051-0260

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	**DOCKET NO. C-**
ALTA BATES MEDICAL GROUP, INC.,	)	
a California corporation.	)	
	)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.* ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Alta Bates Medical Group, Inc. ("ABMG"), herein sometimes referred to as "Respondent," has violated Section 5 of the FTC 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 horizontal agreements among competing physicians, acting through Respondent, to fix prices charged to health plans, other third-party payors, and third-party networks ("payors"), to refuse to deal with certain payors, and to refuse to deal with payors except on collectively agreed terms.

RESPONDENT

2. Alta Bates Medical Group, Inc., an independent practice association ("IPA"), is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 2000 Powell Street, Suite 830, Emeryville, CA 94608. ABMG consists of multiple, independent medical practices with a total of approximately 600 physician members, of which approximately 200 are devoted to primary care.

THE FTC HAS JURISDICTION OVER RESPONDENT

3. At all times relevant to this Complaint, Respondent has been engaged in the business of negotiating or attempting to negotiate contracts with payors for the provision of physician services on behalf, and for the pecuniary benefit, of its members.

4. Except to the extent that competition has been restrained as alleged herein, ABMG's physician members have been, and are now, in competition with each other for the provision of physician services in and around Berkeley and Oakland, California.

5. Respondent is a "person," "partnership," or "corporation" within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

6. The general business practices of Respondent, including the acts and practices alleged herein, affect the interstate movement of patients, the interstate purchase of supplies and products, and the interstate flow of funds, and are in or affect "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF PHYSICIAN CONTRACTING WITH PAYORS

7. Individual physicians and physician group practices contract with payors, including health maintenance organizations (HMOs), preferred provider organizations (PPOs), self-insured employers, and others, to establish the terms and conditions, including price terms, under which the physicians will render their professional medical services to the payors' subscribers. Physicians and physician group practices entering into such contracts often agree to accept lower compensation from payors in order to obtain access to additional patients made available by the payors' relationship with the subscribers. These contracts may reduce payors' costs and enable them to lower the price of insurance or of providing health benefits, thereby resulting in lower medical costs for subscribers.

8. Physicians and physician group practices sometimes form or participate in financially integrated joint ventures to provide physician services under agreements with payors who seek such arrangements. Under such arrangements, the physicians and physician group practices may share financial risks and rewards in several ways. For example, the physicians may provide services at a "capitated" rate or share rewards/penalties based on their collective success in achieving pre-established targets or goals regarding aggregate utilization and costs of the services provided to covered individuals.

9. Physicians and physician group practices may also participate in joint ventures that do not involve financial integration, but involve clinical integration, by implementing an active and ongoing program to evaluate and modify practice patterns by the physician participants and create a high degree of interdependence and cooperation among the physicians to control costs and ensure quality.

10. Other than through their participation in integrated joint ventures, and absent anticompetitive agreements among them, otherwise competing physicians and physician group practices unilaterally decide whether to enter into contracts with payors to provide services to their subscribers, and what prices they will accept as payment for their services pursuant to such contracts.

RESPONDENT'S OPERATION

11. Since its formation, ABMG has entered into contracts with payors for and on behalf of its respective physician members, under which ABMG received capitated payments from the payors in exchange for the medical practices' agreement to provide their professional medical services to subscribers of the contracting payors. The capitated contracts provided to payors, in addition to the physician services, an insurance guarantee component that all covered physician services needed by subscribers of a payor's program would be provided by ABMG's physician members for the predetermined capitation charge, regardless of the actual quantity or type of services needed and provided.

12. The member physicians' participation in ABMG, and their offering of services through ABMG's capitated contracts, was not, however, the member physicians' exclusive method of selling their professional medical services. Rather, the member physicians also continued to sell their medical services individually, on a fee-for-service basis, outside of ABMG to individual patients and through contracts individually and directly entered into with payors.

ANTICOMPETITIVE CONDUCT

13. Since at least 2001, ABMG, acting as a combination of its physician members, and in conspiracy with its members, has acted to restrain competition with respect to fee-for-service contracts by, among other things, facilitating, entering into, and implementing agreements, express or implied, to fix the prices and other terms at which they would contract with payors; to engage in collective negotiations over terms and conditions of dealing with payors; and to have ABMG members refrain from negotiating individually with payors or contracting on terms other than those approved by ABMG.

Collective Negotiations with Payors

14. ABMG refers to its fee-for-service contracting system as a "messenger model." Competing physicians sometimes use a "messenger" to facilitate their contracting with payors, in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Messenger arrangements can reduce contracting costs between payors and physicians. For example, a payor may submit a contract offer to the messenger, with the understanding that the messenger will transmit that offer to a group of physicians and inform the payor how many physicians across specialties accept the offer or have a counteroffer. Alternatively, the messenger may receive authority from the individual physicians to accept contract offers that meet certain criteria. A lawful messenger arrangement does not involve negotiation on prices or other competitively significant terms and does not facilitate coordination among physicians on their responses to contract offers. Additionally, a lawful messenger arrangement does not discourage physicians from dealing individually with a payor.

15. As part of its fee-for-service contracting system, approximately 95 percent of ABMG's physicians signed "powers of attorney" ("POA") granting ABMG authority to contract

with PPO health plans on their behalf. The POA states that the individual ABMG physician appoints ABMG:

> a. To facilitate, execute, revise, modify, or amend an agreement ("Agreement") with PPO networks that is consistent with the financial and other language parameters identified by PHYSICIAN.
>
> b. To execute the Agreement on PHYSICIAN'S behalf without further consultation with or authority of PHYSICIAN, provided the Agreement meets the PHYSICIAN'S parameters.

16. Despite the POA provisions, ABMG did not rely on financial and other language parameters identified by its individual physician members regarding what rates and/or terms they would unilaterally accept. Instead, ABMG decided, on behalf of the group, what rates and/or terms it used in its communications with the PPO health plans. Therefore, ABMG did not employ a lawful messenger arrangement as described in Paragraph 14.

17. Rather than employ a lawful messenger arrangement, ABMG, on behalf of its physician members, has orchestrated collective negotiations for fee-for-service contracts with some payors who do business in and around Berkeley and Oakland, California. Since at least 2001, ABMG negotiated with these payors on price, making proposals and counter-proposals, as well as accepting or rejecting offers, without consulting with its individual physician members regarding the prices they would accept, and without transmitting the payors' offers to its individual physician members until ABMG had approved the negotiated prices.

18. ABMG's conduct, which constituted unlawful agreements between its individual physician members on the prices and other terms, included, but was not limited to:

A. Approaching payors and suggesting contract rates and/or terms that it represented the ABMG physician members would accept, without obtaining price and term criteria from its individual physician members;

B. Expressing its opinion about whether or not the ABMG physicians would likely accept contract rates and/or terms proposed by a payor and suggesting that payors reconsider offers it deemed inadequate, without obtaining price and term criteria from its individual physician members;

C. Failing to submit payor proposals or counter proposals to its individual physician members to determine if each physician member would unilaterally accept the rates and/or terms being offered;

D. Submitting to ABMG physician members, on an opt-out basis, only those payor proposals for which ABMG had accepted the rates and terms; and

E. Periodically providing its member physicians with a list of payors with which ABMG had negotiated contracts, and cautioned them about dealing individually with payors, because the individual contracts may have less favorable contract rates and/or terms. For example, during one negotiation ABMG sent the following notice to its individual member physicians:

> As a general rule of caution, please scrutinize all contract solicitations that are mailed to your office, as many of these contracts do not represent the best interests of physicians. In the event that you may have signed these documents and returned them to [the PPO], you may certainly contact [the PPO] and say that you did not mean to sign the agreement because you should already be participating through ABMG and therefore the Individual Contract is superfluous.

Concerted Refusal to Deal

19. ABMG physicians and the Permanente Medical Group compete in the sale of physician services to consumers in and around Berkeley and Oakland, California. Because the Permanente Medical Group exclusively sells its physicians' services to Kaiser Foundation Health Plans, this competition occurs when a consumer chooses either a Kaiser Foundation Health Plan HMO, which allows the subscriber to access only the Permanente Medical Group, or an open-panel payor.

20. In 2006, a payor, Kaiser Permanente Insurance Corporation ("KPIC"), co-owned by the Permanente Medical Group and Kaiser Foundation Health Plans, began actively marketing an open-panel PPO. KPIC's PPO subscribers would access physician services through a third-party network. With this development, the Kaiser system could offer one-stop shopping to employers who want to offer their employees a choice between an open-panel PPO product (one that would allow subscribers to access physicians who are not members of the Permanente Medical Group), and Kaiser's traditional closed-panel HMO. This would result in more competition between ABMG physicians and the Permanente Medical Group in the sale of physician services through employers.

21. Under a prior contract with the third-party network referenced in Paragraph 20, the ABMG physicians had agreed to sell their physician services at a discount to payors who contract to access that network. In response to KPIC's initiative, however, ABMG decided, on behalf of the group, that ABMG physicians would not be available to KPIC's subscribers through the third-party network.

22. In furtherance of this decision, ABMG provided notice to the third-party network that its prior contract "is hereby amended to state that the physicians who are participating

physicians of [ABMG] shall not provide services to members of Kaiser Health Plans ... ." Although ultimately unsuccessful, the sole purpose of this action was to impede competition in the provision of physician services in and around Berkeley and Oakland, California.

RESPONDENT'S CONDUCT IS NOT LEGALLY JUSTIFIED

23. Respondent's negotiation of fees and other competitively significant terms and concerted refusal to deal on behalf of its competing member physicians, and the agreements, acts, and practices described above, have not been, and are not, reasonably related to any efficiency-enhancing integration among the physician members of ABMG.

RESPONDENT'S ACTIONS HAVE HAD, OR COULD BE EXPECTED TO HAVE, SUBSTANTIAL ANTICOMPETITIVE EFFECTS

24. Respondent's actions described in Paragraphs 12 through 20 of this Complaint have had, have tended to have, or if successful would have had, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in and around Berkeley and Oakland, California, in the following ways, among others:

A. unreasonably restraining price and other forms of competition among physicians who are members of ABMG;

B. increasing prices for physician services;

C. depriving payors, including insurers and employers, and individual consumers, of the benefits of competition among physicians; and

D. depriving consumers of the benefits of competition among payors.

25. 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 _____ day of _____, 2009, issues its Complaint against Respondent Alta Bates Medical Group, Inc.

By the Commission.

Donald S. Clark
Secretary

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