

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

_____)
In the Matter of)
) Docket No. C-4286
M. Catherine Higgins,)
 an individual.)
_____)

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 Respondent M. Catherine Higgins (“Ms. Higgins” or “Respondent”), Executive Director of Boulder Valley Individual Practice Association (“BVIPA”), has violated Section 5 of the Federal Trade Commission Act, 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 matter concerns the conduct of the executive director of a physician practice association in orchestrating agreements among competing physicians in Boulder County, Colorado, to fix the prices and other terms under which the physicians would participate in health plans offered by health insurance firms and other third-party payers (“payers”). As a result of the actions of Respondent Higgins, Executive Director of BVIPA, consumers in the Boulder County area have been forced to pay higher prices for physician services.

2. BVIPA signed a consent agreement with the Commission on or about December 8, 2008. Under its terms, the Commission ordered BVIPA and its employees, among other things, to cease and desist from facilitating agreements among physicians regarding price terms or collective refusals to deal. Ms. Higgins was not named as a respondent in the BVIPA Consent Agreement.

3. Shortly after the BVIPA Consent Agreement was signed, Ms. Higgins took the position that she could continue to negotiate fees on behalf of BVIPA physicians, declaring, “I could do this as an individual, not with my BVIPA hat, but as an individual. I’m not named in the settlement. There’s nothing that precludes me from doing my own work. I could just do it outside.”

4. Absent an order against Ms. Higgins individually, there is a substantial danger that she will continue to orchestrate unlawful price fixing agreements among physicians in the Boulder County area and that consumers will continue to suffer the adverse effects of her conduct.

THE RESPONDENT

5. Ms. Higgins (a/k/a/ Mary C. Higgins), the Executive Director of BVIPA, is an individual with a principal place of business at 6560 Gunpark Drive, Suite B, Boulder, CO 80301.

JURISDICTION

6. Ms. Higgins is a “person” within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

7. BVIPA is organized for the purpose, among others, of serving the interests of its members. BVIPA exists, and operates, and at all times relevant to this complaint has existed and operated, in substantial part for the pecuniary benefit of its physician members.

8. BVIPA is a “corporation” within the meaning of Section 4 of the Federal Trade Commission Act.

9. The general business practices of Ms. Higgins on behalf of BVIPA’s physician members, 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.

10. Except to the extent that competition has been restrained as alleged herein, BVIPA’s physician members have been, and are now, in competition with one another for the provision of physician services in the Boulder County area.

OVERVIEW OF PHYSICIAN CONTRACTING WITH PAYERS

11. Physicians often contract with payers to establish the terms and conditions, including price terms, under which they render services to the payers’ enrollees. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payers’ relationships with enrollees. These contracts between physicians and payers may reduce payers’ costs and enable them to lower the price of insurance,

and thereby result in lower medical-care costs for enrollees. Payers contract with physicians to ensure their enrollees have access to the medical care and services of those physicians.

12. Absent agreements among competing physicians on the terms, including price, on which they will provide services to payers' enrollees, competing physicians decide individually whether to enter into contracts with payers, and what prices they will accept pursuant to such contracts.

13. Competing physicians may use a "messenger" to facilitate their contracting with payers in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Such an arrangement, however, will not avoid a horizontal agreement if the "messenger" or another agent: (1) negotiates fees and other competitively significant terms on behalf of the participating physicians, or (2) facilitates the physicians' coordinated responses to contract offers by, for example, electing not to convey a payer's offer to them based on the agent's, or the participants', opinion on the appropriateness, or lack thereof, of the offer.

BVIPA

14. BVIPA is an association of approximately 365 independent primary care and specialist physicians in solo or small group practices in the Boulder County area that contracts with payers on behalf of its physician members. BVIPA was formed in 1979, in part, to coordinate "the delivery of medical care and other health services to persons enrolled in prepaid health service plans and other contractual health services arrangements."

15. BVIPA physician members represent a substantial percentage of the physicians who practice in the Boulder County area. Payers doing business in the Boulder County area have difficulty offering marketable and competitive health plans without contracting with at least a substantial portion of the BVIPA physician members.

16. Pursuant to BVIPA's Amended and Restated By-laws, ten to fifteen physician members sit on BVIPA's Board of Directors and manage the affairs of the organization. Physician members elect Board members for three-year terms at BVIPA's annual meeting.

17. When joining BVIPA, physician members sign agreements, entitled "Physician Provider Services Agreement." Pursuant to the Physician Provider Services Agreement, physician members authorize BVIPA to contract with payers on their behalf and agree to accept and adhere to such contracts.

ANTICOMPETITIVE CONDUCT

18. Ms. Higgins became BVIPA's Executive Director in or about 1999. BVIPA's by-laws allow its Executive Director to sign contracts upon Board authorization.

19. BVIPA's Board granted Ms. Higgins blanket authority to negotiate contracts with payers on behalf of BVIPA and its physician members, including the authority to enter into

contracts without obtaining approval from the BVIPA Board, Finance Committee, or any of its members.

**MS. HIGGINS ORCHESTRATED BVIPA'S ACTIONS TO FIX PRICES AND
THREATEN TO TERMINATE CONTRACTS WITH PAYERS**

20. From approximately 2001 through 2006, Ms. Higgins, in combination and conspiracy with BVIPA's members, conducted negotiations with numerous payers on behalf of BVIPA physicians and successfully extracted higher fees from them. These payers included United Healthcare of Colorado, PacifiCare of Colorado, Aetna Inc., Sloans Lake Managed Care, Inc. and CIGNA.

21. Ms. Higgins has exhorted BVIPA members to contract jointly through BVIPA, rather than individually, in order to maximize their bargaining leverage and increase the price that BVIPA members can obtain for providing physician services to payers. For example, in a 2002 BVIPA newsletter, Ms. Higgins reminded BVIPA members that "our strength will lie in contracting together, not separately." In the same newsletter, Higgins provided an example of BVIPA members' combined leverage, reporting that BVIPA had accepted a contract at a favorable rate. According to Ms. Higgins, "This is due to your support of our efforts and [the payer's] inability to get providers to sign individual contracts. Thank you for your support!!"

22. Under Ms. Higgins' leadership, BVIPA members have used their combined negotiating leverage to increase the prices that they are paid for physician services. According to BVIPA's medical director, "BVIPA contracts for our physicians with the large insurance companies that do business in Boulder County. We think we negotiate the best contracts with the highest reimbursements for our physicians in general."

23. By approximately June 2006, Ms. Higgins had renegotiated BVIPA's fees on a number of occasions with United Healthcare of Colorado; PacifiCare of Colorado; Aetna Inc.; Sloans Lake Managed Care, Inc.; CIGNA; and others, and signed agreements with those payers memorializing the rate increases on behalf of BVIPA's physician members.

24. Beginning in late in 2007 and continuing until early 2009, Ms. Higgins, as BVIPA's executive director, negotiated and consulted for some of BVIPA's physician members who sought to contract individually with a payer, thereby facilitating the exchange of rate information among them, and facilitating the coordination of rates during the individual negotiations.

25. As a result of Ms. Higgins' collective negotiations of physician fees for BVIPA members, payers contracted with and reimbursed BVIPA members for physician services in Boulder County at rates approximately 15 to 27 percentage points higher than those paid in individual contracts with non-member physicians in Boulder County.

MS. HIGGINS OFFERED PAYERS FICTITIOUS CONTRACTING CHOICES

26. In 2004, BVIPA purported to begin offering payers three options for contracting with BVIPA. Ms. Higgins described the three options in a so-called “white paper” that she drafted and gave to payers at the start of a renegotiation. The white paper’s contracting options through BVIPA included a collectively-negotiated contract that “delivered the entire BVIPA network,” and a “modified messenger model” that “may or may not deliver our entire network.” A third option included direct contracting with individual members outside the IPA. Although Ms. Higgins’ white paper appeared to offer payers a choice of contracting methods, BVIPA’s contracting practices, and Ms. Higgins’ conduct, did not change.

27. Despite purporting to offer a “modified messenger model,” BVIPA did not forward proposals to BVIPA’s individual members for review, unless Ms. Higgins deemed the prices acceptable.

28. Instead, Ms. Higgins used the same collective bargaining approach with each payer. She initiated contact with the payer and then proposed a price increase for physician services over those provided for in the current contract. If the payer agreed, Ms. Higgins signed a contract with the payer on behalf of BVIPA and all of its physician members, at the rate that she had negotiated. If and when a payer submitted a counter-offer, Ms. Higgins accepted or rejected the offer without messaging it to BVIPA’s physician members.

29. When a payer did not cooperate with her demands to either begin negotiation or agree to a price increase, Ms. Higgins reported that payer to the BVIPA Board. The BVIPA Board then voted to threaten the payer with termination of its contract with BVIPA.

30. Despite purporting to offer payers the option of contracting with individual members outside of the BVIPA framework, when payers have approached individual BVIPA physician members, many of these physicians have refused to discuss contracting on an individual basis, instead, referring the payers to BVIPA.

31. Other physicians have offered to negotiate individual contracts, but with Ms. Higgins representing them in their individual capacity.

NEGOTIATIONS WITH SPECIFIC PAYERS

32. United first signed a contract with BVIPA in approximately 2001 in order to contract with certain BVIPA specialists. By 2003, United had agreed to increase rates on approximately two occasions.

33. In January 2003, Ms. Higgins demanded another increase and United responded that it was willing to negotiate a smaller increase. Ms. Higgins rejected United’s proposal and proposed instead “meeting in the middle.” United then asked Ms. Higgins to go “to each of your physicians and let them make their individual decisions based on their practice.” Higgins refused to do so and replied instead that her “goal was to present a proposal that most (if not all)

physicians will agree to.” Ms. Higgins met with the BVIPA Finance Committee to report United’s rejection of her demands. The Committee minutes reported that “the increase is too low and Cathy [Higgins] will continue to follow up with United.” United agreed to a rate increase that was acceptable to Ms. Higgins.

34. In 2004, Ms. Higgins demanded another increase. She gave United a copy of the white paper containing BVIPA’s contracting options. Higgins reported to the Board that “they [United] . . . have requested to use the Messenger Model sending individual contracts to each physician.” Despite this, Higgins did not use a messenger model but continued to negotiate a rate increase with United. When United balked at Higgins’ demands, Higgins told the Board that negotiations with United have “stalled,” and the Board “may have to send a termination letter if the representatives at United do not become more responsive.” Thereafter, United agreed to an increase.

35. PacifiCare first contracted with BVIPA in approximately 2001. Ms. Higgins renegotiated BVIPA’s contract several times by 2004. During the 2004 negotiations for an increase in rates, negotiations with PacifiCare stalled. Ms. Higgins brought PacifiCare to the table by notifying it that BVIPA intended to terminate its contract with PacifiCare for one of its products. Thereafter, PacifiCare agreed to an increase.

36. Aetna first contracted with BVIPA in 2000. In the fall of 2001, Ms. Higgins began to negotiate an increase in the contract rate. By February 2002, BVIPA’s Board agreed that “the IPA should give Aetna an [sic] timeline under which an agreement must be met, otherwise face a termination letter from the IPA.” Aetna agreed to a rate increase for 2003.

37. In 2004, when Ms. Higgins demanded another rate increase, Aetna countered stating that BVIPA fees were already high and that “[o]ther physicians have not requested yearly increases.” Notwithstanding its complaint to Ms. Higgins, Aetna agreed an increase that was acceptable to Ms. Higgins.

38. Ms. Higgins demanded another increase during 2005. Aetna suggested a much smaller rate increase, reminding Ms. Higgins again that BVIPA’s rates were substantially above other rates in the market. Despite this, Aetna agreed to an increase that was acceptable to Ms. Higgins.

MS. HIGGINS’ CONDUCT ON BEHALF OF BVIPA MEMBERS IS NOT JUSTIFIED

39. BVIPA and its physician members have not undertaken any programs or activities that create any integration among their members in the delivery of physician services sufficient to justify their acts or practices, or Ms. Higgins’ negotiations on their behalf, as described in the foregoing paragraphs. BVIPA members do not share any financial risk in providing physician services, do not collaborate in a program to monitor and modify their clinical practice patterns to control costs or ensure quality, or otherwise integrate their delivery of care to patients.

MS. HIGGINS' CONDUCT CONSTITUTES AN UNLAWFUL RESTRAINT OF TRADE

40. BVIPA's participating physicians constitute numerous discrete economic interests. BVIPA's conduct, including that of Ms. Higgins on BVIPA's behalf, constitutes combined or concerted action by its participating physicians.

41. Ms. Higgins, in combination and conspiracy with BVIPA physician members, has acted to restrain competition in the Boulder County, Colorado area in the following ways, among others:

- a. facilitating, negotiating, entering into, and implementing agreements and coordination among physician members on price and other competitively significant terms;
- b. refusing or threatening to refuse to deal with payers except on collectively agreed-upon terms; and
- c. collectively negotiating price and other competitively significant terms in payer contracts for physician members and refusing to messenger payer offers to physician members for their individual consideration about whether to participate.

MS. HIGGINS' ACTIONS ON BEHALF OF BVIPA MEMBERS HAVE HAD SUBSTANTIAL ANTICOMPETITIVE EFFECTS

42. Ms. Higgins' actions, in concert with BVIPA's physician members, have had, or tend to have had, the effect of unreasonably restraining trade and hindering competition in the provision of physician services in the Boulder County area, in the following ways, among others:

- a. unreasonably restraining price and other forms of competition among physicians;
- b. increasing prices for physician services; and
- c. depriving health plans, employers, and individual consumers of the benefits of competition among physicians.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

43. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 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 thirtieth day of March, 2010, issues its complaint against Respondent.

By the Commission, Commissioner Rosch dissenting.

Donald S. Clark
Secretary

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