

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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In the Matter of)
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CARLSBAD PHYSICIAN)
ASSOCIATION, INC., a corporation,)
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and)
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)
WILLIAM J. BAGGS, M.D.,)
SRICHAND S. DARA, M.D.,)
GLEN MOORE,)
JAMES J. PURPURA, D.O.,)
DEBORAH J. SCHENCK, M.D.,)
CHARLES L. SECORA, M.D.,)
MAJID A. SYED, M.D.,)
and RICHARD L. ZIZZA, M.D.,)
individually.)
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Docket No. C-

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, having reason to believe that the Carlsbad Physician Association, Inc. (“CPA”), William J. Baggs, M.D., Srichand S. Dara, M.D., Glen Moore, James J. Purpura, D.O., Deborah J. Schenck, M.D., Charles L. Secora, M.D., Majid A. Syed, M.D., and Richard L. Zizza, M.D., hereinafter collectively referred to as “Respondents,” have 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:

I. NATURE OF THE CASE

1. This matter concerns horizontal agreements among competing physicians who constitute most of the physicians in the Carlsbad, New Mexico, area, to fix prices charged to health care plans and other third-party payors (“payors”), and to refuse to deal with payors except on collectively agreed-upon terms. The physicians orchestrated these price-fixing agreements and

concerted refusals to deal through CPA, and their conduct had the purpose and effect of raising the prices of physician services in the Carlsbad area.

II. RESPONDENTS

2. CPA is a 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 2420 West Pierce St., Suite 100, Carlsbad, NM 88220. CPA's Board of Directors ("Board") consists of the organization's officers: the President, Vice President, Treasurer, Secretary, and Member-at-Large. The Contract Committee, which consists of all the Board members and certain other physician members of Respondent CPA, negotiates and reviews proposed payor contracts before presenting contract information to CPA's physician members. Upon a majority vote of acceptance by CPA's physician members, the Board signs payor contracts on behalf of the members.

3. Glen Moore has been CPA's Executive Director since December 1999. His principal address is P.O. Box 381, Benton, MS 39039. Respondent Moore is CPA's principal negotiator of payor contracts on the physician members' behalf. Respondent Moore has participated in most, if not all, Board meetings, Contract Committee meetings, and general membership meetings in which CPA's physicians discuss and agree on the prices to charge payors. The Board and the Contract Committee often assist Respondent Moore in negotiating and reviewing proposed payor contracts.

4. The following individuals ("Physician Respondents") are physicians licensed to practice medicine in the State of New Mexico, and are engaged in the private practice of medicine for a fee in the Carlsbad, New Mexico area. The Physician Respondents are, or were, active members of CPA. Except to the extent that competition has been restrained as alleged herein, the Physician Respondents have been, and are now, in competition with each other, and with other physician members of CPA, for the provision of services. Their respective names, business addresses, and roles in CPA are as follows:

- a. William J. Baggs, M.D., 2410 W. Pierce St., Carlsbad, NM 88220, was one of CPA's founders, and has been a member of the Board and the Contract Committee at various times between 1998 and the present.
- b. Srichand S. Dara, M.D., 110 S. Halagueno, Carlsbad, NM 88220, was one of CPA's original Board members. Dr. Dara is a former Secretary of CPA, and has been a member of the Board and Contract Committee at various times between 1998 and the present.
- c. James J. Purpura, D.O., 2330 West Pierce St., Carlsbad, NM 88220, is a former President of CPA, and has been a member of the Board and the

Contract Committee at various times between 1998 and the present.

- d. Deborah J. Schenck, M.D., 2420 West Pierce St., Suite 103, Carlsbad, NM 88220, is a former Treasurer of CPA, and has been a member of the Board and the Contract Committee at various times between 2000 and the present.
- e. Charles L. Secora, M.D., 2402 West Pierce St., Suite 6F, Carlsbad, NM 88220, is a former Secretary and Vice President of CPA, and was a member of the Board and the Contract Committee at various times between 1998 and 2002. He is also a former Chairperson of the Contract Committee.
- f. Majid A. Syed, M.D., 2402 West Pierce St., Suite 6D, Carlsbad, NM 88220, was a founder of CPA, is a former President of CPA, and has been a member of the Board and the Contract Committee at various times between 1998 and the present. He is also a former Chairperson of the Contract Committee.
- g. Richard L. Zizza, M.D., 2420 West Pierce St., Suite 100, Carlsbad, NM 88220, has been CPA's President and the Chairperson of its Contract Committee since 2001. He has served on the Board and Contract Committee at various times between 2000 and the present.

III. THE FTC HAS JURISDICTION OVER RESPONDENTS

5. Respondents' general business practices, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

IV. OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

6. CPA has approximately 38 physician members, all of whom are licensed to practice allopathic, osteopathic, chiropractic, or podiatric medicine in the State of New Mexico, and are engaged in the business of providing physician services to patients in the Carlsbad, New Mexico, area. Approximately 83% of the primary care physicians and 76% of all physicians who practice in the Carlsbad area are members of CPA.

7. Carlsbad is in southeastern New Mexico. The closest major cities to Carlsbad are Roswell, New Mexico, 76 miles to the northwest of Carlsbad; El Paso, Texas, 162 miles to the southwest; and Lubbock, Texas, 179 miles to the northeast. To be competitively marketable in the Carlsbad area, a payor's health insurance plan must include in its physician network a large number of primary care physicians and specialists who practice in the Carlsbad area.

8. Physicians often contract with payors to establish the terms and conditions, including price terms, under which the physicians will render services to the payors' subscribers. Physicians entering into such contracts often agree to lower compensation in order to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs and enable them to lower the price of insurance, and thereby result in lower medical care costs for subscribers to the payors' health insurance plans.

9. Absent agreements among competing physicians on the terms, including price, on which they will provide services to enrollees in payors' health care plans, competing physicians decide individually whether to enter into payor contracts to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

10. Medicare's Resource Based Relative Value System ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, payors in the Carlsbad area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fee for a particular year (*e.g.*, "110% of 2003 RBRVS").

11. Competing physicians sometimes use a "messenger" to facilitate the establishment of contracts between themselves and payors in ways that do not constitute or facilitate an unlawful agreement on prices and other competitively significant terms. Such a messenger may not, however, consistent with a competitive model, negotiate prices and other competitively significant terms on behalf of the participating physicians. Nor should a messenger facilitate the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the messenger's opinion on the appropriateness, or lack thereof, of the offer.

V. CPA WAS FORMED TO, AND DID, COLLECTIVELY NEGOTIATE HIGHER FEES

12. In July 1998, Drs. Baggs and Syed and two other physicians organized CPA. In February 1999, it was incorporated as a for-profit corporation and formally named the "Carlsbad Physician Association." CPA was formed to negotiate contracts for physician services between CPA physician members and payors. A "position statement" that CPA created to describe itself asserts that CPA's primary goal is "to negotiate contracts between physicians and employers, insurers and administrators independent of influence from any Health [*sic*] care organization or facility." Similarly, at a May 12, 1999, meeting of CPA's Board, Dr. Secora stated that among CPA's main goals was to "[n]egotiate favorable reimbursement for physicians."

13. CPA's physician members each pay \$500 annual membership dues. A physician becomes eligible to participate in CPA's contracts by entering into a "Participating Physician Agreement" with the organization.

14. Through Executive Director Moore, the Board, and the Contract Committee, CPA negotiates with payors on the prices and other contract terms pursuant to which CPA's members will provide medical care to subscribers of payors' health plans. CPA does not transmit any payor's contract offer to the members for their individual acceptance or rejection unless the Contract Committee approves the terms of the contract. Indeed, CPA told the public that it was operating as a legitimate messenger when, in fact, it repeatedly refused to messenger contract offers that it deemed deficient and engaged in collective price negotiations and refusals to deal.

15. Once the Contract Committee and Executive Director Moore negotiate payor contract terms acceptable to them, they present the contract to the general membership for a vote of approval; if approved, the Board signs it. Thereafter, CPA's members decide whether to opt into or out of the contract. CPA's Contract Committee and Board make recommendations to members about which offers the physicians should accept collectively, and the general membership usually follows these recommendations. At general membership meetings, CPA's members jointly decide whether to allow payor contracts to renew automatically, and whether to allow contract negotiations with payors to move forward. At CPA's general membership meetings, the physicians frequently decide collectively the prices to demand from payors, and to terminate contract negotiations with those payors perceived to be making low proposals.

16. All Physician Respondents are or were members of CPA's Contract Committee and Board and participated in negotiations with payors over prices. On behalf of Physician Respondents and the entire CPA membership, Executive Director Moore actively bargains over price and other contract terms with payors, and dictates to payors the minimum compensation terms under which CPA's members will contract.

17. CPA's members, including Physician Respondents, refuse to entertain offers made to them individually, hindering payors' efforts to establish competitive physician networks in the Carlsbad area. Due to CPA's large share of the physicians in the Carlsbad area, its bargaining power with payors is substantial, with the result that payors have repeatedly acceded to Respondents' demands for supracompetitive fees for all CPA members.

18. Prices for physician services in New Mexico, on average, range from 120% to 150% of RBRVS. Through collective negotiations and threatened refusals to deal, Respondent CPA's physician members have successfully contracted for the highest prices in the state, with prices ranging from 160% to 200% of RBRVS.

A. BLUE CROSS & BLUE SHIELD OF NEW MEXICO

19. Blue Cross & Blue Shield of New Mexico is a payor doing business in the Carlsbad area. Blue Cross started contract negotiations with CPA in September 1999. The Board rejected Blue Cross' initial offer, without transmitting it to the individual physician members of CPA for

their unilateral acceptance or rejection.

20. In December 1999, Blue Cross responded with a new offer that was higher than its original offer but far below CPA's demand. At a January 4, 2000, Board meeting, the Board members unanimously rejected that proposal. Following that meeting, Dr. Secora prepared a letter to Blue Cross, on behalf of CPA's members, rejecting Blue Cross' latest offer.

21. In January 2000, CPA invited two Blue Cross representatives to a meeting of CPA's Board to negotiate the contract. After that meeting, Blue Cross submitted another contract offer to the Board, this time with even higher prices than what it previously offered. Through Executive Director Moore, however, the Board rejected this offer and advised Blue Cross of CPA's demand for still higher prices, to which Blue Cross ultimately agreed. The Board also demanded that Blue Cross agree to contract terms that guaranteed that payments to CPA physicians would not decline. Executive Director Moore and Drs. Secora and Syed jointly presented this demand to Blue Cross on the collective behalf of CPA's members. Blue Cross agreed to this demand, and the contract that the parties signed on March 1, 2000, included the language that CPA demanded. Through negotiations that Executive Director Moore and Dr. Secora led, CPA eventually received prices substantially in excess of 20% above Blue Cross' initial offer.

B. PRESBYTERIAN HEALTH PLAN

22. Presbyterian Health Plan is a payor doing business in the Carlsbad area. CPA began contract negotiations with Presbyterian in December 1998. In July 1999, the Board and Contract Committee agreed that Presbyterian's proposal on prices for its commercial plan was unacceptable. CPA did not transmit Presbyterian's proposal to the members. Instead, it instructed Executive Director Moore to make a counter-proposal of 180% of RBRVS for non-surgical codes and 200% for surgical codes. Presbyterian rejected that offer and did not contract with CPA at that time. Instead, for services provided to subscribers in the Carlsbad area, Presbyterian either paid billed charges or amounts agreed upon under contracts with certain individual physicians.

23. In April 2002, CPA and Presbyterian reentered contract negotiations. On May 1, 2002, Executive Director Moore required that Presbyterian offer CPA's members uniform prices set at 210% of RBRVS for surgical codes and 190% of RBRVS for non-surgical codes. This was an 81% increase over the amount Presbyterian paid in the Carlsbad area the previous year. Presbyterian counter-proposed a contract containing lower prices, but Executive Director Moore, in a May 20, 2002, letter, rejected that offer on behalf of CPA's members.

24. In June 2002, Presbyterian proposed to contract with CPA's members at 125% of RBRVS for surgical codes and between 115% and 135% for various non-surgical codes. Dr. Dara made a motion at a general membership meeting on July 18, 2002, that CPA reject Presbyterian's

latest offer. The motion was unanimously approved.

25. In September 2002, Presbyterian raised its offer to CPA to an amount equal to 122% of RBRVS for non-surgical codes and 148% of RBRVS for surgical codes. At the September 25, 2002, Contract Committee meeting, Dr. Zizza moved to recommend that the general membership reject Presbyterian's new proposal. Dr. Purpura seconded the motion, and it was approved by the Contract Committee. The general membership subsequently rejected Presbyterian's proposal, based upon the Contract Committee's recommendation. In October 2002, Executive Director Moore informed Presbyterian's Contracts Manager that, to continue negotiations with CPA, Presbyterian's offer on price had to be higher - - "MUCH HIGHER." Currently, Presbyterian does not contract with CPA for its commercial plan in the Carlsbad area.

C. UNITED HEALTH CARE

26. United Health Care is a payor doing business in the Carlsbad area. CPA and United began contract negotiations in December 1998, and continued to negotiate price and other contract terms over the course of two years. CPA's Board and Contract Committee often made recommendations on the prices that CPA's Executive Director should demand from United. CPA's Board and Contract Committee proposed prices substantially higher than United's offers, without transmitting United's proposals to individual members. As a result, in October 1999, United complained to CPA that it was committing "FTC violation(s)."

27. At the culmination of these negotiations, in June 2000, Executive Director Moore, under Board and Contract Committee direction, insisted that United pay 160% of RBRVS for non-surgical codes and 185% for surgical codes, or else CPA would not deal with United. United gave in to this demand and, on September 1, 2000, entered into a uniform group contract with CPA.

28. In April 2002, the Contract Committee, including Drs. Schenck, Secora, Purpura, and Zizza, demanded, through Executive Director Moore, substantial increases in the prices United paid to CPA members. CPA stood firm in its demands from United through the Spring and Summer of 2002. At a May 15, 2002, meeting, the general CPA membership unanimously passed Dr. Dara's motion, which Dr. Baggs seconded, to threaten United with termination of its contract unless United increased the prices paid to CPA's members and reinstated a CPA member into the United network. At a meeting on July 18, 2002, over which Dr. Zizza presided, CPA's general membership unanimously agreed with Dr. Dara's call for the termination of CPA's contract with United, due to its failure to accept CPA's collectively demanded terms. Soon thereafter, Executive Director Moore sent a letter to United, terminating CPA's contract. After a United representative requested that each CPA physician furnish United with an individual termination letter, Executive Director Moore provided each of the physician members with a copy of a letter of termination to sign and forward to United. All but six of the participating CPA physicians submitted that letter.

29. United does not have a contract with CPA, and it now pays the subset of CPA members with whom it has individual contracts the highest prices in United's New Mexico network.

D. OTHER PAYORS

30. CPA has orchestrated collective negotiations with all other payors that do business, or attempted to do business, in the Carlsbad area. With the assistance of the Board and Contract Committee, Executive Director Moore negotiated with these payors on price, making proposals and counter-proposals as well as accepting or rejecting offers without transmitting them to physician members for their individual acceptance or rejection. CPA's members collectively accepted or rejected these payor contracts, and refused to deal with these payors individually. Due to CPA's dominant market position in the Carlsbad area, such tactics have been highly successful. CPA has been able to extract far higher prices from these payors than what they pay other physicians in New Mexico.

VI. RESPONDENTS HAVE ENGAGED IN RESTRAINTS OF TRADE

31. Acting as a combination of competing physicians, the Physician Respondents, through CPA and in conspiracy with Executive Director Moore, have restrained competition by, among other things:

- a. facilitating, negotiating, entering into, and implementing agreements among themselves and other members of CPA on price and other competitively significant terms;
- b. refusing to deal with payors except on collectively agreed-upon terms; and
- c. negotiating uniform prices and other competitively significant terms in payor contracts for CPA's members, and refusing to submit payor offers to CPA members that do not conform to CPA's standards for contracts.

VII. THERE ARE NO SIGNIFICANT EFFICIENCIES IN RESPONDENTS' CONDUCT

32. Respondents' joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

VIII. RESPONDENTS' ACTIONS HAVE HAD SUBSTANTIAL ANTICOMPETITIVE EFFECTS

33. Respondents' actions described in Paragraphs 12 through 31 of this Complaint have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Carlsbad area in the following ways, among others:

- a. price and other forms of competition among Physician Respondents and other physician members of CPA were unreasonably restrained;
- b. prices for physician services were increased; and
- c. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

34. 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 ____ day of _____, 2003, issues its Complaint against Respondents CPA, William J. Baggs, M.D., Srichand S. Dara, M.D., Glen Moore, James J. Purpura, D.O., Deborah J. Schenck, M.D., Charles L. Secora, M.D., Majid A. Syed, M.D., and Richard L. Zizza, M.D.

By the Commission.

Donald S. Clark
Secretary

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