

TRANSACTION GRANTED EARLY TERMINATION—Continued

ET date	Trans No.	ET req status	Party name
29–JAN–10	20100018	G	Airvana, Inc.
		G	Airvana, Inc.
	20100019	G	Coventry Health Care, Inc.
		G	Marian Health System, Inc.
		G	Preferred Health Systems, Inc.
	20100317	G	Coventry Health Care, Inc.
		G	Ascension Health.
		G	Preferred Health Systems, Inc.
	20100340	G	Novartis Pharma AG.
		G	Corthera, Inc.
		G	Corthera, Inc.
	20100344	G	Pattern Energy Group Holdings LP.
		G	Babcock & Brown Limited (Liquidators Appointed).
		G	Texas Gulf Wind LLC.
	20100329	G	China National Petroleum Corporation.
		G	ION Geophysical Corporation.
		G	ION Geophysical Corporation.
	20100350	G	EMC Corporation.
		G	Yahoo! Inc.
		G	Zimbra, Inc.
	20100352	G	Shenandoah Valley Electric Cooperative.
		G	Allegheny Energy, Inc.
		G	The Potomac Edison Company.
	20100356	G	Rappahannock Electric Cooperative.
		G	Allegheny Energy, Inc.
		G	The Potomac Edison Company.
	20100362	G	GridPoint, Inc.
		G	David Gelbaum and Monica Chavez Gelbaum.
G		Standard Renewable Energy, LP.	
20100363	G	Molina Healthcare, Inc.	
	G	Unisys Corporation.	
	G	Unisys Corporation.	
20100368	G	Elevation Partners, L.P.	
	G	Yelp!, Inc.	
	G	Yelp!, Inc.	
20100372	G	Limelight Networks, Inc.	
	G	EyeWonder, Inc.	
	G	EyeWonder, Inc.	

FOR FURTHER INFORMATION CONTACT:

Sandra M. Peay, Contact Representative or Renee Hallman, Contact Representative, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H-303 Washington, DC 20580, (202) 326-3100.

By Direction of the Commission.

Donald S. Clark,
Secretary.

[FR Doc. 2010-3590 Filed 2-25-10; 8:45 am]

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FEDERAL TRADE COMMISSION

[File No. 051 0252]

M. Catherine Higgins; Analysis of the Agreement Containing Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order — embodied in the

consent agreement — that would settle these allegations.

DATES: Comments must be received on or before March 8, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to “M. Catherine Higgins, File No. 051 0252” to facilitate the organization of comments. Please note that your comment — including your name and your state — will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (<http://www.ftc.gov/os/publiccomments.shtm>).

Because comments will be made public, they should not include any sensitive personal information, such as

an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . ." as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).¹

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (<http://www.ftc.gov/opa/2008/12/allcare.shtml>) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (<http://www.ftc.gov/opa/2008/12/allcare.shtml>). If this Notice appears at (<http://www.regulations.gov/search/index.jsp>), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (<http://www.ftc.gov/>) to read the Notice and the news release describing it.

A comment filed in paper form should include the "M. Catherine Higgins, File No. 051 0252" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission

is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (<http://www.ftc.gov/os/publiccomments.shtml>). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (<http://www.ftc.gov/ftc/privacy.shtml>).

FOR FURTHER INFORMATION CONTACT: Gary H. Schorr (202-326-3063), Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for February 5, 2010), on the World Wide Web, at (<http://www.ftc.gov/os/actions.shtml>). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an

agreement containing a proposed consent order with M. Catherine Higgins ("Ms. Higgins"), the executive director of the Boulder Valley Individual Practice Association ("BVIPA"). The agreement settles charges that Ms. Higgins violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, among other things, orchestrating and implementing agreements among competing physician members of BVIPA to fix the prices at which BVIPA physicians contract with health plans.

This matter relates to the Commission's prior action against BVIPA. In December 2008, the Commission accepted for public comment a proposed consent order to settle charges that BVIPA orchestrated and carried out illegal agreements to set prices and other terms that BVIPA physicians would accept from health plans. The accompanying complaint against BVIPA alleged that the IPA's executive director, Ms. Higgins, played a key role in the challenged conduct; the complaint did not, however, name her as a respondent. The order against BVIPA, by its terms, applies to Ms. Higgins' conduct as the executive director of BVIPA but does not apply to her actions in her individual capacity.

Based on Ms. Higgins' conduct after BVIPA signed its consent order, the Commission has reason to believe that Ms. Higgins may attempt to evade the order's prohibitions by acting in her individual capacity. There is evidence that, shortly after BVIPA signed the consent agreement, Ms. Higgins represented physicians in her individual capacity. As alleged in today's complaint ("Complaint"), Ms. Higgins told an insurer that she could continue to negotiate fees on behalf of BVIPA physicians, declaring:

I could do this as an individual, not with my BVIPA hat, but as an individual. I'm not named in the settlement. There's nothing that precludes me from doing my own work. I could just do it outside.

Absent an order against Ms. Higgins in her individual capacity, there is a substantial danger that she will continue to orchestrate unlawful price fixing agreements among physicians in the Boulder County area and that consumers will continue to suffer the adverse effects of her conduct.²

² The U.S. Supreme Court has clearly held that it is appropriate for the Commission to name individuals, as well as organizations, where evidence exists that an individual otherwise would be likely to "evade orders by the Commission." Fed. Trade Comm'n v. Standard Education Soc., 302 U.S. 112, 119 (1937).

¹ The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See FTC Rule 4.9(c), 16 CFR 4.9(c).

The proposed consent order ("Proposed Order") has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received and decide whether to withdraw from the agreement or make the Proposed Order final.

The purpose of this analysis is to facilitate public comment on the Proposed Order. The analysis is not intended to constitute an official interpretation of the agreement and Proposed Order or to modify their terms in any way. Further, the Proposed Order has been entered into for settlement purposes only and does not constitute an admission by Ms. Higgins that she violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the Complaint are summarized below.

Ms. Higgins is the executive director of BVIPA, an association of approximately 365 independent primary care and specialist physicians in solo or small group practices in the Boulder County area that contracts with payers on behalf of its physician members. As part of Ms. Higgins' duties, BVIPA's Board granted her blanket authority to negotiate contracts with payers on behalf of BVIPA and its physician members, including the authority to enter into contracts without obtaining approval from the BVIPA Board, Finance Committee, or any of its members.

The Complaint challenges Ms. Higgins' conduct starting in 2001, when she began negotiating the prices and other terms at which BVIPA's otherwise competing physicians would deal with payers. From approximately 2001 through 2006, Ms. Higgins negotiated with numerous payers on behalf of BVIPA physicians and successfully extracted higher fees from them. In order to maximize BVIPA's bargaining leverage, Ms. Higgins exhorted BVIPA members to contract jointly through BVIPA, rather than individually. For example, in a 2002 BVIPA newsletter, Ms. Higgins reminded BVIPA members that "our strength will lie in contracting together, not separately." In reporting that BVIPA had signed a new contract at a favorable rate, Ms. Higgins noted that "[t]his is due to your support of our efforts and [the payer's] inability to get providers to sign individual contracts. Thank you for your support!!"

Beginning in late in 2007 and continuing until early 2009, Ms. Higgins, as BVIPA's executive director, negotiated and consulted for some of BVIPA's physician members who sought to contract individually with a payer, thereby facilitating the exchange of rate information among them, and facilitating the coordination of rates during the individual negotiations.

As a result of Ms. Higgins' collective negotiations of physician fees for BVIPA members, payers contracted with and reimbursed BVIPA members for physician services in Boulder County at rates approximately 15 to 27 percentage points higher than those paid in individual contracts with non-member physicians in Boulder County.

In 2004, Ms. Higgins drafted and gave a "white paper" to payers at the start of a negotiation, which purported to offer three options for contracting with BVIPA members: a single-signature contract that "delivered the entire BVIPA network"; a "modified messenger model" that "may or may not deliver our entire network"; and direct contracting with individual members outside the IPA. BVIPA's contracting practices and Ms. Higgins' conduct, however, did not change. BVIPA still sent proposals to BVIPA's individual members for review only after Ms. Higgins deemed the prices acceptable. Further, many BVIPA physicians refused to discuss contracting on an individual basis, instead, referring the payers to BVIPA, and others offered to negotiate individual contracts with Ms. Higgins representing them in their individual capacity.

Ms. Higgins' conduct had the effect of unreasonably restraining trade and hindering competition in the provision of physician services by unreasonably restraining price and other forms of competition among physicians; increasing prices for physician services; and depriving health plans, employers, and individual consumers of the benefits of competition among physicians. BVIPA members did not engage in any efficiency-enhancing integration of their practices sufficient to justify Ms. Higgins' challenged conduct. Accordingly, the Complaint alleges that Ms. Higgins violated Section 5 of the FTC Act.

The Proposed Consent Order

The Proposed Order is designed to remedy the illegal conduct charged in the Complaint and to prevent its recurrence. To preserve the ability to engage in potentially procompetitive conduct while ensuring that physicians reach contracting decisions independently, the Proposed Order also

includes certain "fencing-in" limitations on Ms. Higgins' activities. The Proposed Order is otherwise similar to prior consent orders the Commission has issued to settle charges that individuals, as well as physician groups, engaged in unlawful agreements to raise the fees that physician groups receive from health plans.

The Proposed Order's specific provisions are as follows:

Paragraph II.A prohibits Ms. Higgins from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician's behalf; (2) to refuse to deal, or threaten to refuse to deal, with payers in furtherance of any conduct or agreement prohibited by any other provision of Paragraph II; (3) on any terms on which a physician is willing to deal with any payer; or, (4) not to deal individually with any payer, or not to deal with any payer other than through BVIPA.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Ms. Higgins from facilitating exchanges of information between physicians concerning any physician's willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D. proscribes Ms. Higgins from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing collective bargaining on behalf of providers with health care purchasers, Paragraph II excludes certain kinds of agreements from its prohibitions. Thus, Ms. Higgins is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a "Qualified Risk-Sharing Joint Arrangement" or a "Qualified Clinically-Integrated Joint Arrangement." The arrangement, however, must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

As defined in the Proposed Order, a "Qualified Risk-Sharing Joint Arrangement" possesses two characteristics. First, all physician participants must share substantial financial risks through the arrangement, such that the arrangement creates incentives for the physician participants jointly to control costs and improve

quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A "Qualified Clinically-Integrated Joint Arrangement," on the other hand, need not involve any sharing of financial risk. Instead, as defined in the Proposed Order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning prices or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III, one of the fencing-in prohibitions, limits for one year Ms. Higgins' activities as an agent or messenger with regard to payer contracts. Subject to the notification requirement of Paragraph V, Ms. Higgins may only receive and transmit offers and responses to those offers between payers and physicians. Paragraph VI sets out the information necessary to make the notification complete.

Paragraph IV, another fencing-in provision, prohibits Ms. Higgins for two years from negotiating on behalf of or advising any physician member of BVIPA with regard to any payer contract offer or term. Both Paragraphs III and Paragraph IV exclude from their prohibitions, however, information Ms. Higgins may provide regarding whether any contract for proposed physician services includes terms required by Colorado state law. Paragraph IV further excludes from its prohibition certain negotiations should Ms. Higgins cease to be employed by BVIPA.

Paragraph V requires Ms. Higgins to notify the Commission, for one year before acting as a limited messenger, and for an additional two years before acting as a messenger or agent, with payers regarding contracts. Paragraph VI sets out the information necessary to make the notification complete.

Paragraph VII requires Ms. Higgins for three years to notify the Commission before contracting with health plans on behalf of either a Qualified Risk-Sharing or a Qualified Clinically-Integrated Joint Arrangement. Paragraph VIII sets out the information necessary to satisfy the notification requirement.

Paragraphs IX, X, and XI impose various obligations on Ms. Higgins to

report or provide access to information to the Commission to facilitate the monitoring of compliance with the Order. Finally, Paragraph XII provides that the Proposed Order will expire in 20 years.

By direction of the Commission, Commissioner Rosch dissenting.

Donald S. Clark
Secretary.

Statement of the Commission

Today, the Commission issues for public comment a consent agreement and proposed Decision and Order against M. Catherine Higgins, the executive director of Boulder Valley Individual Practice Association (BVIPA). The Commission previously accepted for public comment a consent agreement and proposed Decision and Order against BVIPA, resolving charges that BVIPA orchestrated and carried out illegal agreements to set prices and other terms that BVIPA physician members would accept from health plans.³ Based on events that occurred during the BVIPA public comment period, the Commission has reason to believe that an order naming Ms. Higgins is necessary. When an employee of an association, especially a senior one like Ms. Higgins, tries to evade an order against the association by acting in her individual capacity, the Commission has little choice but to seek additional relief to protect competition and health care consumers.

The proposed order against BVIPA, by its terms, covers Ms. Higgins' conduct as the executive director of BVIPA,⁴ but does not apply to Ms. Higgins' actions in her individual capacity. There is evidence, however, that Ms. Higgins attempted to evade the BVIPA consent order shortly after it was signed by representing physicians in her individual capacity. As alleged in the draft complaint that accompanies the settlement announced today, Ms. Higgins told an insurer that she could continue to negotiate fees on behalf of BVIPA physicians, declaring:

"I could do this as an individual, not with my BVIPA hat, but as an individual. I'm not named in the settlement. There's nothing that

precludes me from doing my own work. I could just do it outside."⁵

Based on this and other evidence discussed more fully below, we find reason to believe that, absent the Commission's order, Ms. Higgins is likely to continue to negotiate potentially unlawful agreements in her individual capacity, thus skirting an order prohibiting the same conduct by BVIPA. This alleged conduct, which likely would harm consumers and competition, requires the Commission to issue a complaint against Ms. Higgins, and also provides a sound basis for the Commission to accept a consent order against her.

In light of Commissioner Rosch's dissenting statement, we write to further explain the basis for today's Commission action.

The Commission's Decision to Issue a Complaint Against Ms. Higgins is Necessary

We respectfully disagree with Commissioner Rosch's view that the acts alleged do not justify a complaint against Ms. Higgins.

Ms. Higgins played a central role in BVIPA's negotiations with insurers. As alleged in the complaint, Ms. Higgins had "blanket authority" to negotiate and enter contracts on behalf of BVIPA's members.⁶ For a period of five years, according to the complaint, she "successfully extracted higher fees" from payers on behalf of individual competing physicians, often threatening to terminate contracts unless the insurer accepted a price increase, while reminding BVIPA members that "our strength will lie in contracting together, not separately."⁷ That conduct allegedly increased fees by 15 to 27 percentage points above the prices paid to other area doctors who negotiated individually.⁸

In December 2008, the Commission chose not to name Ms. Higgins in the BVIPA order because the order would, by its terms, cover conduct by officers, employees, and other representatives of BVIPA, including her actions as executive director.⁹ Based on Ms. Higgins' actions after the BVIPA proposed consent agreement was signed, however, the Commission has reason to believe that, absent injunctive relief against her in her individual

³ In the Matter of Boulder Valley Individual Practice Ass'n, FTC File No. 051-0252, *Analysis of Agreement Containing Consent Order to Aid Public Comment* (Dec. 24, 2008), available at (<http://www2.ftc.gov/os/caselist/0510252/081224boulderanal.pdf>).

⁴ See In the Matter of Boulder Valley Individual Practice Ass'n, *supra* note 1 (draft Decision and Order issued Dec. 24, 2008), ¶ I.A, available at (<http://www2.ftc.gov/os/caselist/0510252/081224bouldedo.pdf>) [hereinafter BVIPA Order].

⁵ In the Matter of M. Catherine Higgins, FTC File No. 051-0252 (draft complaint issued Feb. 5, 2010), ¶ 3, available at (www.ftc.gov) [hereinafter Higgins Complaint].

⁶ Higgins Complaint ¶ 19.

⁷ *Id.* ¶¶ 20, 21, 34-36.

⁸ *Id.* ¶ 25.

⁹ BVIPA Order ¶ I.A.

capacity, Ms. Higgins is likely to engage in conduct that is prohibited by the BVIPA order.¹⁰

There is no support for Commissioner Rosch's assertion that the Commission's decision to issue a separate complaint against Ms. Higgins is punitive. The order provisions are similar to those in other orders naming individuals. For a period of time, the respondent may act only as a limited messenger;¹¹ in addition, the respondent may not represent both the IPA and, separately, individual doctors or practices.¹² Especially given the evidence of Ms. Higgins' efforts to circumvent the order against BVIPA, the order against Ms. Higgins is a reasonable way to prevent future price fixing.

Nor is the Commission renegeing on any "deal" it made with BVIPA.¹³ Rather, the proposed order announced today is a natural consequence of actions Ms. Higgins took after the BVIPA consent agreement was signed.¹⁴ The Commission cannot – and did not

¹⁰ The U.S. Supreme Court has clearly held that it is appropriate for the Commission to name individuals, as well as organizations, where evidence exists that an individual otherwise would be likely to "evade orders of the Commission." Fed. Trade Comm'n v. Standard Education Soc., 302 U.S. 112, 119 (1937). Nor is today's action unprecedented. The Commission previously has named individuals and secured relief against them, including non-physician contracting agents in IPA consent orders. See, e.g., White Sands Health Care System, LLC, FTC Dkt. No. C-4130 (consent order issued Jan. 11, 2005); Southeastern New Mexico Physicians IPA, Inc., FTC Dkt. No. C-4113 (consent order issued Aug. 5, 2004); The Maine Health Alliance, FTC Dkt. No. C-4095 (consent order issued Aug. 27, 2003).

¹¹ Piedmont Health Alliance, Inc., FTC Dkt. No. 9314 (consent order issued Oct. 1, 2004).

¹² New Century Health Quality Alliance, Inc., FTC Dkt. No. C-4169 (consent order issued Sep. 29, 2006); White Sands Health Care System, LLC, FTC Dkt. No. C-4130 (consent order issued Jan. 11, 2005); Physician Network Consulting, LLC, FTC Dkt. No. C-4094 (consent order issued Aug. 27, 2003).

¹³ Commissioner Rosch's dissenting statement implies that the Commission's decision not to name Ms. Higgins back in December 2008 was a *quid pro quo* for BVIPA's acceptance of the proposed consent agreement. In the Matter of M. Catherine Higgins, *supra* note 3, Dissenting Statement of Commissioner J. Thomas Rosch, at 2, *available at* (www.ftc.gov) [hereinafter Rosch Dissent]. We disagree with Commissioner Rosch's interpretation of the facts. Moreover, BVIPA has not suggested that such an agreement ever existed. Nor has BVIPA argued that the Commission should not finalize the BVIPA consent order.

¹⁴ Commissioner Rosch's dissenting statement suggests that Ms. Higgins may not have understood that the proposed consent agreement required immediate compliance from the time it was signed. Rosch Dissent at 2. Our decision is not based on whether Ms. Higgins thought the order was effective. Rather, the order against Ms. Higgins is justified by her belief that acting in her individual capacity would put her beyond the order's reach, even once the order was effective. Moreover, she knew or should have known, based on the action against BVIPA, that jointly negotiating on behalf of physicians was illegal.

– bargain away its right to secure adequate relief to protect consumers.

The BVIPA Enforcement Action is Consistent with the Commission's Prior IPA Cases

Although Commissioner Rosch continues to support entering a final Decision and Order against BVIPA, he states that the BVIPA order is "not just a logical successor to other finalized decrees the Commission entered against" IPAs.¹⁵ We disagree; the order the Commission proposes to enter against BVIPA is no different than numerous orders the Commission has entered against other IPAs. As in a number of other cases, the Commission has alleged that BVIPA jointly negotiated prices with insurers. And, the BVIPA order, like all of the orders in those cases, bans joint negotiations except where reasonably necessary to the formation or operation of a clinically or financially integrated arrangement.¹⁶

Finally, we note three areas where we disagree, on factual and legal grounds, with the views expressed by Commissioner Rosch in his dissent. First, we disagree with Commissioner Rosch's interpretations of *International Healthcare Management* and *Tunica Web Advertising*. Neither the inclusion of non-price terms in negotiations among competitors, nor customer acquiescence to a *per se* illegal agreement among competitors, insulates such an agreement among competitors from *per se* treatment.

Second, we do not think this situation raises any legal issues surrounding non-price negotiations because BVIPA's negotiations were primarily focused on raising prices. At most, any discussion of non-price terms was tangential to joint negotiations of price terms.

Third, we reject any implication that if conduct is not a *per se* violation of the antitrust laws, it can be prohibited only by virtue of "fencing-in" relief.

Irrespective of whether facts such as those presented in this case ultimately could support a *per se* violation of the antitrust laws, we have reason to believe that the conduct in which BVIPA allegedly engaged would violate Section 5 of the Federal Trade Commission Act if allowed to continue. Further, in light

¹⁵ Rosch Dissent at 1.

¹⁶ See especially *Independent Physician Associates Medical Group, Inc., d/b/a AllCare IPA*, FTC Dkt. No. C-4245, (consent order issued Feb. 2, 2009) (unanimous Commission vote, including Commissioner Rosch); *Colegio de Optometras*, FTC Dkt. No. C-4199 (consent order issued Sept. 6, 2007) (same); *Advocate Health Partners*, FTC Dkt. No. C-4184 (consent order issued Dec. 29, 2007) (same); *New Century Health Quality Alliance, Inc.*, FTC Dkt. No. C-4169 (consent order issued Sept. 29, 2006) (same).

of Ms. Higgins' alleged attempts to evade the order against BVIPA, we believe an order against her is proper and necessary.¹⁷

Dissenting Statement of Commissioner J. Thomas Rosch

Today's events represent a sad conclusion to an unnecessarily sordid tale. Four years ago, in October 2005, the Commission opened an investigation into whether the Boulder Valley Individual Practice Association ("Boulder Valley" or "BVIPA") and Mary Catherine Higgins (Boulder Valley's Executive Director) violated the antitrust laws by allowing competing physicians to jointly negotiate terms with payors. Boulder Valley ultimately agreed to enter into a consent decree. That consent decree, however, was not just a logical successor to other finalized decrees the Commission has entered against Individual Practice Associations ("IPAs") composed of competing physicians who have jointly negotiated rates with payors. The underlying conduct in those cases was horizontal price-fixing – which is *per se* illegal, or, to be charitable, conduct that violates the rule of reason. See *In re N. Tex. Specialty Physicians*, 140 F.T.C. 715 (2005), *aff'd*, 528 F.3d 346 (5th Cir. 2008). Boulder Valley's underlying conduct, however, consisted at least in part of joint negotiation of non-price terms – conduct that is not a *per se* violation. See *Internat'l Healthcare Mgmt. v. Haw. Coal. for Health*, 332 F.3d 600, 605 (9th Cir. 2003). Moreover, insofar as Boulder Valley's underlying conduct did consist of joint negotiation of rates, it consisted, in part, of alleged horizontal price-fixing in which some of the alleged "victims" were payors who agreed to the conduct, apparently believing joint negotiation of rates to be efficient and in the payors' self-interest. Joint negotiations by horizontal competitors with those who invite those joint negotiations are not a *per se* antitrust violation either. *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 410 (5th Cir. 2007). Thus, insofar as the consent decree against Boulder Valley bars either of these kinds of conduct, it can legitimately do so only by way of "fencing-in" or not at all. Boulder Valley chose not to litigate these issues, instead electing to enter into a consent decree that names Boulder Valley alone and not Ms. Higgins as a respondent. This was

¹⁷ Because this matter relates to the matter against BVIPA, the Commission will defer a decision to make final the order against BVIPA until after the close of the comment period for the proposed order against Ms. Higgins.

consistent with Commission practice: when an individual is just an employee of the organizational respondent (as opposed to an owner of the organization or someone who is shown to control the organization's decisions), the Commission has rarely named the individual as a separate respondent; it has instead simply provided that the order will apply to the directors of the organizational respondent, its officers, and employees. Despite my doubts about whether liability based on the two species of conduct discussed above could be found, I found that there was "reason to believe" that Boulder Valley could be fenced-in in this fashion, and I voted for the decree.¹ One of the factors I considered, however, was that Ms. Higgins was not joined as a respondent.

Thereafter, it is undisputed that the following events occurred. First, Ms. Higgins denounced the consent decree in the press, asserting, among other things, that Boulder Valley had agreed to the consent decree only to avoid the substantial expense that litigation would entail.² Second, in response to the notice for public comment on Boulder Valley's proposed consent, Anthem Blue Cross Blue Shield complained that "the terms of the Consent Order may be interpreted to allow individuals associated with . . . BVIPA" to continue to attempt to facilitate collusive pricing.³ Third, following those complaints and conversations with Anthem, staff notified Ms. Higgins that it was evaluating whether to add her to the *Boulder Valley* complaint or name her separately. Fourth, Ms. Higgins then separately met with the Commissioners (with the exception of the undersigned) in an effort to persuade them not to pursue her individually. Fifth, following those meetings, staff offered Ms. Higgins a consent decree that restricts Ms. Higgins's ability to participate in a pure "messenger system" in obtaining rates for those physicians that Boulder Valley represents. Sixth, Ms. Higgins rejected that consent decree, but rather than litigate, the Commission has since

agreed to a consent decree that (unlike the Commission's consent decree with Boulder Valley) (1) restricts Ms. Higgins to a limited messenger model for one year and (2) prevents Ms. Higgins from negotiating with any payor on behalf of any physician that participates in the BVIPA for two years.

Under these circumstances, I cannot vote in support of the consent decree against Ms. Higgins. First, I do not believe that the Commission has adduced evidence that warrants switching its stance from not naming Ms. Higgins at all to requiring her to enter into a consent decree that restricts her ability to participate in a pure "messenger system." There is a factual dispute as to whether when Ms. Higgins made her post-consent statements to Anthem, Ms. Higgins understood that she (or Boulder Valley) was subject to the binding consent decree in *Boulder Valley*, which had not yet been made final. I do not believe that such disputed facts supply a sufficient basis for the Commission to now proceed against Ms. Higgins separately and require that she engage in more restrictive conduct as a condition of settlement.

Second, in my view, the Commission's decision today is unnecessarily punitive: Ms. Higgins cannot possibly do her job to the fullest extent for Boulder Valley if she is limited in her conduct as described. Moreover, I am gravely concerned that the Commission's abrupt decision to change its tune can be viewed as retaliation for Ms. Higgins's decision to exercise her First Amendment rights when she publicly criticized the Commission's initial decision against Boulder Valley and for her ensuing decision to meet individual Commissioners in an effort to persuade them not to pursue her separately.

Third, I believe that by separately naming Ms. Higgins, the Commission has reneged on its deal. Such actions will inevitably undermine the Commission's ability to effectively negotiate consent decrees in the future.

I greatly regret this chain of events, and I hope that it does not happen again.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS-0937-0025]

Agency Information Collection Request; 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

Agency Information Collection Request; 60-Day Public Comment Request

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to Sherette.funncoleman@hhs.gov, or call the Reports Clearance Office on (202) 690-6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60 days.

Proposed Project: Application for Appointment as a Commissioned Officer in the United States Public Health Service Commissioned Corps, OMB No. 0937-0025 Revision, Office of Commissioned Corps Force Management, Office of Public Health and Science.

Abstract: Pursuant to the Paperwork Reduction Act of 1995, the Office of Commissioned Corps Force Management (OCCFM), Office of Public Health and Science (OPHS), requests that the Office of Management and Budget (OMB) approve form PHS-50, "Application for Appointment as a Commissioned Officer in the United States Public Health Service Commissioned Corps," (OMB No. 0937-0025) and form PHS-1813, "Reference Request for Applicants to the United States Public Health Service Commissioned Corps" (OMB No. 0937-0025).

The principal purpose for collecting the information is to permit HHS to determine eligibility for appointment of applicants into the Commissioned Corps

¹ Complaint, *In the Matter of Boulder Valley Individual Practice Assoc.*, FTC File No. 051-0252 (Dec. 24, 2008), available at (<http://www.ftc.gov/os/caselist/0510252/081224bouldercompt.pdf>).

² See, e.g., John Aguilar, *Doctors Settle with FTC; Boulder County Physicians' Group: Feds Wrong with price-fixing claims*, DAILY CAMERA, Dec. 30, 2008, at A1; Greg Blesch, *FTC's Not Done Yet; Calif., Colo. Doc partnerships latest to be scrutinized*, 39 MODERN HEALTHCARE 10 (Jan. 5, 2009).

³ Comment submitted by Wellpoint, Inc., *In re Boulder Valley Independent Practice Assoc.*, FTC File No. 051-0252 (Jan. 22, 2009), available at (<http://www.ftc.gov/os/comments/bouldervalley%20ipa/539810-00002.pdf>).