

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of Keystone Orthopaedic Specialists, LLC and Orthopaedic Associates of Reading, Ltd. FTC File No. 141-0025

I. Overview

The Federal Trade Commission has accepted, subject to final approval, an Agreement Containing a Consent Order (“Consent Agreement”) with Keystone Orthopaedic Specialists, LLC (“Keystone”), and Orthopaedic Associates of Reading, Ltd. (“Orthopaedic Associates”) (together “Respondents”). The Consent Agreement settles charges that Respondents violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

The Consent Agreement 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 Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

The purpose of this analysis is to facilitate public comment on the Consent Agreement. The analysis is not intended to constitute an official interpretation of the Consent Agreement or to modify its terms in any way. Further, the Consent Agreement has been entered into for settlement purposes only and does not constitute an admission by Respondents that they violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

II. Background and Market Structure

Nineteen orthopedists affiliated with six independent orthopedic practices in Berks County, Pennsylvania, merged to form Keystone in January 2011 (the “Merger”). One of those practices is Respondent Orthopaedic Associates, and the other five practices are Advanced Orthopaedics of Reading, Arthritis & Joint Replacement Center of Reading, P.C., Berkshire Orthopedic Associates, Inc., Commonwealth Orthopaedic Associates, Inc., and Reading Neck and Spine Center, P.C. (“Keystone Component Practices”). The Keystone Component Practices became divisions of Keystone after the Merger.

Before the Merger, competition among orthopedists in Berks County was robust. At that time, 25 orthopedists in 11 independent practices competed to provide orthopedic physician services. The Merger substantially eliminated this competition by combining 19 out of 25, or 76 percent, of the orthopedists practicing in Berks County into one practice. Only six other orthopedists remained as competitors. After the Merger, the Keystone orthopedists ceased to do business through their respective independent practices and began doing business exclusively through Keystone. Three years after the Merger, in 2014, six orthopedists left Keystone and

resumed doing business as Orthopaedic Associates for business reasons independent of the Commission's investigation.

III. The Relevant Markets

The relevant line of commerce in which to analyze the Merger's effects is the provision of orthopedic physician services. Orthopedic physician services include surgery and other services provided by physicians who specialize as orthopedists to treat injuries and diseases of the musculoskeletal system.

The relevant geographic market in which to assess the competitive effects of the Merger is Berks County, Pennsylvania. Patients in Berks County generally do not leave the county to obtain orthopedic physician services, and health plans are unable to serve their members in Berks County without including Berks County orthopedists in their provider networks.

IV. Effects of the Merger

Before the Merger, the Keystone Component Practices competed with each other, and health plans could form a network with some of the Keystone Component Practices. The Merger eliminated this competition and created a dominant orthopedic practice in Berks County. After the Merger, Keystone negotiated prices with health plans on behalf of all the previously competing Keystone Component Practices, and health plans could not offer a commercially marketable network that would appeal to Berks County residents without Keystone. Thus, Keystone gained substantial market power through the Merger, which it used to raise prices with most health plans with coverage in Berks County.

V. Entry

Recruiting new orthopedists to Berks County is difficult, expensive, and time intensive. Neither entry by new practices nor expansion by the remaining practices following the Merger has been timely or sufficient to offset the actual anticompetitive harm from the Merger. Nor is future entry to be timely, likely, or sufficient to do so.

VI. Efficiencies

The Merger has not produced merger-specific efficiencies sufficient to offset the actual anticompetitive harm from the Merger.

VII. The Decision and Order

The proposed Decision and Order ("Order") is designed to maintain competition in the relevant market, including by prohibiting future anticompetitive consolidation, and by allowing health plans to cancel and renegotiate the contracts they entered with Keystone after the Merger was consummated.

In evaluating the remedies in the proposed Order, it is important to note that market conditions have changed since the 2011 Merger. Market concentration levels are lower now than after the Merger was consummated in 2011 due to orthopedists leaving Keystone. Most significantly, for reasons independent of and pre-dating the Commission's investigation, six orthopedists separated from Keystone in 2014 and resumed doing business separately and independently as Orthopaedic Associates. Following the separation, Orthopaedic Associates has become a major player in the market with eight orthopedists. Keystone, in contrast, currently has 11 orthopedists, down from 19 when the Merger was consummated.

Had Orthopaedic Associates remained a part of Keystone, the Commission likely would have sought divestiture. As it is, the unique circumstance of Orthopaedic Associates' separation from Keystone for business reasons pre-dating the Commission's investigation resulted in structural changes that factored into the Commission's decision not to pursue further structural relief. But a recombination of the two groups could raise serious antitrust concern. Therefore, the proposed Order is designed to maintain competition in the relevant market by, among other things, preserving the Orthopaedic Associates' separation, and by allowing health plans to avail themselves of current market conditions by renegotiating existing Keystone contracts. Orthopaedic Associates is a named Respondent because its orthopedists helped form Keystone and benefitted from Keystone's post-merger price increases. Moreover, putting Orthopaedic Associates under Order is necessary to obtain appropriate relief, as discussed below.

Paragraph II of the proposed Order preserves Orthopaedic Associates' separation by requiring Keystone and Orthopaedic Associates to obtain prior approval from the Commission before acquiring any interest in each other.

Paragraph III requires Keystone and Orthopaedic Associates to obtain prior approval from the Commission before either practice may acquire another orthopedic practice located in Berks County. Keystone and Orthopaedic Associates also must obtain prior approval before entering into any employment, membership, or other agreement of affiliation with an orthopedist who during the prior year provided services in Berks County.

The proposed Order also prohibits Keystone and Orthopaedic Associates from engaging in illegal concerted activity apart from merging or acquiring other practices in Berks County. Under the Horizontal Merger Guidelines, mergers may harm competition where a "market shows signs of vulnerability to coordinated conduct." In this case, the Commission is concerned that the effects of this consummated merger could linger because of the close ties developed between Keystone and Orthopaedic Associates. Keystone and the orthopedists affiliated with Orthopaedic Associates jointly negotiated with payors and shared price information for over three years before the Orthopaedic Associates orthopedists left Keystone. Therefore, Paragraph IV includes provisions prohibiting certain joint activity among competing orthopedists who are members of or employed by Keystone or Orthopaedic Associates in order to limit the risk of coordination.

Paragraph IV.A prohibits Keystone and Orthopaedic Associates from jointly negotiating or refusing to deal with payors, and from engaging in this conduct with other orthopedists in Berks County. Paragraph IV.B prohibits Keystone and Orthopaedic Associates from facilitating exchanges of information among orthopedists concerning whether, and on what terms, to

contract with a payor. Paragraph IV.C bars attempts to engage in any action prohibited by Paragraphs IV.A or IV.B. Paragraph IV.D proscribes inducing anyone to engage in any action prohibited by Paragraphs IV.A through IV.C.

Certain kinds of agreements that do not raise antitrust concerns are excluded from the general bar on joint negotiations. Paragraph IV does not preclude Keystone or Orthopaedic Associates from engaging in conduct that is reasonably necessary to form or participate in “qualified risk-sharing” or “qualified clinically-integrated” joint arrangements, as defined in the Order. Paragraph V requires Keystone and Orthopaedic Associates to notify the Commission before initiating certain contacts regarding contracts with payors pursuant to these joint arrangements. Paragraph V also sets out the information necessary to satisfy the notification requirement.

Paragraph VI imposes other notification obligations on Keystone and Orthopaedic Associates and requires the termination of certain contracts that were entered into after the Merger. Paragraphs VI.A and VI.B require Keystone and Orthopaedic Associates to distribute the Complaint and Order to their respective orthopedist members and personnel identified in the Order, and to each payor that they have a record of having been in contact with since January 1, 2010.

Paragraph VI.C requires Keystone and Orthopaedic Associates to terminate, without penalty, any existing contracts with payors for the provision of orthopedic physician services at the earlier of a written request from a payor to terminate or the earliest termination or renewal date under the contract. Paragraph VI.C also allows a payor to extend a contract beyond the termination or renewal date for a period of no longer than one year from the date the order becomes final to allow payors sufficient time to renegotiate contracts with Keystone and Orthopaedic Associates. The contract termination requirement allows payors to avail themselves of current conditions in renegotiating contracts, where Keystone is no longer the dominant provider. Paragraph VI.D requires Keystone and Orthopaedic Associates to distribute payor requests for contract termination to their respective orthopedist members. Paragraph VI.E requires Keystone and Orthopaedic Associates to provide new orthopedists, payors, and various personnel not previously receiving a copy, a copy of the Order and the Complaint.

Paragraphs VII, VIII, and IX impose various obligations on Keystone and Orthopaedic Associates to report or provide access to information to the Commission to facilitate the monitoring of compliance with the Order. Finally, Paragraph X provides that the Order will expire in 10 years from the date it is issued.