

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

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<b>In the Matter of</b>	)	
	)	
<b>MEMORIAL HERMANN HEALTH NETWORK PROVIDERS,</b>	)	<b>Docket No. C-4104</b>
	)	
<b>a corporation.</b>	)	
	)	

**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 Memorial Hermann Health Network Providers (hereinafter “MHHNP”) 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 MHHNP’s actions to orchestrate and implement agreements among competing physicians on the prices they would accept from health plans and other third-party payors (“payors”) in the greater Houston, Texas area. The challenged actions of MHHNP had the purpose and effect of increasing prices paid for physician services in the greater Houston area.

**RESPONDENT**

2. MHHNP is a non-profit corporation, organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal address at 9401 Southwest Freeway, Houston, Texas 77074.
3. MHHNP has approximately 3000 participating physician members (hereinafter “physician“members”) who are licensed to practice medicine in the State of Texas and engaged in the business of providing medical services to patients in the Houston metropolitan area (hereinafter “Houston area”).

4. Except to the extent that competition has been restrained as alleged herein, the physician members of MHHNP have been, and are now, in competition with each other for the provision of physician services.

### **JURISDICTION**

5. MHHNP's general business activities and those of the physician members who utilize MHHNP's services, 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.
6. MHHNP is a corporation within the meaning of Section 4 of the FTC Act. Although MHHNP's articles of incorporation and by-laws designate Memorial Hermann Healthcare System, a non-profit corporation, as its "sole member" for purposes of Texas corporation law, the physician members of MHHNP are members of the corporation within the meaning of Section 4 of the FTC Act. MHHNP engages in substantial activities for the pecuniary benefit of its for-profit physician members.
7. MHHNP is governed by its Board of Directors, which includes 16 "Voting Directors," all of whom are physician members. These Board members are elected by MHHNP's physician members, subject to the ultimate approval of its sole member.

### **OVERVIEW OF MARKET AND PHYSICIAN COMPETITION**

8. MHHNP regularly and in the ordinary course of business classifies its physicians as "physician members," and conducts its business affairs in a manner that demonstrates that the physician members are "members" of MHHNP. To participate in MHHNP's network and utilize MHHNP's contract negotiation and other services, a physician member must complete a MHHNP "Membership Application" and sign a "Network Participation Agreement." MHHNP's "Membership and Credentialing Committee," a 13-member panel of board members and appointees, evaluates the physician's credentials and recommends to the board the physician's eligibility for membership.
9. Physician members, through their elected representatives on the board, actively participate in MHHNP's management and business operations. Among other things, the board develops guidelines for negotiating, reviewing, approving, rejecting, terminating, and renewing payor contracts; approves price terms for dealing with payors; establishes procedures for credentialing MHHNP's physician members; and establishes certain billing and payment procedures for physician members.
10. MHHNP's activities substantially advance its physician members' economic interests.

These activities include negotiating payor contracts, including price and price-related terms; group purchasing; continuing medical education; and engaging in marketing on behalf of its physician members.

11. 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 third-party payors' costs, enable them to lower the price of insurance, and reduce out-of-pocket medical expenditures by subscribers to the payors' health insurance plans.
12. 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.
13. Medicare's Resource Based Relative Value System (hereinafter "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 Houston area contract with individual physicians or groups at a price level specified in the RBRVS, plus a markup or a discount based on some percentage of that price (e.g., "110% or 95% of 2001 RBRVS").
14. To be competitively marketable in the Houston 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 Houston area. Many of the primary care physicians and specialists who practice in the Houston area are physician members of MHHNP.
15. 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 fees and other competitively significant terms. Such an arrangement, however, will not avoid constituting or facilitating a horizontal agreement if the "messenger" or an agent negotiates fees and other competitively significant terms on behalf of the participating physicians, or facilitates the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the agent's, or collectively the participants', opinion on the appropriateness, or lack thereof, of the offer.

## **FORMATION AND OPERATION OF MHHNP**

16. MHHNP was incorporated in 1982 under the name Memorial Healthnet Providers, Inc. In 2000, its name was changed to MHHNP. Before 1999, MHHNP engaged in risk contracting with some payors. In 1999 or 2000, MHHNP terminated all existing risk contracts with payors on behalf of its physician members, and renegotiated such contracts to be non-risk contracts—*i.e.*, contracts that do not involve financial risk sharing by physicians through arrangements such as fee withholds or capitation. MHHNP has not subsequently entered into any risk contracts with any payors. In negotiating non-risk contracts with payors for its physician members, MHHNP has sought, and has often obtained, higher fees and other more advantageous terms than those physician members, negotiating unilaterally, could have obtained.
17. To participate in MHHNP’s payor contracts, a physician member enters into a “Network Participation Agreement” with MHHNP, granting MHHNP the authority to arrange for his or her services to be provided to persons covered by payors pursuant to agreements between MHHNP and the payors. Individual physician members may opt into or out of any particular contract negotiated between MHHNP and a particular payor, but each physician member agrees to participate in a reasonable number of payor plans as a condition of continued participation in MHHNP.

#### **MHHNP’S ILLEGAL ACTS AND PRACTICES**

18. MHHNP has regularly negotiated with payors the fees and other terms relating to the medical care its physician members offer to persons covered by the payors. At the direction of its Board, MHHNP has actively bargained with payors, often proposing and counter-proposing applicable fee schedules, among other terms.
19. MHHNP periodically has polled its physician members, asking each to disclose the minimum fee, typically stated in terms of a percentage of RBRVS, that he or she would accept in return for providing medical services pursuant to future MHHNP-payor agreements. The Board then has calculated minimum acceptable fees for use in payor negotiations, based in part on the information received from physician members concerning their future pricing intentions. The Board has generally set minimum fees at levels which at least 40% of the physician members have indicated would be acceptable to them. Often, MHHNP has begun discussions with a payor regarding a possible contract for physician services by informing the payor that its physician members have minimum fees, which MHHNP provides. MHHNP has then stated that it will not enter into or otherwise forward to its physician members any payor offer that does not satisfy those fee minimums. In some instances, payors have reformulated or revised their planned or proposed fee schedules to satisfy MHHNP’s stated fee minimums, thereby resulting in payor fee offers that exceed the fees that would have been offered absent the participating physicians’ agreement and MHHNP negotiations with payors on behalf of its physician members.

20. In other instances, MHHNP has responded to payor proposals that included fee schedules that did not meet MHHNP physician members' minimum fees for services to be provided, by advising the payors of the established fee minimums and instructing them to resubmit the proposals with fee schedules satisfying those minimums. At other times, MHHNP has rejected the payors' proposed offers, and counter-proposed fee schedules at prices at or above its physician members' agreed-to minimums, and otherwise actively bargained with payors as to fees to be paid MHHNP's physician members. As a result, payors sometimes have either submitted new offers with higher fees or accepted the higher fees counter-proposed by MHHNP on behalf of its physician members.
21. In at least one instance, at the direction of its Board, MHHNP solicited from its physician members the response they wanted MHHNP to give a payor, who had approached MHHNP with an offer. The physician members were told that the Board already had rejected the payor's offer because it was below the minimum threshold level previously set pursuant to physician member surveys. Although the payor had asked MHHNP to messenger its latest offer to MHHNP's physician members for individual opt-in/opt-out decisions, MHHNP instead polled each of its physician members to determine whether or not the Board should accept the latest payor offer. A large majority of physician members voted to agree with the Board's decision to reject the offer. MHHNP then rejected the payor's offer and explicitly refused to forward the offer to any of its physician members, whether or not the proposed fees were above any given physician's stated minimum acceptable fees. Following that refusal and numerous communications between MHHNP, its physician members, and others attacking the payor's fee proposal as "below market," the payor increased proposed fees to the MHHNP fee minimums. Only then did MHHNP enter into a contract and forward the agreement to its physician members, affording them the option to participate (or not) in the payor's offer.
22. In addition, while seeking to negotiate fees on behalf of its physician members, MHHNP has discouraged and prevented payors and participating physicians from negotiating directly with one another. In at least one instance, after MHHNP fee negotiations with a payor broke down, MHHNP discouraged individual physician members from signing individual participation agreements with the payor. This increased the pressure on the payor to contract for the services of MHHNP's physician members through MHHNP, at higher proposed fees. The payor ultimately yielded to that pressure and contracted with MHHNP and its physician members at increased fee levels.
23. MHHNP has on occasion prior to 2000 entered into contracts with payors for physician services that contain a term prohibiting the payor from negotiating individual contracts with MHHNP physician members for a period of several months after either MHHNP or the payor terminates the contract that provided for reimbursement for the services of MHHNP physician members. On other occasions, MHHNP has sought the agreement of other payors to a contract term of this sort. Such a contract term interferes with the ability of a payor to terminate a contract with MHHNP and seek individual agreements with its

physician members at lower fee levels.

### **RESTRAINT OF TRADE**

24. The conduct of MHHNP constitutes combined or concerted action by its physician members. MHHNP, acting as a combination of competing physicians, has acted to restrain competition by, among other things:
- A. facilitating, negotiating, entering into, and implementing agreements among its physician members on price and other competitively significant terms;
  - B. refusing to deal with payors except on collectively agreed-upon terms;
  - C. seeking or entering into contracts with third-party payors that restrict the payors' freedom to enter into contracts with individual physicians following termination of a group contract with MHHNP; and
  - D. negotiating prices and other competitively significant terms in payor contracts for MHHNP's physician members, and refusing to submit payor offers to its physician members that do not conform to MHHNP's standards for contracts.

### **LACK OF SIGNIFICANT EFFICIENCIES**

25. The acts and practices described in Paragraphs 18 through 23, including MHHNP's negotiation of fees and other competitively significant terms of contracts, have not been and are not, reasonably related to any efficiency-enhancing integration.

### **ANTICOMPETITIVE EFFECTS**

26. Respondent MHHNP's actions as described in Paragraphs 18 through 23 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 Houston area in the following ways, among others:
- A. price and other forms of competition among Respondent MHHNP's physician members 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.

27. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 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 eighth day of January, 2004, issues its Complaint against Respondent MHHNP.

By the Commission.

Donald S. Clark  
Secretary

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