

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT**

**In the Matter of Colegio de Optometras de Puerto Rico and Edgar Dávila García, O.D.,
and Carlos Rivera Alonso, O.D., File No. 051-0044**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with the Colegio de Optometras de Puerto Rico (“the Colegio”) and two of its officers, Edgar Dávila García, O.D., and Carlos Rivera Alonso, O.D. The agreement settles charges that the Colegio, acting as a combination of otherwise competing optometrists, and in combination with individual optometrists, including Drs. Dávila and Rivera, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating, negotiating, entering into, and implementing express or implied agreements on price and other competitively significant terms; negotiating fees and other competitively significant terms in vision and health plan contracts on behalf of the Colegio’s members; and refusing or threatening to refuse to deal with such entities except on collectively agreed-upon terms. 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 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 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 the Colegio or Drs. Dávila and Rivera that any of them 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.

The Colegio is a not-for-profit, incorporated professional association of optometrists that is organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico (“Puerto Rico”), with its office and principal place of business in San Juan, Puerto Rico.

The Colegio has approximately 500 member optometrists, constituting all of the optometrists licensed to practice in Puerto Rico. Except to the extent that competition has been restrained, the member optometrists of Colegio have been, and are now, in competition with each other for the provision of optometry services in Puerto Rico.

Dr. Dávila is a licensed optometrist who provides vision care services to patients for a fee. Dr. Dávila served as the Treasurer of the Colegio from 2002 through 2004; he also served as the President of the Colegio’s Health Plans Commission from 2001 through 2004. Dr. Rivera is a licensed optometrist who provides vision care services to patients for a fee. Dr. Rivera served

as President-Elect of the Colegio in 2004, and then as President from October 2004 through September 2006.

Since 1997, Ivision International Inc. (“Ivision”) has offered vision care services and products in Puerto Rico. Ivision contracts with Puerto Rico health plans to administer vision plans and provide vision care services and products to covered patients. The health plans pay Ivision on a capitated basis, per individual member. Ivision then contracts with Puerto Rico optometrists to provide these services. By August of 2004, Ivision had almost 130 optometrists—located all over Puerto Rico—in its network, making it very attractive to health plans.

In June and July 2004, Ivision sent out announcements to optometrists regarding contracts with several new health plans (many of which previously had contracted only directly with optometrists). Ivision scheduled meetings with optometrists to be held that August to discuss the mechanics of implementing these new contracts. Under these new contracts, Ivision paid optometrists the same fees as in its contracts with other health plans. As a result of these new contracts, the optometrists would lose much if not all of their more lucrative direct business with these plans.

In early August, Ivision began receiving calls from optometrists, some of whom were Colegio representatives, complaining about the reimbursement structure and rates for the new health plan contracts, and threatening that if Ivision did not pay more, it would lose optometrists. In addition, as part of a collective effort to force Ivision to raise its rates, Colegio representatives and other optometrists contacted additional optometrists and urged them to stop participating in Ivision’s network.

On August 22, Ivision met with its providers. Just prior to that meeting, the optometrists held their own meeting at which a chart comparing Ivision’s rates with those of other health plans had been distributed. During their meeting with Ivision, the optometrists demanded that Ivision pay them higher reimbursement rates, in the form of one fee for an examination and another fee for refraction, instead of paying a flat fee for both services. Dr. Rivera, who was an Ivision provider, stated that he was the President-Elect of the Colegio and that he knew or was familiar with all the optometrists in Puerto Rico. He indicated that as President-Elect of the Colegio he had the authority to meet with Ivision and discuss rates on behalf of the Colegio’s members. Dr. Rivera also indicated that if Ivision did not raise reimbursement rates, the Colegio would make sure that Ivision had no providers left in Puerto Rico. In response to Ivision’s assertion that it could enlist other providers, Dr. Rivera maintained that he could get to those providers who had not yet joined Ivision and that Ivision would not have any optometrists in its network.

The next day, Dr. Dávila circulated a letter on Colegio letterhead addressed to all of the members of the Colegio concerning Ivision’s new health plan contracts. Dr. Dávila, who was not an Ivision provider, wrote this letter in his capacity as President of the Colegio’s Health Plans

Commission. In the letter, he urged optometrists not to participate in the Ivision network, and informed the Colegio members that the Colegio was going to develop a policy to be followed with respect to the Ivision plan. He concluded the letter by stating that to continue onward, all of the providers were needed, and that this was not a battle the Colegio could confront alone.

Two days later, a Colegio advisor and a former Colegio officer met with Ivision representatives and told them that Ivision was going to lose all of its providers and that if it did not pay the providers what they deserved, they would quit. At a later meeting, the same former Colegio officer told Ivision's President that the providers were really angry and wanted to destroy Ivision. The President also was told that if Ivision agreed to pay a certain amount (matching another plan's fee), the providers would forget Ivision's other problems and "everything would go away."

In September 2004, there were a number of meetings held by the Colegio Board of Directors and by Colegio members discussing how to deal with Ivision. At one meeting, the Colegio members present were advised to resign immediately from Ivision network to force Ivision to increase its reimbursement rates. At another meeting, attended by several Colegio members, Dr. Rivera asked for a show of hands as to who was going to remain in the Ivision network. No optometrist raised a hand. Several optometrists voiced complaints about Ivision's reimbursement rates and discussed leaving Ivision; an offer was made to circulate a sample letter terminating the Ivision contract. A former Colegio officer who announced his resignation from Ivision at that meeting followed this up a few days later by sending letters to certain health plans, stating that because of Ivision's reimbursement structure and rates, the optometrists had decided to resign en masse from Ivision, which would cause a great uproar among the plans' subscribers.

In early October 2004, some Colegio representatives, including Dr. Dávila and Dr. Rivera, met with officials from some of the health plans with which Ivision contracted. The Colegio representatives requested that the health plans pay optometrists higher fees. They also asked the health plan officials to put pressure on Ivision, and informed them that providers were not going to remain in the Ivision network if the reimbursement rates did not increase.

The Colegio's and Drs. Dávila's and Rivera's efforts to obtain higher reimbursement rates from Ivision succeeded. By mid-October, almost 40 Colegio members had left the Ivision network. These optometrists either quit outright by notifying Ivision that they were cancelling their optometrist agreements (some in similarly-worded letters), or by simply refusing service to those patients enrolled in Ivision plans, so that Ivision was forced to terminate these doctors as optometrists. In order to maintain an effective network, retain its remaining optometrists and recruit new optometrists in the face of the Colegio's efforts and success in organizing a boycott, Ivision was forced to substantially raise its reimbursement rates. In November 2004, Ivision significantly increased its reimbursement rate for an eye examination and the dispensing of eye glasses; it made a similar increase for an examination and the dispensing of contact lenses. Ivision was also forced to waive monetary amounts that some optometrists owed it.

In addition to the conduct outlined above, the Colegio and Drs. Dávila and Rivera orchestrated collective negotiations with at least two other plans. Their efforts included several meetings with and letters to a certain health plan, all directed at having that plan amend its contracts with optometrists so that the optometrists could provide additional higher paying services for the plan. Indeed, to increase its negotiating leverage with this plan, Dr. Dávila sent a letter to all Colegio members urging them not to join the plan until these issues were resolved to the Colegio's satisfaction. Further, officers of the Colegio on several occasions approached another health plan and attempted to negotiate higher reimbursement levels for its members who service that plan. Thus far, these two health plans have been able to resist the collective action exerted by the Colegio.

Respondents' price fixing and concerted refusal to deal, and the agreements, acts, and practices described above, have not been, and are not, reasonably related to any efficiency-enhancing integration among the optometrist members of the Colegio. By the acts set forth in the Complaint, the Colegio and Drs. Dávila and Rivera violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed consent order is designed to prevent a recurrence of the illegal concerted actions alleged in the complaint, while allowing the Colegio and its members, including Drs. Dávila and Rivera, to engage in legitimate joint conduct. The proposed order is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements refusing to deal with health plans.¹

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits the Colegio, Dr. Dávila, and Dr. Rivera, from entering into or facilitating agreements among any optometrists with respect to their provision of optometry services, including: (1) negotiating on behalf of any optometrist with any payor; (2) dealing, refusing to deal, or threatening to refuse to deal with any payor; (3) regarding any term upon which any optometrist deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (4) not to deal individually with any payor, or not to deal with any payor other than through the Colegio.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Colegio, Dr. Dávila, and Dr. Rivera from exchanging or facilitating the transfer of information among optometrists concerning any optometrist's willingness to deal with a payor, or the terms or conditions, including any price terms, on which the optometrist is willing to deal. Paragraph II.C prohibits the Colegio, Dr. Dávila, and Dr. Rivera from attempting to engage in

¹ New Century Health Quality Alliance, Inc., File No. 051-0137 (Oct. 6, 2006); Puerto Rico Association of Endodontists, Corp., File No 051-0170 (Aug. 29, 2006).

any action prohibited by Paragraphs II.A or II.B. Paragraph II.D prohibits the Colegio from encouraging, pressuring, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C.

Paragraph III requires that the Colegio, Dr. Dávila, and Dr. Rivera for three years from the date the Order becomes final, notify the Secretary of the Commission in writing at least sixty days prior to: (1) participating in, organizing, or facilitating any discussion or understanding with or among any optometrists in any qualified joint arrangement relating to price or other terms or conditions of dealing with any payor; or (2) contacting a payor to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any payor, on behalf of any optometrists or any optometrist group practice in such arrangement. The remaining provisions of Paragraph III contain other standard notification and compliance-related provisions.

Paragraph IV requires the Colegio to translate the Order and the Complaint into Spanish, distribute the translated Order and Complaint to Colegio members, as well as payors, and annually publish these documents in official annual reports or newsletters.

The proposed order will expire in 20 years.