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ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT
In the Matter of New Century Health Quality Alliance, Inc.,
Prime Care of Northeast Kansas, L.L.C., et. al., File No. 051-0137

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with New Century Health Quality Alliance, Inc. ("New Century"), Prime Care of Northeast Kansas ("Prime Care"), four current or former officials of New Century or Prime Care, and 18 physician practices that are members of New Century or Prime Care (collectively referred to as "Proposed Respondents").

New Century and Prime Care each are a type of physician joint venture known as an independent practice association (IPA). The New Century and Prime Care IPAs were comprised of competing physician practices in the Kansas City area who came together to jointly offer their services to certain payors who sought to purchase the physicians' services under capitation payment arrangements. Through the IPAs, the physicians shared financial risk that the services provided under the contracts might exceed the capitation payment from the payor to the IPA. In addition to together offering capitation risk-sharing contracts through the IPAs, each individual physician practice also continued to offer and sell its medical services to individual patients and payors on a fee-for-service basis as the physician practice's primary method of doing business.

At various times, certain payors attempted to purchase the services of the individual physician practices in New Century and Prime Care not as part of the IPAs' risk-sharing capitation contracts as the payors had done in the past, but rather directly and on an individual fee-for-service basis. Although the physician practices continued to offer their services in competition with one another individually and on a fee-for-service basis in the market to other payors, the physician practices, acting through New Century and Prime Care and their officials, agreed that they would only sell their services to those payors through capitation contracts entered into between the payors and the IPAs. The physician practices did this because they believed that they would receive lower payments under the direct, fee-for-service arrangements than they were making under the capitation contracts with the payors.

The four named officials led New Century's and Prime Care's efforts to force the payors to deal through the IPAs in order to obtain access to the services of those physician practices, and actively encouraged the physician practice members of New Century and Prime Care to refuse to deal individually with health plans outside the IPAs. Each of the 18 named physician practices took one or more affirmative actions in furtherance of the illegal agreement alleged in the proposed Complaint.

In the absence of market power, jointly offering medical services on a capitation risk-sharing basis through New Century and Prime Care may be lawful and even procompetitive. However, the agreement by the physician members of New Century and Prime Care, respectively, to provide capitation risk contracts through each IPA does not justify their agreements not to deal, or only to deal on collectively determined terms, including price terms, regarding the sale of the individual physician practices' services outside the joint ventures. The member physicians' practices have not been fully integrated through either of the IPAs, and the individual physician practices in each IPA continue to compete with each other outside the IPAs in the sale of their services on a fee-for-service basis. Moreover, the offering by each IPA of capitation risk contracts does not justify the agreement of the two IPAs, at various times, to coordinate their actions, and the actions of their physician members, regarding the separate capitation risk contracts that each IPA had with payors. Neither the two IPAs, nor their respective physician memberships, were integrated at all with each other regarding those separate capitation risk contracts. Likewise, the IPAs' offering of capitation risk contracts, either separately or together, does not justify the two IPAs' agreement to act together, and their joint actions, regarding the sale of their individual member physician practices' medical services on a fee-for-service basis outside of the IPAs.

The agreement settles charges that the Proposed Respondents violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by entering into, orchestrating, and implementing agreements to fix prices and other contract terms on which the physician practice members of the IPAs would deal with health plans. Even though the physician practice members offered their services jointly regarding their capitation risk contracts through the IPAs, they remained competitors in the sale of physician services and their refusals to deal with health plans except collectively and on collectively-determined terms through the IPAs violated Section 5.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final. The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Proposed Respondents that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the Complaint are summarized below.

New Century is an independent practice association ("IPA") that consists of 16 medical practice groups with a total of approximately 87 primary care physicians who treat patients in the

Kansas City area. Prime Care also is an IPA, and consists of nine medical practice groups with a total of about 40 primary care physicians who treat patients in the Kansas City area. In 2002, the two IPAs began combining their Board meetings, offices, and administrative staff and operations. They voted to merge into a single entity, effective January 1, 2005, but never completed the steps legally necessary to consolidate.

At various times, the physician practice members of New Century and Prime Care, acting jointly through those IPAs and their officials, and with the two IPAs acting either in concert or separately on different occasions, refused to deal with various health plans on any terms except by contracting through the IPAs and on a capitated basis.

Most recently, in 2004 and 2005, the physician practice members of New Century and Prime Care, acting together through the two IPAs and their officials, agreed to refuse to contract, and did refuse to contract, with Humana Health Plan, Inc. ("Humana") regarding its offers of fee-for-service payment contracts with the individual physician practices. Humana notified New Century and Prime Care of its intention to eliminate its use of capitated arrangements in the Kansas City area, and also notified them of its intention to terminate the separate, pre-existing, capitated contracts it had with each IPA. Before the capitated contract terminations were to become effective, Humana attempted to enter into new, individual, fee-for-service contracts with each of the physician practices that were members of New Century or Prime Care. However, New Century's and Prime Care's physician members agreed that they would deal with Humana only through their IPAs, acting in concert, and only on terms, including price terms, that were collectively agreed upon by the IPAs' physician practice members. These demands included, among other things, continued joint contracting, payment by capitation, and a 30% increase in physician reimbursement under one health plan contract.

New Century and Prime Care, and their physician practice members, realized that together, with approximately 125 primary care physicians concentrated in certain parts of the Kansas City Area, they would have a better chance of forcing health plans, including Humana, to accept their contract demands. For example, they and their member physician practices were aware that Humana would be unable to offer certain of its programs to customers in the Kansas City area without the New Century and Prime Care physicians under contract as participating providers, and used that information to attempt to coerce Humana to accede to their contract demands.

When Humana objected to New Century and Prime Care's demands, and refused to contract on a capitated basis or otherwise to deal with New Century or Prime Care in attempting to contract with the physician practices, New Century and Prime Care embarked on a multi-faceted campaign to encourage employers, brokers, and patients to put pressure on Humana to accept the contract terms demanded by the IPAs. Among the actions taken in furtherance of the challenged agreement were that various physician practice members of New Century and Prime Care, with the active encouragement and assistance of New Century and Prime Care officials: notified Humana that they were closing their medical practices to new patients covered by

Humana's programs; mailed or distributed notices to patients covered by Humana programs informing the patients of impending disruption in their physician care due to Humana's refusal to enter into a contract with the physicians on acceptable terms; and rebuffed efforts by Humana to contract with the individual physician practices, referring Humana back to New Century and Prime Care for all contracting issues. By the acts set forth in the Complaint, the Proposed Respondents violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the Complaint and prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans.

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits the Proposed Respondents from entering into, or facilitating, any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) regarding on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving New Century or Prime Care.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Proposed Respondents from facilitating exchanges of information between or among physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes the Proposed Respondents from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. The Proposed Respondents would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians in a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The arrangement, however, must not facilitate the refusal of, or restrict, physicians in contracting with payors outside of the arrangement. As defined in the proposed order, a "qualified risk-sharing joint arrangement" possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the physician participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A "qualified clinically-integrated joint arrangement," on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III, for three years, requires New Century and Prime Care to notify the Commission before entering into any arrangement to act as an agent on behalf of any physicians, with payors regarding contracts. Paragraph III also sets out the information necessary to make the notification complete.

Paragraph IV, for three years, requires the Proposed Respondents to notify the Commission before participating in contracting with health plans on behalf of a qualified risk-sharing joint arrangement, or a qualified clinically-integrated joint arrangement. The contracting discussions that trigger the notice provision may be either among physicians, or between New Century or Prime Care and health plans. Paragraph IV also sets out the information necessary to satisfy the notification requirement.

Paragraph V provides that, for three years, the New Century and Prime Care officials named in the proposed complaint and order may not: (1) negotiate or act as an agent on behalf of any physician or medical group practice that participates or has participated in either New Century or Prime Care; or (2) advise any physician or medical group practice that participates in or has participated in either New Century or Prime Care on contracts, offers, contract terms, conditions, or requirements for dealing with any payors. Exempted from Paragraph V's prohibition are the officials' participation in: (1) certain qualified risk-sharing joint arrangements; (2) certain qualified clinically-integrated joint arrangements; and (3) activities that solely involve physicians in a medical group practice in which the official participates.

For three years, Paragraph VI requires both New Century and Prime Care, respectively, to distribute the complaint and order: (1) to all physicians who have participated in the IPAs, who currently participate in the IPAs, or who express interest in participating in the IPAs; and (2) to payors that have negotiated contracts with the IPAs, or that contract with the IPAs in the future.

Paragraphs VII, VIII, IX, and X of the proposed order impose various obligations on the Proposed Respondents to report or provide access to information to the Commission to facilitate the monitoring of compliance with the order. Paragraph XI provides that the proposed order will expire in 20 years.