

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT**

In the Matter of White Sands Health Care System, L.L.C., et al., File No. 031 0135

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order with the White Sands Health Care System, L.L.C., Alamogordo Physicians' Cooperative, Inc., Dacite, Inc., and James R. Laurenza. The agreement settles charges that these parties violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among the physician and certified registered nurse anesthetist (nurse anesthetist) members of White Sands to fix prices and other terms on which they would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed Consent 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 will decide whether it should 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 Consent Order has been entered into for settlement purposes only and does not constitute an admission by any respondent that said respondent 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.

White Sands is a physician-hospital organization (PHO), consisting of Alamogordo Physicians, an independent practice association (IPA); Gerald Champion Regional Medical Center (Gerald Champion), the sole hospital in the Alamogordo area, which is located in south-central New Mexico; and 31 non-physician health care providers, including all five nurse anesthetists in the Alamogordo area. White Sands was organized in 1996 to "develop pricing policies and . . . negotiate and enter into Managed Care Contracts" on behalf of its members.

Alamogordo Physicians is composed of 45 physicians, representing 84% percent of all physicians independently practicing (that is, those not employed by area hospitals) in and around the Alamogordo area. Dacite provides consulting and payor contracting services to White Sands. Mr. Laurenza is the founder and President of Dacite, and the General Manager and principal contract negotiator for White Sands.

White Sands' members refuse to deal with health plans on an individual basis. Instead, Mr. Laurenza negotiates price and other contract terms with health plans that desire to contract with White Sands' members. Contract terms for physician services that Mr. Laurenza negotiates for White Sands are presented to the White Sands' Board of Managers for approval after acceptance by the Alamogordo Physicians' Board of Directors. Mr. Laurenza also negotiates

contract provisions, including fees, on behalf of independently practicing non-physician health care providers, namely nurse anesthetists. Respondents have orchestrated collective agreements on fees and other terms of dealing with health plans, carried out collective negotiations with health plans, and orchestrated refusals to deal and threats to refuse to deal with health plans that resisted respondents' desired terms. Although White Sands purported to operate as a "messenger model," – that is, an arrangement that does not facilitate horizontal agreements on price – it engaged in various actions that demonstrated or orchestrated such agreements.¹

Respondents have repeatedly succeeded in forcing numerous health plans to raise fees paid to White Sands' members, and thereby raised the cost of medical care in the Alamogordo area. They have been successful in "leverag[ing] the collective power of the members in obtaining more favorable reimbursement rates than could be negotiated . . . individually."

White Sands engaged in no efficiency-enhancing integration sufficient to justify respondents' joint negotiation of fees. By orchestrating agreements among White Sands members to deal only on collectively-determined terms, and actual or threatened refusals to deal with health plans that would not meet those terms, respondents have 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 prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans. Unlike recent consent orders, however, this Order also settles charges that non-physician health care providers engaged in unlawful price agreements as well. The Order also includes temporary "fencing-in" relief to ensure that the alleged unlawful conduct by respondents does not continue.

The proposed Order's specific provisions are as follows:

Paragraph II.A prohibits respondents from entering into or facilitating any agreement between or among any health care providers: (1) to negotiate with payors on any health care provider's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents.

¹ Some arrangements can facilitate contracting between health care providers and payors without fostering an illegal agreement among competing physicians on fees or fee-related terms. One such approach, sometimes referred to as a "messenger model" arrangement, is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice, at 125. *See* <http://www.ftc.gov/reports/hlth3s.htm#8>.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the respondents from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing health care providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. First, respondents would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing health care providers, whether a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The arrangement, however, must not facilitate the refusal of, or restrict, participants from contracting with payors outside of the arrangement.

As defined in the proposed Order, a "qualified risk-sharing joint arrangement" possesses two key characteristics. First, all participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the 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, 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 participants. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Also, because the Order is intended to reach agreements among horizontal competitors, Paragraph II would not bar agreements that only involve health care providers who are part of the same medical group practice (defined in Paragraph I.E).

Paragraph III, for a period of three years, bars Dacite and Mr. Laurenza from negotiating with any payor on behalf of White Sands, Alamogordo Physicians, or any White Sands or Alamogordo Physicians member; and from advising any White Sands or Alamogordo Physicians member to accept or reject any term, condition, or requirement of dealing with any payor. This temporary "fencing-in" relief is included to ensure that the alleged unlawful conduct by these respondents does not continue.

Paragraph IV, for a period of three years, requires respondents to notify the Commission before entering into any arrangement to act as a messenger, or as an agent on behalf of any health care providers, with payors regarding contracts. Paragraph IV sets out the information

necessary to make the notification complete.

Paragraph V, which applies only to White Sands, requires White Sands to distribute the Complaint and Order to all health care providers who have participated in White Sands, and to payors that negotiated contracts with White Sands or indicated an interest in contracting with White Sands. Paragraph V.B requires White Sands, at any payor's request and without penalty, or within one year after the Order is made final, to terminate its current contracts. Paragraph V.C requires White Sands to distribute payor requests for contract termination to all health care providers who participate in White Sands, and, in the event that White Sands fails to comply with the requirements of Paragraph V due to dissolution or cessation of business, Alamogordo Physicians is required to do so.

Paragraph VI requires Alamogordo Physicians to notify the Commission of any change in Alamogordo Physicians that may affect its compliance with the Order, such as dissolution. In the event that White Sands or Alamogordo Physicians fails to comply with the requirements of Paragraph V, or Alamogordo Physicians fails to comply with Paragraph VI, Paragraph VII would require Mr. Laurenza to do so.

Paragraph VIII generally requires Dacite to distribute the Complaint and Order to health care providers who have participated in any group that has been represented by Dacite since January 1, 2003, and to each payor with which Dacite has dealt since January 1, 2003, for the purpose of contracting. In the event that Dacite fails to comply with the requirements of Paragraph VIII, Paragraph IX would require Mr. Laurenza to do so.

Paragraphs V.E, V.F, VIII.C, VIII.D, X, and XI of the proposed Order impose various obligations on respondents to report or provide access to information to the Commission to facilitate monitoring respondents' compliance with the Order.

The proposed Order will expire in 20 years.