

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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| In the Matter of | |) |
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| COLEGIO DE OPTOMETRAS, | |) |
| a professional association, | |) |
| | |) |
| and | |) |
| | |) |
| EDGAR DÁVILA GARCIA, O.D., and | |) |
| CARLOS RIVERA ALONSO, O.D., | |) |
| individuals. | |) |
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Docket No. C-4199

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the Colegio de Optometras, Edgar Dávila García, O.D., and Carlos Rivera Alonso (hereinafter sometimes collectively referred to as “Respondents”), and Respondents having been furnished with a copy of the draft 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 attorneys, 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 this 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, 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 Colegio De Optometras (“the Colegio”) is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal address located at Eleanor Roosevelt Avenue, #118, Hato Rey, Puerto Rico, 00918.
2. Respondent Edgar Dávila García , O.D., an individual, is an optometrist licensed to practice optometry in Puerto Rico. His principal address is Dr. Berrocal & Asociados, 150 De Diego Avenue, Suite 404, Santurce, Puerto Rico, 00907.
3. Respondent Carlos Rivera Alonso, O.D., an individual, is an optometrist licensed to practice optometry in Puerto Rico. His principal address is Centro Visual Juncos, 29 Martinez, Juncos, Puerto Rico, 00777.
4. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

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

- A. “Respondent Colegio” means the Colegio de Optometras, a professional association, its officers, directors, employees, agents, attorneys, representatives, predecessors, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each.
- B. “Respondent Dávila” means Edgar Dávila García, O.D.
- C. “Respondent Rivera” means Carlos Rivera Alonso, O.D.
- D. “Optometrist” means a doctor of optometry (“O.D.”) and includes any optometrist who individually or through a business entity (*e.g.*, clinical group or corporation) provides

services relating to a person's vision, including eye examinations, refractions, dispensing of contact lenses and eye glasses, and fitting of same.

- E. "Optometrist group practice" means a bona fide, integrated firm in which optometrists practice optometry together as partners, shareholders, owners, or employees, or in which only one optometrist practices optometry.
- F. "Participate" in an entity or an arrangement 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 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 payment, for all or any part of any optometrist services for itself or for any other person, as well as any person that develops, leases, or sells access to networks of optometrists.
- H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- I. "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.
- J. "Qualified clinically-integrated joint arrangement" means an arrangement to provide optometry services in which:
 - 1. all optometrists who 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 optometrists that 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 arrangement.
- K. "Qualified risk-sharing joint arrangement" means an arrangement to provide optometry services in which:
 - 1. all optometrists who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the optometrists who participate jointly to control costs and improve quality by managing the provision of optometry services, such as risk-sharing involving:

- a. the provision of optometry services to payors at a capitated rate,
 - b. the provision of optometry services for a predetermined percentage of premium or revenue from payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for optometrists 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 optometrists 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 arrangement.

L. "Qualified joint arrangement" means a qualified clinically-integrated joint arrangement or a qualified risk-sharing 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 optometry 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 optometrists with respect to their provision of optometry services:
 1. to negotiate on behalf of any optometrist 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 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 Respondent Colegio;
- B. Exchanging or facilitating in any manner the exchange or transfer of information between or 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 with a payor;
- C. Attempting to engage in any action prohibited by Paragraphs 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 this Paragraph II. shall prohibit any agreement or conduct involving any Respondent: (a) that subject to the requirements of Paragraph III. of this Order, is reasonably necessary to form, participate in, or take any action in furtherance of, a qualified joint arrangement, so long as such qualified joint arrangement does not restrict the ability of, or facilitate the refusal of, optometrists who participate in it to deal with payors on an individual basis or through any other arrangement; or (b) where such agreement or conduct solely involves optometrists in the same optometrist group practice.

III.

IT IS FURTHER ORDERED that for three (3) years from the date this Order becomes final, pursuant to each qualified joint arrangement (referred to in this Paragraph III. as "Arrangement") in which any Respondent is a participant, that Respondent participant shall notify the Secretary of the Commission in writing ("Paragraph III. Notification") at least sixty (60) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any optometrists in such Arrangement relating to price or other terms or conditions of dealing with any payor; or
- B. Contacting a payor, pursuant to an Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any payor, on behalf of any optometrist or any optometrist group practice in such Arrangement.

PROVIDED FURTHER, Paragraph III. Notification shall include the following information regarding the Arrangement pursuant to which Respondent intends to engage in the above identified conduct:

- a. the total number of optometrists participating in the Arrangement;
- b. a description of the Arrangement, including its purpose and geographic area of operation;
- c. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;
- d. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the Arrangement;
- e. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and
- f. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for optometry services in any relevant market, including, but not limited to, the market share of optometry services in any relevant market.

Provided, however, that if Respondent Davila or any Respondent Rivera is Participating in an Arrangement solely as participant of an optometrist group practice, that Respondent, may, upon written affirmation, exclude from his Paragraph III. Notification any information that is not known by such Respondent.

PROVIDED FURTHER that:

- (a) if, within sixty (60) days from the Commission's receipt of the Paragraph III. Notification, a representative of the Commission makes a written request for additional information to the Respondent providing such Paragraph III. Notification, that Respondent shall not participate in any Arrangement described in Paragraph III.A. or Paragraph III.B. of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition;
- (b) the expiration of any waiting period described herein without a request for additional information shall not be construed as a determination by the Commission, or its staff, that the proposed Arrangement does or does not violate this Order or any law enforced by the Commission;
- (c) the absence of notice that the Arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the Arrangement has been approved;

(d) receipt by the Commission of any Paragraph III. Notification regarding participation pursuant to an Arrangement is not to be construed as a determination by the Commission that any such Arrangement does or does not violate this Order or any law enforced by the Commission; and

(e) Paragraph III. Notification shall not be required prior to participating in any Arrangement described at Paragraph III.A. or Paragraph III.B. of this Order pursuant to an Arrangement for which Paragraph III. Notification has previously been given.

IV.

IT IS FURTHER ORDERED that Respondent Colegio shall:

- A. Translate the Order and the Complaint into Spanish (“translated Order and Complaint”), and within thirty (30) days after the date on which this Order becomes final, send a copy of this Order and the Complaint with a copy of the translated Order and Complaint by:
 1. first-class mail, with return receipt requested or delivery confirmation, or electronic mail, with return confirmation, to each optometrist that is a member of Respondent Colegio;
 2. first-class mail, with return receipt requested or delivery confirmation, or electronic mail, with return confirmation, to each present officer, director, manager, and employee of Respondent Colegio; and
 3. first-class mail, return receipt requested, to the chief executive officer of each payor with whom Respondent Colegio has a record of being in contact since January 1, 2001.
- B. For a period of three (3) years after the date this Order becomes final:
 1. Distribute a copy of this Order and the Complaint with a copy of the translated Order and Complaint by:
 - a. first-class mail, with return receipt requested or delivery confirmation, or electronic mail, with return confirmation, to each optometrist that joins Respondent Colegio, and who did not previously receive a copy of this Order and the Complaint from Respondent Colegio, within thirty (30) days of the day that such membership begins;

- b. first-class mail, with return receipt requested or delivery confirmation, or electronic mail, with return confirmation, to each person who becomes an officer, director, manager, or employee of Respondent Colegio, and who did not previously receive a copy of this Order and the Complaint from Respondent Colegio, within thirty (30) days of the day that he or she assumes such responsibility with Respondent Colegio;
 2. Annually publish a copy of this Order and the Complaint with a copy of the translated Order and Complaint, in an official annual report or newsletter sent to all members of Respondent Colegio, with such prominence as is given to regularly featured articles.
- C. File a verified written report within sixty (60) days after the date on which 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 Colegio has complied and is complying with this Order;
 2. The name, address, and telephone number of each payor with which Respondent Colegio has had any contact; and
 3. Depending on the method of delivery used, copies of the delivery confirmations, electronic mail confirmations, or signed return receipts required by Paragraphs IV.A. and IV.B. of this Order.

V.

IT IS FURTHER ORDERED that Respondents Dávila and Rivera shall each file a verified written report within ninety (90) days after the date on which 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 a detailed description of the manner and form in which Respondents Dávila and Rivera individually have complied and are complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent Colegio shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent Colegio, (2) acquisition, merger, or consolidation of Respondent Colegio, or (3) other change in Respondent Colegio that may affect compliance obligations arising out of this Order, including but not

limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent Colegio.

VII.

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

VIII.

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 its possession, or under its control, relating to any matter contained in this Order; and
- B. Upon five (5) days' notice, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of the Respondents.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on September 6, 2027.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: September 6, 2007