each hospital (but with only one vote per hospital). Contract approval requires that both a majority of the PHA physician directors and two of the three hospital shareholders approve the contract. Frye's, the other PHA hospitals', and the physician members' representatives on the PHA Board voted on the approval of contracts containing physician fee schedules that PHA collectively negotiated with payors.

27. PHA hired actuaries and other consultants to develop physician fee schedules containing price terms that PHA subsequently demanded from payors as a condition of contracting for the services of PHA's physician members.

28. PHA's most common contracting method has been to enter into a single-signature contract between PHA and a payor that covers the services of all PHA physician members. Payors that failed to reach agreement with PHA on contract terms, including price and price-related terms, were denied access to PHA's physician members for inclusion in their provider networks.

29. PHA's physician members agreed with each other and with PHA that they would not deal individually, or through any other organization, with any payor with which PHA was attempting to negotiate, or had signed, a contract jointly on behalf of PHA's members. Until 2001, the physicians' participation agreements with PHA expressly included this provision. After 2001, this provision was no longer written into the PHA participation agreements, but PHA physicians nonetheless continued to adhere to it. PHA's physician members also refused to deal directly and individually with payors after PHA terminated its contracts with those payors.

30. By and through PHA, the member physicians and hospitals, including Frye, jointly agreed to require payors, as a condition of dealing with the PHA physicians, to refrain from contracting with non-PHA physicians or physician organizations in the Unifour area.

PHA'S SO-CALLED "MESSENGER" APPROACH TO CONTRACTING CONSTITUTES PRICE-FIXING

31. Competing physicians sometimes use a "messenger" to facilitate their contracting with payors in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Legitimate messenger arrangements can reduce contracting costs between payors and physicians. A messenger can be an efficient conduit to which a payor submits a contract offer, with the understanding that the messenger will transmit that offer to a group of physicians and inform the payor how many physicians across specialties accept the offer or have a counteroffer. At less cost, payors can thus discern physician willingness to contract at particular prices, and assemble networks, while physicians can market themselves to payors and assess contracting opportunities. A messenger may not negotiate prices or other competitively significant terms, however, and may not facilitate coordination among physicians on their responses to contract offers.

32. In February 2001, the PHA Board voted to change prospectively PHA's method of contracting with payors for physician services. PHA called its new contracting method the "modified messenger model." PHA told physician members that this contracting method would not apply to existing PHA payor contracts or to contracts then in the final stages of negotiation – all of which contained price and other terms that the PHA physician members had fixed and jointly demanded through PHA. Since the PHA Board's decision to institute its so-called "messenger" method for contracting, many existing PHA payor contracts renewed, and a number of new contracts were finalized, without being processed through PHA's messenger model.

33. In setting up this new contracting method, PHA told its physician members to report to PHA the minimum price levels they would accept under payor contracts. To aid physicians in making these price decisions, PHA informed them of the prices they had been paid for their most common medical procedures under several pre-existing, PHA-negotiated payor contracts. All such contracts contained prices that the physicians had collusively fixed and demanded through PHA. Many PHA physician members used these fixed prices to determine the prices that they would demand under the new "messenger" method.

34. PHA has processed a total of two payor contracts for its physician members pursuant to its "messenger" method for contracting – one with CIGNA HealthCare of North Carolina, Inc. ("CIGNA"), and the other with United HealthCare of North Carolina, Inc. ("United"). PHA and its members, including Frye, engaged in price-fixing in connection with both contracts. PHA negotiated with CIGNA and United, respectively, on the overall average price levels that each would pay to all PHA physicians in the aggregate. PHA engaged in this conduct without transmitting contract offers to its physician members for their unilateral acceptance or rejection.

35. After fixing the overall average price level that would be paid to all its physician members under each of these two contracts, PHA, through its actuarial consultant, created fee schedules that established different price levels for each medical procedure and for different medical specialties. The actuary calculated these fee schedules such that, in their aggregate, they would total the overall average price level that PHA had negotiated for all PHA physicians to receive under the contract. In effect, the overall average price level was the "pie" that the PHA physicians collectively would share, and the fee schedules were the "pieces of the pie" that

individual physicians could earn – depending on their specialty and the procedures they performed. PHA negotiated for United's and CIGNA's acceptance of these fee schedules. It did so without transmitting contract offers to its physician members for their unilateral acceptance or rejection.

36. PHA negotiated with United and CIGNA regarding, or collectively agreed on, various other contract terms as well – including pricing terms such as a demand for periodic, across-the-board percentage increases in physician fee levels to occur at certain times under the contract, and cost containment programs – without transmitting contract offers to PHA physician members for their unilateral acceptance or rejection.

37. After PHA had collectively negotiated with United and CIGNA on behalf of its physician members, more than 90% of PHA's physician members agreed to participate in those contracts.

FRYE CONSPIRED WITH PHA PHYSICIANS TO FIX PHYSICIAN PRICES

38. Beginning in 1994 and continuing through the present, through its representatives on the PHA Board and otherwise, Frye acted to implement and facilitate the fixing of prices that PHA physicians charge payors for services rendered. Frye agreed with PHA and its physician members to fix physician prices by, among other things: (a) approving proposed contracts with payors that included fixed prices for PHA's physician members; (b) rejecting proposed contracts or contract terms, including price, that payors offered to PHA's physician members; (c) authorizing PHA's Contracts Committee and other representatives to negotiate with payors for fixed physician fee schedules and prices; (d) authorizing PHA representatives to make specific counteroffers to payors containing fixed prices for PHA physician members; (e) authorizing development of, and approving, physician fee schedules for use by PHA in negotiations and contracting with payors; (f) terminating contracts for physician services between PHA and payors; (g) approving recommendations of the PHA Contracts Committee concerning payor contracts and terms, including physician payment rates; and (h) refusing to contract with payors for hospital services unless those payors agreed to meet the PHA physicians' price-fixed terms.

PHA'S PRICE-FIXING IS NOT JUSTIFIED

39. PHA's collective negotiation of fees and other competitively significant contract terms has not been, and is not, reasonably necessary to achieving any efficiency-enhancing integration.

ANTICOMPETITIVE EFFECTS

40. Respondents' actions described in Paragraphs 16 through 38 of this Complaint have had, or have tended to have, the effect of restraining trade unreasonably and hindering

competition in the provision of physician services in the Unifour area of North Carolina in the following ways, among others:

A. price and other forms of competition among PHA's physician members were unreasonably restrained;

B. prices for physician services in the Unifour area have increased or been maintained at artificially high levels; and

C. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

41. The combination, conspiracy, 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 combination, conspiracy, 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 on this _____ day of _____, 2004, issues its Complaint against Tenet Healthcare Corporation and Frye Regional Medical Center, Inc.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: