

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

_____)	
In the Matter of)	
)	Docket No. C-4054
PHYSICIAN INTEGRATED)	
SERVICES OF DENVER, INC.,)	
a corporation,)	
)	
MICHAEL J. GUESE, M.D., and)	
MARCIA L. BRAUCHLER,)	
individually.)	
_____)	

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 Physician Integrated Services of Denver, Inc. (“Respondent PISD”), Michael J. Guese, M.D. (“Respondent Guese”), and Marcia L. Brauchler (“Respondent Brauchler”) have violated and are violating 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:

RESPONDENTS

PARAGRAPH 1: Respondent PISD is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 850 E. Harvard Street, Suite 455, Denver, CO 80210.

PARAGRAPH 2: Respondent Guese is a physician licensed under the laws of the State of Colorado, with his office and principal place of business located at 850 E. Harvard Street, Suite 455, Denver, CO 80210. Respondent Guese is the President and the sole director of Respondent PISD. Respondent Guese is also the principal negotiator for Respondent PISD.

PARAGRAPH 3: Respondent Brauchler is a consultant to Respondent PISD. The address of her office and principal place of business is at P.O. Box 260661, Littleton, CO 80163-0171.

JURISDICTION

PARAGRAPH 4: At all times relevant to this Complaint, all members of Respondent PISD were primary care physicians engaged in the business of providing health care services for a fee to patients. Except to the extent that competition has been restrained as alleged herein, members of Respondent PISD have been, and are now, in competition with each other for the provision of physician services.

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

PARAGRAPH 6: Respondent PISD has been organized in substantial part, and is engaged in substantial activities, for the pecuniary benefit of Respondent PISD's members and is therefore a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

PARAGRAPH 7: Respondent PISD has approximately 41 members, all of whom are primary care physicians, licensed to practice medicine in the State of Colorado, and engaged in the business of providing primary care physician services to patients. The membership of Respondent PISD consists of internists, pediatricians, family physicians, and general practitioners with offices in the southern part of the Denver metropolitan area ("South Denver area").

PARAGRAPH 8: Physicians often contract with health insurance firms and other third-party payors (hereinafter "payors"), such as preferred provider organizations. Such contracts typically establish the terms and conditions, including fees and other competitively significant 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 payors to lower the price of insurance, and thereby result in lower medical care costs for subscribers to the payors' health insurance plans.

PARAGRAPH 9: Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by third-party payors, competing physicians decide individually whether to enter into contracts with third-party payors to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

PARAGRAPH 10: Medicare’s Resource Based Relative Value System (“RBRVS”) is a system used by the 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. It is the practice of payors in the South Denver area to make contract offers to individual physicians at a fee level specified in the RBRVS for a particular year, plus a markup based on some percentage of that fee (*e.g.*, “110 percent of 2001 RBRVS”).

PARAGRAPH 11: In order to be competitively marketable in the South Denver area, a payor’s health insurance plan must include in its physician network a large number of primary care physicians who practice in the South Denver area. Many of the primary care physicians who practice in the South Denver area are members of Respondent PISD.

PARAGRAPH 12: 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 a messenger may not, however, consistent with a competitive model, negotiate fees and other competitively significant terms on behalf of the participating physicians, or 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.

RESTRAINT OF TRADE

PARAGRAPH 13: Respondents PISD and Guese, acting as a combination of competing physicians, and Respondent Brauchler, in conspiracy with Respondent PISD and at least some of Respondent PISD’s members, respectively, have acted to restrain competition by, among other things:

- A. facilitating, negotiating, entering into, and implementing agreements among Respondent PISD’s members on fees and other competitively significant terms;
- B. refusing to deal with payors except on collectively agreed-upon terms; and
- C. negotiating uniform fees and other competitively significant terms in payor contracts for Respondent PISD’s members, and refusing to submit payor offers to members that do not conform to Respondent PISD’s standards for contracts.

FORMATION AND OPERATION OF RESPONDENT PISD

PARAGRAPH 14: Respondent Guese and others formed Respondent PISD in November 1999 to be a vehicle for physicians' collective contract negotiations with payors, in order to achieve contracts that contain higher fees and other, more advantageous terms than individual members could obtain by negotiating unilaterally with payors. Respondents sought to replace individual physician-payor contracts with a single PISD-payor contract that contained such higher fees and other terms for all members of Respondent PISD.

PARAGRAPH 15: In or about December 1999, Respondent PISD, at Respondent Guese's direction, retained Respondent Brauchler to help coordinate and manage Respondent PISD's payor contracting activities and to assist in renegotiating payor contracts previously entered into by members of Respondent PISD on a unilateral, rather than collective, basis. Thereafter, on behalf of Respondent PISD's collective membership, Respondent Guese and Respondent Brauchler negotiated with payors for higher fees and other, more economically advantageous contract terms.

PARAGRAPH 16: To join Respondent PISD, physicians sign an agreement that authorizes Respondent PISD to negotiate, on their behalf, fees and other contract terms with payors. Members authorize Respondent PISD to negotiate "non-risk" contracts, which are accepted only if first approved by a majority of Respondent PISD's members. Non-risk contracts do not involve sharing between physicians and payors of financial risk through arrangements such as capitation or fee withholds. Upon such approval, Respondent PISD executes a contract with a payor.

PARAGRAPH 17: Respondents have a practice – inconsistent with a messenger model arrangement – of refusing to convey to Respondent PISD's members the terms of payor offers that Respondents deem deficient. Respondents instead demand, and receive, from payors more favorable contract terms – terms that payors would not have offered to Respondent PISD's members had those members negotiated on a unilateral, rather than collective, basis. Only after payors accede to Respondents' demand for higher fees and other favorable terms do Respondents convey the contract in question to Respondent PISD's members for approval.

PARAGRAPH 18: Respondent PISD's members authorized Respondents Guese and Brauchler to act as their exclusive bargaining agents. Respondent Brauchler reported to Respondent PISD's members on the details of her negotiations with payors, including on the status of fee negotiations and the specific fee levels that were discussed. Respondents Guese and Brauchler also held general PISD membership meetings to discuss details of payor contract negotiations and overall contract strategy.

PARAGRAPH 19: In negotiations with payors, Respondents Guese and Brauchler used a “contract-or-no-contract” strategy, through which the payor could either contract on PISD’s terms and likely have all of the members of PISD in the provider network, or not contract on PISD’s terms and have few or none of the PISD members in the network. Respondents Guese and Brauchler would either recommend that PISD members approve a negotiated contract, or, if respondents were unable to negotiate acceptable terms, refuse to convey the payor’s offer to members.

PARAGRAPH 20: Respondents Guese and Brauchler told payors that Respondent PISD’s members would deal with them only if the payor agreed to PISD’s collectively determined terms. This assertion was demonstrated when payors attempted unsuccessfully to deal individually with members of Respondent PISD – only to be told by the members that they would contract for services only through Respondent PISD. Respondents’ strategy of collective negotiations and concerted refusals to deal outside PISD left payors in the untenable position of having to pay higher fees to all members of Respondent PISD, or being denied such members’ inclusion in their respective health insurance plan’s provider networks – an outcome that would have substantially impaired payors’ ability to compete effectively.

NEGOTIATIONS WITH PACIFICARE

PARAGRAPH 21: PacifiCare Health Systems of Colorado, Inc. (“PacifiCare”) is a payor doing business in the South Denver area. In December 1999, Respondent Guese and other members of Respondent PISD signed and had delivered to PacifiCare letters demanding that the payor recognize Respondent PISD as its members’ negotiating agent for both the commercial and Medicare lines. In meetings with PacifiCare, Respondents Brauchler and Guese specified minimum fees, annual increases in such fees, and an “administrative” fee that PacifiCare had to pay in order to contract with Respondent PISD as an entity and thereby enlist Respondent PISD’s members into PacifiCare’s network of health plan physicians. Respondents Brauchler and Guese asserted that Respondent PISD’s members would not accept, as part of any agreement, financial risk-sharing, including capitation or fee withholds. They also emphasized to PacifiCare that Respondent PISD’s members were negotiating collectively through Brauchler and Guese, and that PacifiCare had no choice but to adopt the terms that Respondent PISD was demanding in order to have individual members of Respondent PISD under contract.

PARAGRAPH 22: PacifiCare approached Respondent PISD’s members individually with independent contract proposals, but the members refused to negotiate unilaterally. Respondent PISD’s members told PacifiCare that it could deal with them only on a collective basis through Respondent PISD, and in particular through Respondent PISD’s negotiators, Respondents Brauchler and Guese. Respondents’ employment of such tactics exerted the members’ collective power to obtain higher fees in a group contract than each physician might have obtained acting individually.

PARAGRAPH 23: Concerned that it otherwise would have an unmarketable health insurance plan because of a limited primary care physician network in the South Denver area, PacifiCare entered a fee-for-service contract with Respondent PISD at the higher contract rate that the members, through Respondent PISD, collectively demanded. PacifiCare also agreed to Respondent PISD's demand for annual fee increases tied to the inflation rate, the potential for bonus incentives, administrative fees to Respondent PISD, and other miscellaneous fees, all of which were concessions that PacifiCare made in response to Respondent PISD's coercive tactics. Only after Respondent PISD's collectively determined terms were met did Respondent PISD accept the PacifiCare contract and mail it to members of Respondent PISD for their acceptance.

NEGOTIATIONS WITH AETNA

PARAGRAPH 24: Aetna U.S. Healthcare ("Aetna") is a payor doing business in the South Denver area. In April 2000, Aetna offered individual contracts to physicians who were members of Respondent PISD. Respondent Brauchler, upon learning that Aetna was contacting Respondent PISD's members on an individual rather than collective basis, asked each member to write a letter to Aetna, notifying it that said physician would deal only through Respondent PISD and that Aetna should direct all further contacts to Respondent Guese. Most of the members of Respondent PISD, acting on Respondent Brauchler's request, sent the requested letter to Aetna.

PARAGRAPH 25: Aetna refused to sign a single contract with Respondent PISD that covered all its members, but negotiated with Respondent PISD in its role as the members' exclusive bargaining agent. To obtain contracts with PISD members, Aetna agreed to offer them a contract at the higher RBRVS level that Respondent PISD had demanded; and most if not all of PISD's members thereafter signed contracts.

NEGOTIATIONS WITH ANTHEM

PARAGRAPH 26: Anthem Blue Cross and Blue Shield of Colorado ("Anthem") is a payor doing business in the South Denver area. In mid-2000, Respondent Brauchler contacted Anthem to initiate negotiations on behalf of Respondent PISD's members. At that time, all members of Respondent PISD held individual contracts with Anthem at competitive market rates. Anthem at first refused to negotiate with Respondent Brauchler because it already had contracts with Respondent PISD's individual member physicians. Respondents, however, attempted to force Anthem into dealing with Respondent PISD for new contracts for its members.

PARAGRAPH 27: Respondents Brauchler and Guese subsequently met with Anthem representatives and told them that, in order to reach an agreement with Respondent PISD, Anthem had to offer fees equal to a specified percentage of RBRVS. These fees were not only well above the fees that Anthem was currently paying the individual physicians, but also well above the fees contained in Respondent

PISD's contract with PacifiCare. Respondents Guese and Brauchler emphasized to Anthem that they were negotiating fees for the collective benefit of the members of Respondent PISD, that the PISD contract with PacifiCare had established new "minimum" fees, and that Respondent PISD's members would not enter contracts for fees lower than the aforementioned percentage of RBRVS.

PARAGRAPH 28: On or about April 27, 2001, Anthem submitted a fee offer to Respondents that was higher than the fees contained in Anthem's contracts with individual members of Respondent PISD, but lower than the fee levels demanded by Respondents Guese and Brauchler. Anthem's offer equaled the highest fees that it was paying to any physicians in the Denver area. Respondents refused to convey Anthem's offer to Respondent PISD's members, however, because it did not meet the fee levels that Respondents Guese and Brauchler demanded.

PARAGRAPH 29: Respondents Guese and Brauchler urged Respondent PISD's members to send contract termination notices to Anthem, and to advise Anthem that it could deal with them in the future only through Respondent PISD. At least 36 of the approximately 41 members of Respondent PISD terminated their individual contracts with Anthem in this fashion. Some of those terminating members had signed their Anthem contracts only a few months earlier.

PARAGRAPH 30: Anthem attempted to bypass Respondents by sending its contract proposal directly to individual members of Respondent PISD, but this approach failed. The members again told Anthem that they would deal only through Respondent PISD, and that Anthem must negotiate for their services exclusively with Respondents Guese and Brauchler.

PARAGRAPH 31: In the summer of 2001, Anthem continued to attempt to reach a compromise on fees with Respondents Brauchler and Guese, but was unsuccessful. Respondents rejected Anthem's offer and negotiations ended. Most members of Respondent PISD continue to refuse to enter into individual contracts with Anthem.

NEGOTIATIONS WITH OTHER PAYORS

PARAGRAPH 32: Since the inception of Respondent PISD in 1999, Respondents Guese and Brauchler have informed other payors that Respondent PISD represented the collective interest of its members, and that Respondent PISD would negotiate and sign contracts on behalf of all its members. Respondents also informed these payors of the specific fees that Respondents demanded as a condition for signing a contract, emphasizing that Respondent PISD would likely refuse any fee lower than a specified percentage of Medicare RBRVS. To exert pressure on and coerce these payors into paying higher fees, Respondent PISD's members sent termination letters to such payors, informing the payors that they would not negotiate individually, and told the payors to deal for members' services only through Respondent PISD. Respondent PISD's coercive tactics have been successful. It has obtained contracts with at least two other payors for fees matching or exceeding Respondent PISD's desired percentage of RBRVS.

LACK OF SIGNIFICANT EFFICIENCIES

PARAGRAPH 33: In collectively negotiating and entering the contracts identified above, Respondent PISD and its members refused to consider any form of financial risk-sharing and have not integrated their practices to create sufficient potential efficiencies. Respondents' joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

ANTICOMPETITIVE EFFECTS

PARAGRAPH 34: Respondents' actions described above in Paragraphs 13 through 33 have had, or have the tendency to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the South Denver area in the following ways, among others:

- A. fees and other forms of competition among Respondent PISD's members were unreasonably restrained;
- B. fees for physician services were increased; and
- C. competition in the purchase of physician services was restrained to the detriment of health plans, employers, and individual consumers.

PARAGRAPH 35: 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 Sixteenth day of July, 2002, issues its Complaint against Respondents PISD, Guese, and Brauchler.

By the Commission.

Donald S. Clark
Secretary