

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

_____)
)
In the Matter of)
) Docket No. C-4113
SOUTHEASTERN NEW MEXICO)
PHYSICIANS IPA, INC.,)
a corporation,)
)
and)
)
BARBARA GOMEZ and)
LONNIE RAY,)
individually.)
_____)

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the Southeastern New Mexico Physicians IPA, Inc. (“SENM”), Barbara Gomez, and Lonnie Ray, hereinafter sometimes referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having carefully considered the comments received from interested persons, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Southeastern New Mexico Physicians IPA, Inc., is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 500 North Main Street, Suite 618, Roswell, NM 88201.
2. Respondent Barbara Gomez's principal address is 500 North Main Street, Suite 618, Roswell, NM 88201.
3. Respondent Lonnie Ray's principal address is 500 North Main Street, Suite 618, Roswell, NM 88201.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "Respondent SENM" means Southeastern New Mexico Physicians IPA, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Southeastern New Mexico Physicians IPA, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. "Respondent Gomez" means Barbara Gomez.
- C. "Respondent Ray" means Lonnie Ray.
- D. "Respondents" means Respondent SENM, Respondent Gomez, and Respondent Ray.
- E. "Medical group practice" means a bona fide, integrated firm in which physicians practice

medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.

- F. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition also applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- G. “Payor” means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. “Payor” includes any person that develops, leases, or sells access to networks of physicians.
- H. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- I. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- J. “Preexisting contract” means a contract that was in effect on the date of the receipt by a payor, that is a party to such contract, of notice sent by Respondent SENM, pursuant to Paragraph V.A.3 of this Order, of such payor’s right to terminate such contract.
- K. “Principal address” means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.
- L. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
 - 1. all physicians that participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 - 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.
- M. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:
 - 1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for

the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:

- a. the provision of physician services for a capitated rate from payors;
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors;
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals; or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and
2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:
 1. to negotiate on behalf of any physician with any payor,
 2. to deal, refuse to deal, or threaten to refuse to deal with any payor,
 3. regarding any term, condition, or requirement upon which any physician 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 through any arrangement other than Respondent SENM;

- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;
- C. Attempting to engage in any action prohibited by Paragraph II.A or II.B, above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED, HOWEVER, that nothing in Paragraph II of this Order shall prohibit any agreement involving or conduct by:

- (i) Respondent Gomez or Respondent Ray, subject to the provisions of Paragraph IV below, that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement, or that solely involves physicians in the same medical group practice; or
- (ii) Respondent SENM that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement, so long as the arrangement does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement.

III.

IT IS FURTHER ORDERED that Respondent Gomez and Respondent Ray, for three (3) years after the date that this Order becomes final, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Negotiating with any payor on behalf of Respondent SENM or on behalf of any physician who participates or has participated in Respondent SENM, notwithstanding whether such conduct also is prohibited by Paragraph II of this Order; and
- B. Advising any physician who participates, or has participated, in SENM to accept or reject any term, condition, or requirement of dealing with any payor, notwithstanding whether such conduct also is prohibited by Paragraph II of this Order.

IV.

IT IS FURTHER ORDERED that, for three (3) years from the date this Order becomes final, Respondents shall notify the Secretary of the Commission in writing (“Notification”) at least sixty (60) days prior to entering into any arrangement with any physicians under which Respondents would act as a messenger, or as an agent on behalf of those physicians, with payors regarding contracts. The Notification shall include the identity of each proposed physician participant; the proposed geographic area in which the proposed arrangement will operate; a copy of any proposed physician participation agreement; a description of the proposed arrangement’s purpose and function; a description of any resulting efficiencies expected to be obtained through the arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Notification is not required for Respondents’ subsequent acts as a messenger pursuant to an arrangement for which this Notification has been given. Receipt by the Commission from Respondents of any Notification, pursuant to this Paragraph IV, is not to be construed as a determination by the Commission that any action described in such Notification does or does not violate this Order or any law enforced by the Commission.

V.

IT IS FURTHER ORDERED that Respondent SENM shall:

- A. Within thirty (30) days after the date on which this Order becomes final, send by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 1. each physician who participates, or has participated, in Respondent SENM since January 1, 2000;
 2. each officer, director, manager, and employee of Respondent SENM; and
 3. the chief executive officer of each payor with which Respondent SENM has a record of having been in contact since January 1, 2000, regarding contracting for the provision of physician services, and include in such mailing the notice specified in Appendix A to this Order;
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of physician services, at the earlier of: (1) receipt by Respondent SENM of a written request from a payor to terminate such contract, or (2) the earliest termination or renewal date (including any automatic renewal date) of such contract; *provided, however*, a preexisting contract may extend beyond any such termination or renewal date no later than one (1) year after the date on which the Order becomes final if, prior to such termination or renewal date, (a) the payor submits to Respondent SENM a written request to extend such contract to a specific date no later than one (1) year after the date this Order becomes final, and (b) Respondent SENM has

determined not to exercise any right to terminate; *provided further*, that any payor making such request to extend a contract retains the right, pursuant to part (1) of Paragraph V.B of this Order, to terminate the contract at any time;

- C. Within ten (10) days after receiving a written request from a payor, pursuant to Paragraph V.B(1) of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician participating in Respondent SENM as of the date Respondent SENM receives such request;
- D. For a period of three (3) years after the date this Order becomes final:
 - 1. distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each physician who begins participating in Respondent SENM, and who did not previously receive a copy of this Order and the Complaint from Respondent SENM, within thirty (30) days of the time that such participation begins;
 - b. each payor that contracts with Respondent SENM for the provision of physician services, and that did not previously receive a copy of this Order and the Complaint from Respondent SENM, within thirty (30) days of the time that such payor enters into such contract;
 - c. each person who becomes an officer, director, manager, or employee of Respondent SENM, and who did not previously receive a copy of this Order and the Complaint from Respondent SENM, within thirty (30) days of the time that he or she assumes such responsibility with Respondent SENM; and
 - 2. annually publish a copy of this Order and the Complaint in an official annual report or newsletter sent to all physicians who participate in Respondent SENM, with such prominence as is given to regularly featured articles;
- E. File a verified written report within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each such report shall include:
 - 1. a detailed description of the manner and form in which Respondent SENM has complied and is complying with this Order; and
 - 2. copies of the return receipts required by Paragraphs V.A, V.C, and V.D of this Order; and

- F. Notify the Commission at least thirty (30) days prior to any proposed change in Respondent SENM, such as dissolution, assignment, sale resulting in the emergence of a successor company or corporation, the creation or dissolution of subsidiaries, or any other change in Respondent SENM that may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that, if Respondent SENM fails to comply with all or any portion of Paragraph V.A or Paragraph V.D.1.b of this Order within sixty (60) days of the times set forth in the paragraph, then Respondent Ray shall, within thirty (30) days thereafter, comply with those portions of Paragraphs V.A and V.D.1.b of this Order with which Respondent SENM did not comply.

VII.

IT IS FURTHER ORDERED that, within thirty (30) days after the date on which this Order becomes final, Respondent Gomez and Respondent Ray shall send a copy of this Order and the Complaint by first-class mail, return receipt requested:

- A. To each physician who participates, or has participated, in a physician group represented by Respondent Gomez or Respondent Ray since August 1, 2001; and
- B. To each payor with which Respondent Gomez or Respondent Ray has dealt since August 1, 2001, for the purpose of contracting, or seeking to contract, while representing or advising any physician or group of physicians relating to contracting with such payor for the provision of physician services.

PROVIDED, HOWEVER, that Respondent Gomez and Respondent Ray are not required to send a copy of this Order and the Complaint to any physician who has participated in Respondent SENM or any payor that has been in contact with Respondent SENM and that received a copy of this Order and the Complaint from Respondent SENM, pursuant to Paragraph V.A.1 and Paragraph V.A.3 of this Order.

VIII.

IT IS FURTHER ORDERED that Respondent Gomez and Respondent Ray shall:

- A. For three (3) years after the date this Order becomes final, distribute a copy of this Order and the Complaint by first-class mail, return receipt requested:

1. to all physicians that Respondent Gomez or Respondent Ray represents relating to contracting, or seeking to contract, with payors for the provision of physician services, or that Respondent Gomez or Respondent Ray advises relating to providing payors with physician services, within (30) days of the time that Respondent Gomez or Respondent Ray begins providing such representation or advice; and
 2. to each payor with which Respondent Gomez or Respondent Ray deals for the purpose of contracting, or seeking to contract, pursuant to any arrangement to represent or advise any physician, relating to contracting with such payor for the provision of physician services, within thirty (30) days of such dealing; *provided, however,* that Respondent Gomez and Respondent Ray are not required to send a copy of this Order and the Complaint to any physician who begins participating in Respondent SENM or any payor that contracts with Respondent SENM for the provision of physician services and that received a copy of this Order and the Complaint from Respondent SENM, pursuant to Paragraph V.D.1.a or Paragraph V.D.1.b of this Order; and
- B. File verified written reports within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include:
1. a detailed description of the manner and form in which Respondent Gomez or Respondent Ray has complied and is complying with this Order; and
 2. copies of the return receipts required by Paragraphs VII and VIII.A.

IX.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission of any change in her or its respective principal address within twenty (20) days of such change in address.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, each Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and

documents in her or its possession, or under her or its control, relating to any matter contained in this Order; and

- B. Upon five (5) days' notice to such Respondent, and in the presence of counsel, and without restraint or interference from her or it, to interview such Respondent or employees of such Respondent.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on August 5, 2024.

By the Commission.

C. Landis Plummer
Acting Secretary

SEAL

ISSUED: August 5, 2004