

## Complaint

**IN THE MATTER OF****EPN, INC.  
D/B/A  
CHECKNET, INC.****CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT**

*Docket No. C-4370; File No. 112 3143  
Complaint, October 3, 2012 – Decision, October 3, 2012*

This consent order addresses EPN, Inc.'s allowing an EPN employee to install a P2P application on her desktop computer, which was connected to EPN's computer network, resulting in two files containing personal information about a client's customers being made available on a P2P network. The complaint alleges that EPN violated of Section 5(a) of the Federal Trade Commission Act by failing to employ reasonable and appropriate measures to prevent unauthorized access to personal information which caused, or is likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. The consent order prohibits misrepresentations about the privacy, security, confidentiality, and integrity of any personal information collected from or about consumers.

*Participants*

For the *Commission*: Karen Jagielski, Jessica Lyon, and Manas Mohapatra.

For the *Respondent*: Amy Purcell and Scott Vernick, Fox Rothschild LLP.

**COMPLAINT**

The Federal Trade Commission ("Commission"), having reason to believe that EPN, Inc., d/b/a Checknet Inc. ("EPN") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent EPN is a Utah corporation with its principal office or place of business at 746 East 1910 South, Suite 3, Provo, UT 84606.

## Complaint

2. The acts and practices of Respondent as alleged in this complaint are in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

**RESPONDENT’S BUSINESS PRACTICES**

3. At all relevant times, Respondent has been in the business of collecting debts for clients in a variety of industries, including commercial credit, retail, and healthcare.

4. In conducting business, Respondent routinely obtains information about its clients’ customers. This information includes, but is not limited to: name, address, date of birth, gender, Social Security number, employer address, employer phone number, and in the case of healthcare clients, physician name, insurance number, diagnosis code, and medical visit type (collectively, “personal information”).

5. Respondent operates computer networks in conducting its business. Among other things, it uses the networks to receive, store, and use personal information about its clients’ customers to assist in collecting debts on its clients’ behalf.

**EPN’S SECURITY PRACTICES**

6. EPN has engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computers and networks. Among other things, Respondent failed to:

- a. Adopt an information security plan that was appropriate for its networks and the personal information processed and stored on them. For example, EPN did not have an incident response plan;
- b. Assess risks to the consumer personal information it collected and stored online;
- c. Adequately train employees about security to prevent unauthorized disclosure of personal information;
- d. Use reasonable measures to assess and enforce compliance with its security policies and procedures,

## Complaint

such as scanning networks to identify unauthorized peer-to-peer (“P2P”) file sharing applications and other unauthorized applications operating on the networks or blocking installation of such programs; and

- e. Use reasonable methods to prevent, detect, and investigate unauthorized access to personal information on its networks, such as by adequately logging network activity and inspecting outgoing transmissions to the Internet to identify unauthorized disclosures of personal information.

7. As a result of the failures set forth in Paragraph 6, EPN’s chief operating officer was able to install a P2P application on her desktop computer, which was connected to EPN’s computer network. Respondent is unaware of the date the application was installed; it was disabled in April 2008 when EPN was informed by a client that two files containing personal information about the client’s debtors were available on a P2P network (“breached files”). EPN had no business need for the P2P application.

8. The breached files contained personal information about approximately 3,800 consumers, including each consumer’s name, address, date of birth, Social Security number, employer name, employer address, health insurance number, and a diagnosis code. Such information, among other things, can easily be used to facilitate identity theft (which also could result in medical histories that are inaccurate because they include the medical records of identity thieves) and exposes sensitive medical data.

9. The breached files were shared to the P2P network from EPN’s chief operating officer’s computer, and other files containing personal information may have been shared to P2P networks from that computer.

10. Files shared to a P2P network are available for viewing or downloading by anyone using a personal computer with access to the network. Generally, a file that has been shared cannot be permanently removed from P2P networks.

## Decision and Order

**VIOLATION OF THE FTC ACT**

11. As set forth in Paragraphs 6 through 10, Respondent's failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information caused, or is likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, Respondent's practices were, and are, an unfair act or practice.

12. The acts and practices of Respondent as alleged in this Complaint constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

**THEREFORE**, the Federal Trade Commission this third day of October, 2012, has issued this complaint against Respondent.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission ("Commission" or "FTC"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45 *et seq.*;

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and

## Decision and Order

does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the FTC Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent, EPN, Inc., also d/b/a Checknet Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah, with its office and principal place of business located in the City of Provo, State of Utah.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. Unless otherwise specified, "respondent" shall mean EPN, Inc., also dba Checknet, Inc., and each of their successors and assigns.
- B. "Personal information" shall mean individually identifiable information from or about an individual

## Decision and Order

consumer including, but not limited to: (a) first and last name; (b) date of birth; (c) a home or other physical address, including street name and name of city or town; (d) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's email address; (e) a telephone number; (f) a Social Security number; (g) credit or debit card information, including card number, expiration date, and security code; (h) a persistent identifier, such as a customer number held in a "cookie" or processor serial number; and (i) any information that is combined with any of (a) through (h) above.

- C. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

**I.**

**IT IS ORDERED** that respondent and its officers, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, website or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers.

**II.**

**IT IS ORDERED** that respondent, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and

## Decision and Order

scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

- A. The designation of an employee or employees to coordinate and be accountable for the information security program.
- B. The identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures.
- C. The design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.
- D. The development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards.
- E. The evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by sub-Part C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a

## Decision and Order

material impact on the effectiveness of its information security program.

**III.**

**IT IS FURTHER ORDERED** that, in connection with its compliance with Part II of this order, respondent shall obtain initial and biennial assessments and reports (“Assessments”) from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. Professionals qualified to prepare such assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. Set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;
- B. Explain how such safeguards are appropriate to respondent’s size and complexity, the nature and scope of respondent’s activities, and the sensitivity of the personal information collected from or about consumers;
- C. Explain how the safeguards that have been implemented meet or exceed the protections required by the Part II of this order; and
- D. Certify that respondent’s security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and



## Decision and Order

integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request. Unless otherwise directed by a representative of the Commission, initial and biennial Assessments shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line "In re EPN, Inc., FTC File Number 1123143." *Provided, however*, that, in lieu of overnight courier, Assessments may be sent by first-class mail, but only if an electronic version of such Assessments is contemporaneously sent to the Commission at [DEBrief@ftc.gov](mailto:DEBrief@ftc.gov).

**IV.**

**IT IS FURTHER ORDERED** that respondent shall maintain and, upon request, make available to the Federal Trade Commission for inspection and copying:

- A. For a period of five (5) years, a print or electronic copy of each document relating to compliance, including but not limited to documents, prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and
- B. For a period of three (3) years after the date of preparation of each Assessment required under Part II of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of respondent, including, but not limited to, all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other

## Decision and Order

materials relating to respondent's compliance with Parts I and II of this order, for the compliance period covered by such Assessment.

**V.**

**IT IS FURTHER ORDERED** that for a period of five (5) years from the date of entry of this Order, respondent shall deliver copies of the Order as directed below:

- A. Respondent must deliver a copy of this order to (1) all current and future principals, officers, directors, and managers, (2) all current and future employees, agents and representatives who engage in conduct related to the subject matter of the Order, and (3) any business entity resulting from any change in structure set forth in Part VI. For current personnel, delivery shall be within thirty (30) days of service of this Order. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Part VI, delivery shall be at least ten (10) days prior to the change in structure.
- B. Respondent must secure a signed and dated statement acknowledging receipt of this Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this section.

**VI.**

**IT IS FURTHER ORDERED** that respondent shall notify the Commission at least thirty (30) days prior to any change that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in respondent's name or address. *Provided, however,* that, with respect to any proposed change in the entity about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent

## Decision and Order

shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line “In re EPN, Inc., FTC File Number 1123143.” *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at [DEBrief@ftc.gov](mailto:DEBrief@ftc.gov).

**VII.**

**IT IS FURTHER ORDERED** that respondent within ninety (90) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports. Unless otherwise directed by a representative of the Commission, each report required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line “In re EPN, Inc., FTC File Number 1123143.” *Provided, however,* that, in lieu of overnight courier, reports may be sent by first-class mail, but only if an electronic version of such reports is contemporaneously sent to the Commission at [DEBrief@ftc.gov](mailto:DEBrief@ftc.gov).

**VIII.**

This order will terminate on October 3, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

## Analysis to Aid Public Comment

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further,* that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

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

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from EPN, Inc.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

The Commission's proposed complaint alleges that EPN, which does business as Checknet, Inc., is a Utah corporation that is in the business of collecting debts for clients in a variety of

## Analysis to Aid Public Comment

industries, including commercial credit, retail, and healthcare. According to the complaint, In conducting business, EPN routinely obtains information about its clients' customers, which includes, but is not limited to: name, address, date of birth, gender, Social Security number, employer address, employer phone number, and in the case of healthcare clients, physician name, insurance number, diagnosis code, and medical visit type.

The complaint further alleges that EPN engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computers and networks. In particular, EPN failed to: (1) adopt an information security plan that was appropriate for its networks and the personal information processed and stored on them; (2) assess risks to the consumer personal information it collected and stored online; (3) adequately train employees about security to prevent unauthorized disclosure of personal information; (4) use reasonable measures to assess and enforce compliance with its security policies and procedures, such as scanning networks to identify unauthorized peer-to-peer ("P2P") file sharing applications and other unauthorized applications operating on the networks or blocking installation of such programs; and (5) use reasonable methods to prevent, detect, and investigate unauthorized access to personal information on its networks, such as by adequately logging network activity and inspecting outgoing transmissions to the Internet to identify unauthorized disclosures of personal information.

The complaint alleges that as a result of these failures, an EPN employee was able to install a P2P application on her desktop computer, which was connected to EPN's computer network, resulting in two files containing personal information about a client's customers being made available on a P2P network; other files containing personal information may also have been shared to P2P networks from that computer. The breached files contained personal information about approximately 3,800 consumers, including each consumer's name, address, date of birth, Social Security number, employer name, employer address, health insurance number, and a diagnosis code. The complaint alleges that such information, among other things, can easily be used to facilitate identity theft (which also could result in medical

## Analysis to Aid Public Comment

histories that are inaccurate because they include the medical records of identity thieves) and exposes sensitive medical data.

In fact, the presence of P2P software on business computers can pose significant data security risks. A 2010 FTC examination of P2P-related breaches uncovered a wide range of sensitive consumer data available on P2P networks, including health-related information, financial records, and drivers' license and social security numbers. *See* Press Release, FTC, Widespread Data Breaches Uncovered by FTC Probe (Feb. 22, 2010), <http://www.ftc.gov/opa/2010/02/p2palert.shtm>. Files shared to a P2P network are available for viewing or downloading by any computer user with access to the network. Generally, a file that has been shared cannot be removed permanently from the P2P network. In addition, files can be shared among computers long after they have been deleted from the original source computer.

According to the complaint, EPN's failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information caused, or is likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, EPN's practices were, and are an unfair act or practice, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a).

The proposed order contains provisions designed to prevent EPN from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits misrepresentations about the privacy, security, confidentiality, and integrity of any personal information collected from or about consumers.

Part II of the proposed order requires EPN to establish, implement, and thereafter maintain a comprehensive information security program, including the designation of an employee to oversee EPN's security program, employee training, and implementation of reasonable safeguards. Part III of the order requires EPN to obtain, for a period of twenty years, biennial assessments of its information security program from an

Analysis to Aid Public Comment

independent third-party professional possessing certain credentials or certifications.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires EPN to retain documents relating to its compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third party assessments and supporting documents, EPN must retain the documents for a period of three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that EPN submit a compliance report to the FTC within 90 days, and periodically thereafter as requested. Part VIII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

**COOPERATIVA DE FARMACIAS  
PUERTORRIQUEÑAS**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4374; File No. 101 0079**Complaint, November 6, 2012 – Decision, November 6, 2012*

This consent order addresses Cooperativa de Farmacias Puertorriqueñas's ("Coopharma") negotiating, entering into, and implementing agreements among its member pharmacy owners to fix the prices on which they contract with third-party payers in Puerto Rico. The complaint alleges that Coopharma's member pharmacies restrained competition by jointly negotiating and entering into agreements with third-party payers. Coopharma achieved this result by encouraging its members: (1) to refuse to deal with third-party payers except through Coopharma; and (2) to threaten termination, or actually terminate, contracts with payers that refused to deal with Coopharma on the terms it demanded. The consent order prohibits Respondent from entering into or facilitating agreements between or among any pharmacies: (1) to negotiate on behalf of any pharmacy with any payer; (2) to refuse to deal or threaten to refuse to deal with any payer; (3) to include any term, condition, or requirement upon which any pharmacy deals, or is willing to deal, with any payer, but not limited to, price terms; or (4) not to deal individually with any payer, or not to deal with any payer other than through Respondent.

*Participants*

For the *Commission*: Linda Blumenreich and Randy David Marks.

For the *Respondent*: David Balto, Brendan Coffman, and Brad Wasser, Law Offices of David Balto.

**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 ("Commission"), having reason to believe that Respondent Cooperativa de Farmacias Puertorriqueñas ("Coopharma") violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding



## Complaint

by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges in that respect as follows:

**I. NATURE OF THE CASE**

1. This matter concerns an agreement among competing pharmacies in Puerto Rico, through their membership and participation in Coopharma, to fix prices in their negotiations with third-party payers. In furtherance of their conspiracy, the pharmacies collectively negotiated contracts, including price terms; contracted jointly with some payers; and organized boycotts to coerce payers to accept their demands. Coopharma has not undertaken any efficiency-enhancing integration sufficient to justify the challenged conduct. By collectively negotiating prices without any legitimate justification or state action or other defense, Coopharma has unreasonably restrained competition and engaged in unfair methods of competition in violation of the Federal Trade Commission Act.

**II. RESPONDENT AND JURISDICTION**

2. The Cooperativa de Farmacias Puertorriqueñas is a not-for-profit corporation that is organized, exists, and does business as a cooperative under and by virtue of the laws of the Commonwealth of Puerto Rico. Its principal address is 2 Calle Colon, Aguada, Puerto Rico 00602.

3. Coopharma has approximately 300 pharmacy owner members who together own approximately 360 community pharmacies that operate in Puerto Rico. Coopharma members control at least a third of all pharmacies in Puerto Rico and the organization has a particularly strong presence on the western side of the island.

4. At all times relevant to the Complaint, Coopharma has been engaged in the business of contracting with third-party payers, on behalf of its members, for the provision of pharmacy services. Except to the extent that competition has been restrained as alleged herein, Coopharma's members compete with one another for the provision of pharmacy services.

## Complaint

5. Coopharma is organized for the purpose, in part, of fostering its members' material interests and acts to further those interests. By virtue of such purposes and activities, Respondent is a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. The general business practices of Coopharma, including the acts and practices alleged herein, affect the interstate purchase of supplies and products and the interstate flow of funds, and are in or affect "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

### III. OVERVIEW OF PHARMACY CONTRACTING

7. Pharmacies often contract with third-party payers — including health insurers and managed care organizations — to establish the terms and conditions, including price and other competitively significant terms, under which they will provide services to subscribers of health plans. To negotiate for pharmacy services, payers often use pharmacy benefit managers (PBMs) to create networks of pharmacies and administer pharmacy benefit programs.

8. Pharmacies entering into payer contracts often agree to discount or lower their prices in exchange for access to additional patients made available by the payers' relationship with their subscribers. These contracts with pharmacies may reduce payers' costs and enable payers to lower the price of health insurance and reduce patients' out-of-pocket medical care expenditures.

9. Absent agreements among pharmacies on prices and other contract terms on which they will provide services to subscribers of health plans, competing pharmacies decide individually whether to enter into contracts with payers, and at what prices they will accept payment for services rendered pursuant to such contracts.

10. Third-party payers reimburse pharmacies for filling a prescription based on a formula consisting of an ingredient cost and a dispensing fee. For brand prescriptions, the ingredient cost

## Complaint

traditionally has been a percentage of Average Wholesale Price or “AWP.”

#### IV. ANTICOMPETITIVE CONDUCT

11. Coopharma, acting as a combination of its members, and in conspiracy with them, has acted to restrain competition by, among other things:

- a. negotiating, entering into, and implementing agreements to fix the prices on which their members contract with third-party payers, and
- b. encouraging its members to (i) refuse to deal with third-party payers except through Coopharma and (ii) threaten to terminate, and terminate, contracts with payers who refuse to deal with Coopharma on the terms it demands.

Coopharma’s coercive activities have led some payers to enter into individual contracts with Coopharma members at higher rates than the payer would otherwise have paid.

##### A. Agreement to Negotiate and Contract Jointly

12. Pursuant to Coopharma’s By-Laws, Coopharma’s pharmacy owner members elect fellow members to serve on Coopharma’s Board of Directors and manage Coopharma’s operations. The Board oversees contract negotiations and approves contracts between Coopharma and third party payers.

13. Coopharma members, in joining Coopharma, agree to participate in Coopharma’s contracts with payers. Coopharma’s Rules (“Reglamento de Socios de Coopharma”) state that its members “shall comply with the agreements and contracts which are approved by the Member’s Assembly and the Board of Directors.”

14. Coopharma’s Medical Plans Committee was responsible for negotiating payer contracts from late 2002 until 2008 and supervised negotiations since then. Between 2008 and 2011, Coopharma hired consultants to negotiate contracts. The

## Complaint

Committee has had between two and four members since its establishment in 2002.

15. Coopharma's Board Presidents and the Medical Plans Committee supervised the consultants in their consulting role when they negotiated with payers.

16. According to Coopharma's Board, Coopharma "was established with the principal purpose to be able to negotiate in representation of all of its members, of which include PBM [pharmacy benefit manager] and/or health insurance negotiations . . . and to establish master contracts which adhere and unite all of the Coopharma pharmacies." A "master contract" is a single-signature contract between Coopharma and a payer that binds all Coopharma pharmacies to its terms.

17. Coopharma believes "being able to get the best contract that is possible is something fundamental for pharmacies" and that the "best contract" includes the highest reimbursement rates. Coopharma's goal has been to obtain 90 percent of AWP plus a \$3.00 dispensing fee for brand pharmaceuticals. That is higher than many Coopharma pharmacies were receiving on most of their individual contracts with payers. Coopharma's contract with one negotiating consultant stated that he should seek to obtain 90 percent of AWP plus a \$3.00 dispensing fee in his negotiations with payers.

18. Since 2006, Coopharma negotiated with more than ten payers over reimbursement levels and reached agreements on behalf of its members with seven of them. These contracts set rates for brand pharmaceuticals ranging from 87 percent to 90 percent of AWP, with dispensing fees ranging from \$2.50 to \$5.00.

**B. Collective Efforts Coerced CVS-Caremark to Contract with Coopharma**

19. Through its members' collective action, Coopharma forced pharmacy benefits manager CVS-Caremark ("Caremark") to rescind a rate cut and to enter into a master contract at a higher rate.

## Complaint

20. In 2008, Caremark paid all pharmacies in Puerto Rico, including Coopharma's members, a Medicare Part D reimbursement rate of 87 percent of AWP plus a dispensing fee of \$2.50 for each brand prescription. For commercial business, Caremark's reimbursement to Coopharma pharmacies ranged from 85-90 percent of AWP plus a dispensing fee of \$2.00-\$3.00.

21. To remain competitive with other PBMs, Caremark notified pharmacies throughout the country that, effective January 1, 2009, it was reducing the Medicare Part D reimbursement rate to 86 percent of AWP plus a \$2.00 dispensing fee. Pharmacies across the United States accepted these terms.

22. Coopharma organized its members to oppose the Caremark terms. It held regional meetings in December 2008 and communicated to members the status of the negotiations. Its contract negotiator co-signed a memorandum telling members of "the HISTORIC opportunity we have today to negotiate as one single [*sic*] institution, **'COOPHARMA THE BIGGEST CHAIN OF PHARMACIES IN ALL OF PUERTO RICO.'**" [Emphasis in original.] Coopharma provided members with a template letter to reject Caremark's rate change and demand that Caremark negotiate with Coopharma.

23. Many Coopharma member pharmacies responded by sending the form letter rejecting the new Medicare Part D and commercial contracts and telling Caremark to negotiate through Coopharma. Coopharma then told Caremark that its members would not accept Caremark's reimbursement offer and wanted 90 percent of AWP.

24. Coopharma also informed Caremark that it was telling Caremark clients that Caremark was threatening to terminate pharmacies that did not accept Caremark's rate change. This pressured Caremark to acquiesce to Coopharma's demands or face losing customers with a more limited pharmacy network.

25. Responding to the pressure, Caremark rescinded the Part D rate change for the pharmacies that sent letters rejecting the change.

## Complaint

26. Coopharma also pressured Caremark to enter into a master contract on all lines of business, including Medicare Part D. Coopharma used three tactics: demanding to negotiate and contract collectively, threatening that its members would terminate their Caremark contracts, and contacting Caremark's clients.

27. First, Coopharma repeatedly asserted its "authority to represent the pharmacies" in its communications with Caremark. For example, its contract negotiator told Caremark that "effective immediately none of our members will negotiate independently." Coopharma also instructed its members "**TO NOT SIGN ANY CONTRACT SEPRATELY [sic] OR INDIVIDUALLY!**" and to tell Caremark that they would not negotiate directly and Caremark should call Coopharma to negotiate. [Emphasis in original.] More than 75 percent of Coopharma's members authorized Coopharma to negotiate with Caremark on their behalf.

28. Second, throughout the negotiations, Coopharma repeatedly threatened that its members would terminate their individual contracts with Caremark and individual members did so. After telling members that their responses to Caremark affirming their contract cancellations "**MUST BE CLEAR AND DIRECT,**" Coopharma said "[w]e maintain that this responsibility to maintain a united front is shared by all the Coopharma members. . . . [W]e remind you that this is the time to demonstrate that we are one: **WE ARE COOPHARMA.**" [Emphasis in original.] At one point, Coopharma hand-delivered a package to Caremark of virtually identical letters from members notifying Caremark of their terminations. Coopharma also placed a newspaper advertisement stating that negotiations with Caremark had failed and that, as of May 28, 2009, "we will not continue providing services" to Caremark plans. At an April 25, 2009 meeting, Coopharma's membership confirmed its united position and 91 percent of attendees voted to affirm the decision to terminate the contracts.

29. Third, Coopharma contacted Caremark clients American Health Medicare and MAPFRE Grupo PRAICO. Coopharma's contract negotiator and its Chair of the Medical Plans Committee told American Health Medicare that hundreds of Coopharma pharmacies would terminate their contracts with Caremark, thus making Coopharma pharmacies unavailable to American Health

## Complaint

Medicare members. That led American Health Medicare to intervene in the Caremark-Coopharma negotiations to press Caremark to reach an agreement with Coopharma.

30. In August 2009, Caremark agreed to replace Coopharma's members' individual contracts with a master contract with Coopharma. The master contract continued the 2008 Medicare Part D reimbursement rate for 2009. The contract negotiator told the Board that the master contract was a "success." Without Coopharma members' collective action, Caremark would have paid all members the lower rates it pays to non-Coopharma independent pharmacies in Puerto Rico. Caremark's price concessions to Coopharma cost it approximately \$640,000 in 2009 alone.

### C. Payer Concessions in Individual Contracts

31. The mere threat of collective terminations benefitted individual Coopharma pharmacies at a cost of millions of dollars to third-party payers. Coopharma pharmacies obtained higher reimbursement rates from Medco and Medicare Mucho Mas, through its PBM, even though negotiations with Coopharma did not result in a master contract with Coopharma.

32. Coopharma informed the Medco PBM in 2006 that Coopharma members would contract with Medco only through Coopharma. When Coopharma and Medco reached an impasse in negotiations, Coopharma threatened to pull all of its pharmacies out of Medco's network. In response, Medco raised the rates of all Coopharma members from 85-87 percent of AWP to 88 percent of AWP to encourage them to ignore Coopharma's orders. Despite Coopharma's efforts to persuade its members to hold out, Medco offered high enough rates to create a sufficient network without signing a master contract with Coopharma. Coopharma took credit for Medco's improved reimbursement terms, which cost Medco and/or its clients over \$2 million for 2007-2011.

33. Medicare Mucho Mas, a large Medicare Advantage payer in Puerto Rico, feared a disruption in its pharmacy network from Coopharma's activities. As a result, Medicare Mucho Mas, through its PBM, paid Coopharma members a reimbursement rate higher than it paid non-Coopharma members. A Medicare Mucho

## Complaint

Mas document states that it “conceded and gave Coopharma better rates.”

**D. Collective Efforts to Force Humana to Maintain Rates**

34. While ultimately unsuccessful, Coopharma also threatened to terminate its members’ contracts with Humana Health Plans of Puerto Rico, Inc. and Humana Insurance of Puerto Rico, Inc. (“Humana”) for Medicare Part D and commercial health benefit programs to coerce Humana to maintain the reimbursement rates it was paying Coopharma pharmacies under individual contracts and to enter into a master contract.

35. Coopharma’s conduct arose from the settlement of a class action lawsuit against First Data Bank and Medi-Span and related decisions by them that resulted in a market-wide reduction in AWP benchmark drug prices they reported effective September 26, 2009. Making no changes in the terms of Humana’s AWP-based contracts with pharmacies would have resulted in reduced rates. Humana decided to propose amendments to its pharmacy contracts that mitigated the reduction in part, but would have still reduced net rates from what they had been previously. Outside Puerto Rico, Humana’s pharmacies generally accepted the revision.

36. At an October 25, 2009 meeting, Coopharma’s members agreed to terminate their contracts with any payer that failed to adjust reimbursement rates to maintain the existing level of reimbursement, which they called “AWP cost neutrality.”

37. Pursuant to their collective decision, Coopharma members resisted Humana’s amended rates and sought restoration of the pre-September 26, 2009 compensation levels. On December 7, 2009, Coopharma wrote Humana that it was terminating its members’ contracts, stating “as approved in an Extraordinary Assembly of the COOPHARMA membership held on October 25, 2009, . . . all members of COOPHARMA withdraw as pharmacy services providers to Humana and its policyholders. . . . This decision is final and is the end result of a deliberate process involving the entire membership.” Coopharma demanded that Humana agree to contract terms that would raise payment levels back to the pre-September 26, 2009 amounts.



## Complaint

38. When Humana asserted that Coopharma lacked legal authority to terminate its members' contracts, Coopharma encouraged its members to terminate their contracts, and most did so. Although Humana was able to maintain enough of a network to continue to operate in Puerto Rico, Coopharma's conduct disrupted its business.

#### **VI. NO LEGITIMATE JUSTIFICATION FOR THE CONDUCT**

39. Coopharma did not undertake any activities to integrate the delivery of pharmacy services of its members and thus cannot justify its acts and practices described in the foregoing paragraphs. Its members neither shared financial risk in providing pharmacy services nor integrated their delivery of care to patients.

40. Coopharma's conduct has not been reasonably related to any efficiency-enhancing integration among its members.

#### **VII. PUERTO RICO REGULATION OF HEALTH CARE COOPERATIVES**

41. In 2004, Puerto Rico enacted Law 239 to provide for the establishment and regulation of cooperatives. (5 L.P.R.A. § 4381, *et seq.*) Law 239 declares that such cooperatives "shall not be considered conspiracies or cartels to restrict business...nor shall the contracts entered between the same and their members...be interpreted as illegal restrictions of business. . . ." Law 239 establishes the Corporacion para la Supervision y Seguro de Cooperativas de Puerto Rico, known as COSSEC, to regulate cooperatives.

42. COSSEC has no process for reviewing cooperatives' negotiations with purchasers or for approving or disapproving prices and other terms that result from such negotiations. A May 7, 2012 letter from COSSEC to Coopharma's counsel, stated that COSSEC was "currently drafting" regulations to "provide a set of procedures to review and approve the business activities and contracts of health care provider cooperatives on an ongoing basis." COSSEC does not have any regulations now, nor did they exist while Coopharma was engaging in the conduct alleged in Paragraphs 11-40.

## Complaint

43. Neither COSSEC nor any other Puerto Rico agency or official has approved any Coopharma contract with any payer.

44. In 2008, four years after enacting Law 239, Puerto Rico enacted Law 203 (26 L.P.R.A. § 3101, *et seq.*) to regulate “collective bargaining” between providers of health care services, including pharmacies, and “third-party administrators and health services organizations.” Law 203 authorizes such collective bargaining, but only under specified conditions. Among other things, it requires that the group of health care providers comprise less than 20 percent of their specialty or service in each specified geographic area and that the group register with the Puerto Rico government before initiating any collective bargaining. Law 203 also bars “threats to boycott, go on strike, or other coordinated action” and requires the mandatory arbitration of any bargaining impasse.

45. In December 2008, the Commonwealth of Puerto Rico issued Regulation 91 to implement Law 203. Under Regulation 91, the threshold step for a health care provider group seeking to bargain collectively is to obtain certification from the Puerto Rico Department of Justice. To obtain this certification, the group must demonstrate that it represents less than 20 percent of the specialty or service in its specified geographic area(s).

46. Coopharma has neither sought nor received on behalf of its member pharmacies any determination that it has satisfied the 20 percent limit on providers or services in the geographic areas in which it operates, or any other requirements of Law 203 and its implementing regulations.

47. Under Law 203, Puerto Rico has not clearly articulated a policy to displace competition with respect to Coopharma’s challenged conduct. Moreover, Puerto Rico has not actively supervised that conduct. As a result, Coopharma’s conduct is not entitled to immunity under the state action doctrine.

### VIII. ANTICOMPETITIVE EFFECTS

48. Coopharma’s actions have the purpose and had the effect of unreasonably restraining trade and hindering competition in the

## Decision and Order

provision of pharmacy services in Puerto Rico in the following ways, among others:

- a. Unreasonably restraining prices of pharmacy services and other competition among Coopharma members;
- b. Increasing prices for pharmacy services; and
- c. Depriving third-party payers and consumers of the benefits of such competition.

**IX. VIOLATION OF THE FTC ACT**

49. The acts and practices described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such 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 has caused this Complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this sixth day of November, 2012.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of the Cooperativa de Farmacias Puertorriqueñas (“Coopharma”), hereinafter referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with

## Decision and Order

violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by any Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment filed thereafter by an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. The Cooperativa de Farmacias Puertorriqueñas is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico with its principal address at 2 Calle Colon, Aguada, Puerto Rico 00602.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

## Decision and Order

**ORDER****I.**

**IT IS ORDERED** that, as used in this Order, the following definitions shall apply:

- A. “Respondent” means the Cooperativa de Farmacias Puertorriqueñas (“Coopharma”); its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and subsidiaries, divisions (including, but not limited to, the PSAO Department), groups, and affiliates controlled by it; and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Distribute” means to provide a copy of the specified documents by (1) personal delivery, with a signed receipt of confirmation; (2) first-class mail with delivery confirmation or return receipt requested; (3) facsimile with return confirmation; or (4) electronic mail with electronic return confirmation.
- C. “Participate” in an entity or an arrangement means (1) to be a partner, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services to a Payer through such entity or arrangement. This definition applies to all tenses and forms of the word “Participate,” including, but not limited to, “Participating,” “Participated,” and “Participation.”
- D. “Payer” means any person that pays or arranges for payment, for all or any part of any Pharmacy services to itself or any other Person, as well as any Person that develops, leases, or sells access to networks of Pharmacies.

## Decision and Order

- E. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- F. “Pharmacy” means any Person licensed by the Commonwealth of Puerto Rico to dispense pharmaceuticals.
- G. “Preexisting Contract” means a contract for the provision of Pharmacy services that was in effect on the date of the receipt by a Payer that is a party to such contract of notice sent by Respondent pursuant to Paragraph III.A.2 of this Order of such Payer’s right to terminate such contract.

**II.**

**IT IS FURTHER ORDERED** that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of Pharmacy services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Pharmacies with respect to the provision of Pharmacy services:
  - 1. To negotiate on behalf of any Pharmacy with any Payer;
  - 2. To refuse to deal or threaten to refuse to deal with any Payer, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;
  - 3. Regarding any term, condition, or requirement upon which any Pharmacy deals, or is willing to deal, with any Payer, including, but not limited to, price terms; or

## Decision and Order

4. Not to deal individually with any Payer, or not to deal with any Payer other than through Respondent;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among Pharmacies concerning any Pharmacy's willingness to deal with a Payer, or the terms or conditions, including price terms, on which the Pharmacy is willing to deal with a Payer;
  - C. Attempting to engage in any action prohibited by Paragraphs II.A through II.B above; and
  - D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any Person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

**III.**

**IT IS FURTHER ORDERED** that Respondent shall:

- A. Within thirty (30) days from the date this Order becomes final:
  1. Distribute this Order and the Complaint to each current officer, director, member, or employee of Respondent; and
  2. Send by first-class mail, with return receipt requested, with the letter attached as the Appendix, to the chief executive officer of each Payer with which Respondent has contracted at any time since January 1, 2008.
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any Preexisting Contract with any Payer, at the earlier of: (1) receipt by Respondent of a written request from a Payer to terminate such contract, or (2) the earliest termination

## Decision and Order

or renewal date (including any automatic renewal date) of such contract.

*Provided, however,* a Preexisting Contract may extend beyond any such termination or renewal date no later than one (1) year from the date that the Order becomes final if, prior to such termination or renewal date:

1. the Payer submits to Respondent a written request to extend such contract to a specific date no later than one (1) year from the date that this Order becomes final, and
2. Respondent has determined not to exercise any right to terminate.

*Provided further* that any Payer making such request to extend a contract retains the right, pursuant to Paragraph III.B of this Order, to terminate the Preexisting Contract at any time.

- C. Within ten (10) days of receiving notification from a Payer to terminate, pursuant to Paragraph III.B of the Order, notify in writing, by first class mail with return receipt requested, each Pharmacy that provides services through that contract to be terminated.
- D. For three (3) years from the date this Order becomes final:
  1. Distribute this Order and the Complaint to each Person who becomes an officer, director, member, or employee of Respondent, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that he or she becomes an officer, director, member, or employee;
  2. send by first class mail, return receipt requested, a copy of this Order and the Complaint to each Payer who contracts with Respondent for the provision of Pharmacy services and who did not previously



## Decision and Order

receive a copy of this Order and the Complaint, within thirty (30) days of the time that such Payer enters into such contract; and

3. post and maintain on Respondent's website and annually publish in an official annual report or newsletter sent to all Pharmacy members of Respondent, this Order and the Complaint with such prominence as is given to regularly featured articles.

**IV.**

**IT IS FURTHER ORDERED** that Respondent shall:

- A. File a verified written report within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include:
  1. a detailed description of the manner and form in which Respondent has complied and is complying with this Order;
  2. the name, address, and telephone number of each Payer with which each Respondent has had any contact during the one (1) year period preceding the date for filing such report; and
  3. the status of each contract required to be terminated;
- B. In addition to the information required by Paragraph IV.A, the sixty day report shall include:
  1. the identity of each Payer sent a copy of the letter in the Appendix to the Order and the response of each Payer to that letter;
  2. a copy of each verification of Distribution required by Paragraph III.A.1; and

## Decision and Order

3. a copy of each return receipt required by Paragraph III.A.2 and Paragraph III.C
- C. In addition to the information required by Paragraph IV.A, each annual report shall include:
1. a copy of each verification of Distribution required by Paragraph III.D.1;
  2. a copy of each return receipt required by Paragraph III.C that Respondent received subsequent to filing its 60 day report.
  3. a copy of each return receipt required by Paragraph III.D.2; and
  4. evidence that the copy of the Order and Complaint has been published, as required by Paragraph III.D.3.

**V.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission:

- A. Of any change in its primary business address within twenty (20) days of such change in address; and
- B. At least thirty (30) days prior to any proposed: (1) dissolution of Respondent; (2) acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

**VI.**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, that Respondent shall,

Decision and Order

without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense;
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

**VII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on November 6, 2032. By the Commission.

**APPENDIX**

[letterhead of Coopharma]  
[name of Payer's CEO] [address]

Dear \_\_:

Enclosed is a copy of a complaint and a consent order ("Order" ) issued by the Federal Trade Commission against Cooperativa de Farmacias Puertorriqueñas ("Coopharma").

Pursuant to Paragraph III.B of the Order, Coopharma must allow you to terminate, upon your written request, without any penalty or charge, any contracts with Coopharma that are in effect as of the date you receive this letter.

## Analysis to Aid Public Comment

If you do not make a written request to terminate the contract, Paragraph III.B. further provides that the contract will terminate on the earlier of the contract's termination date, renewal date (including any automatic renewal date), or anniversary date, which is [date].

You may, however, ask Coopharma to extend the contract beyond [date], the termination, renewal, or anniversary date, to any date no later than [date], one (1) year after the date the Order becomes final.

If you choose to extend the term of the contract, you may later terminate the contract at any time.

Any request either to terminate or to extend the contract should be made in writing, and sent to me at the following address: [address].

Sincerely,

[Coopharma to fill in information in brackets]

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

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Cooperativa de Farmacias Puertorriqueñas (“Coopharma” or “Respondent”). The agreement settles charges that Coopharma violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by negotiating, entering into, and implementing agreements among its member pharmacy owners to fix the prices on which they contract with third-party payers in Puerto Rico.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons.

*Analysis to Aid Public Comment*

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 consent order final.

The purpose of this analysis is to facilitate public comment on the proposed consent order. The analysis is not intended to constitute an official interpretation of the agreement and proposed consent 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 Respondent that it violated the law or that the facts alleged in the proposed complaint (other than jurisdictional facts) are true.

**The Proposed Complaint**

Coopharma is a not-for-profit corporation organized and doing business as a cooperative under the laws of Puerto Rico. Coopharma consists of approximately 300 pharmacy owners who own roughly 360 community pharmacies in Puerto Rico. Coopharma members control at least a third of the pharmacies in Puerto Rico and the organization has a particularly strong presence on the western side of the main island.

Coopharma was established with the principal purpose of negotiating on behalf of its members and entering into single-signature “master contracts” with payers that bind all Coopharma pharmacies. The proposed complaint alleges that Coopharma members negotiated collectively through Coopharma to obtain higher reimbursement rates than its members were receiving in their individual contracts with payers, including pharmacy benefits managers and insurers.

The proposed complaint alleges that Coopharma’s member pharmacies restrained competition by jointly negotiating and entering into agreements with third-party payers. Coopharma achieved this result by encouraging its members: (1) to refuse to deal with third-party payers except through Coopharma; and (2) to threaten termination, or actually terminate, contracts with payers that refused to deal with Coopharma on the terms it demanded.

## Analysis to Aid Public Comment

Coopharma collectively negotiated reimbursement rates with more than ten payers and has reached agreements on behalf of its members with seven of them. The mere threat of Coopharma members' collective action led two additional payers to pay higher rates. The proposed complaint alleges that Coopharma's actions caused payers to pay higher reimbursement rates to Coopharma members, and that this price increase ultimately may be passed along to consumers in the form of higher premium payments, diminished service, or reduced coverage. As a result, Coopharma's actions caused substantial harm to the consumers of Puerto Rico. Coopharma's conduct was unrelated to any efficiency-enhancing integration among its members.

*Negotiations with CVS-Caremark*

As a specific example of Coopharma's misconduct, the proposed complaint alleges that CVS-Caremark ("Caremark"), a pharmacy benefits manager operating in Puerto Rico, was forced to rescind a rate cut and to enter into a master contract at a higher rate because of the collective action of Coopharma members.

In 2008, Caremark notified pharmacies throughout the country that it was reducing reimbursement on its Medicare Part D contracts. Coopharma mobilized its members to collectively resist that rate change. Coopharma provided its members with a form letter, which many sent, rejecting the new Medicare Part D contracts and telling Caremark to negotiate rates through Coopharma. Coopharma then informed Caremark that its members would not accept Caremark's reimbursement offer and demanded higher rates. Coopharma also informed certain Caremark clients that Caremark was threatening to terminate pharmacies that did not accept Caremark's rate change. This pressure led Caremark to rescind the Part D rate change for the pharmacies that sent letters rejecting the change.

Coopharma continued to pressure Caremark to enter into a master contract on all lines of business, including Medicare Part D. Coopharma used the same basic tactics to accomplish this goal, by: (1) demanding that Caremark negotiate exclusively through Coopharma; (2) threatening that its members would terminate their Caremark contracts; and (3) contacting Caremark's clients. Indeed, Coopharma took the matter public by placing a

## Analysis to Aid Public Comment

newspaper advertisement stating that negotiations with Caremark had failed and that, as of May 28, 2009, “we will not continue providing services” to Caremark patients.

In August 2009, Caremark agreed to replace Coopharma’s members’ individual contracts with a master contract with Coopharma. The proposed complaint alleges that Caremark’s price concessions cost it approximately \$640,000 in 2009 alone.

*Other Coercive Conduct*

In addition, the proposed complaint alleges that in at least two instances, the mere threat of collective terminations benefitted individual Coopharma pharmacies at a cost of millions of dollars to third-party payers. Coopharma pharmacies obtained higher reimbursement rates from third-party payers Medco and Medicare Mucho Mas even though negotiations with Coopharma did not result in a master contract. During its negotiations with Medco, Coopharma threatened to pull all Coopharma pharmacies out of Medco’s network. In an attempt to prevent such a disruption of its network, Medco raised the reimbursement rates it paid to individual Coopharma pharmacies, a concession that cost Medco and its clients over \$2 million between 2007 and 2011. Medicare Mucho Mas, a large Medicare Advantage payer, also feared that Coopharma could cause a similar disruption in its pharmacy network. As a result, Medicare Mucho Mas’ pharmacy benefits manager offered a higher reimbursement rate to Coopharma pharmacies.

Finally, the proposed complaint alleges that Coopharma attempted to use collective action to resist a reimbursement rate reduction by health insurer Humana. Coopharma attempted to coerce Humana into maintaining its reimbursement rates by threatening termination of the individual contracts and pressuring it into entering into a master contract. When Humana asserted that Coopharma lacked the legal authority to terminate its members’ contracts, Coopharma encouraged its members to terminate their contracts individually.

## Analysis to Aid Public Comment

*Coopharma Cannot Qualify for State Action Immunity*

The proposed complaint alleges that Coopharma's anticompetitive conduct cannot be shielded by the state action doctrine. The state action doctrine provides that states are not subject to federal antitrust liability, and that by extension certain subordinate state entities and private parties exercising state-granted powers may be immunized as well.<sup>1</sup> Private parties claiming the protection of this immunity must meet two elements. First, private parties must demonstrate that the challenged conduct was undertaken pursuant to a clearly articulated state policy to displace competition with regulation. Second, private parties must show that the challenged conduct has been actively supervised by the state.<sup>2</sup> The proposed complaint alleges that neither requirement is satisfied here.

Puerto Rico has not clearly articulated a policy to replace competition with the challenged conduct. Law 203 regulates "collective bargaining" between providers of health care services, including pharmacies, on the one hand, and payers, on the other.<sup>3</sup> However, Law 203 limits collective bargaining to situations where the providers obtain a certificate verifying that they constitute less than 20 percent of providers in a particular area, do not engage in boycotts, submit to mandatory arbitration in the case of an impasse, and comply with certain other requirements.<sup>4</sup> Coopharma has not – and cannot – satisfy these requirements.<sup>5</sup>

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<sup>1</sup> See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>2</sup> *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

<sup>3</sup> 26 L.P.R.A. § 3101, *et seq.*

<sup>4</sup> E.g., 26 L.P.R.A. §§ 31.040; 31.050; 31.060.

<sup>5</sup> The Commission is aware that Law 239, which regulates cooperatives generally, declared that cooperatives "shall not be considered conspiracies or cartels to restrict business." 5 L.P.R.A. § 4516 (Law 239, § 20.5). The Commission and the Puerto Rico Department of Justice interpret Law 203 (which was passed after Law 239) to supersede Law 239. At the very least, Law 203 imposes additional requirements on health care cooperatives, which Coopharma cannot meet.



## Analysis to Aid Public Comment

The proposed complaint also alleges that Puerto Rico has not actively supervised Coopharma's conduct because no Puerto Rican official has exercised the power to review, approve, or disapprove either the rates in Coopharma's contracts with payers or the coercive collective action it used to obtain them.<sup>6</sup> Under Law 203, Coopharma has neither sought to comply with nor satisfied any of the law's requirements. Even under Law 239, the Puerto Rico agency charged with the general regulation of cooperatives, the Corporacion para la Supervision y Seguro de Cooperativas de Puerto Rico ("COSSEC"), has no process in place for reviewing cooperatives' negotiations with payers or for approving or disapproving prices and other terms that result from such negotiations.

### **The Proposed Consent Order**

The proposed consent order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the proposed complaint, while allowing Coopharma to engage in legitimate joint conduct.

Paragraph II prevents Coopharma from continuing the challenged conduct. Paragraph II.A prohibits Respondent from entering into or facilitating agreements between or among any pharmacies: (1) to negotiate on behalf of any pharmacy with any payer; (2) to refuse to deal or threaten to refuse to deal with any payer; (3) to include any term, condition, or requirement upon which any pharmacy deals, or is willing to deal, with any payer, but not limited to, price terms; or (4) not to deal individually with any payer, or not to deal with any payer other than through Respondent.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Respondent from facilitating exchanges of information between pharmacies concerning whether, and on what terms, to contract with a payer. Paragraph II.C bars attempts to engage in any action prohibited by

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<sup>6</sup> Cf. *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.").

## Analysis to Aid Public Comment

Paragraph II.A or II.B, and Paragraph II.D proscribes encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C.

Paragraph III is designed to prevent the challenged conduct from reoccurring. Paragraph III.A requires Coopharma to send a copy of the complaint and consent order to its members, its management and staff, and any payers with whom Coopharma has contracted at any time since January 1, 2008. Paragraph III.B allows for contract termination if a payer voluntarily submits a request to Coopharma to terminate its contract. Pursuant to such a request, Paragraph III.B requires Coopharma to terminate, without penalty, any pre-existing payer contracts. Upon receiving such request, Paragraph III.C requires that Coopharma notify in writing each pharmacy that provides services through that contract to be terminated. Paragraph III.D requires Coopharma, for three years, to distribute a copy of the complaint and consent order to new members, officers, directors, and employees, and to payers who begin contracting with Coopharma and to post them on its website.

Paragraphs IV, V, and VI impose various obligations on Coopharma to report or to provide access to information to the Commission to facilitate its compliance with the consent order. Finally, Paragraph VII provides that the proposed consent order will expire 20 years from the date it is issued.

## Complaint

## IN THE MATTER OF

**BRAIN-PAD, INC.  
AND  
JOSEPH MANZO**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4375; File No. 122 3073**Complaint, November 15, 2012 – Decision, November 15, 2012*

This consent order addresses Brain-Pad, Inc.'s advertising and promotion of mouth guards. The complaint alleges that respondents did not have a reasonable basis to represent in advertising and on packaging for their mouth guards that they reduced the risk of concussions. The complaint further alleges that the respondents made the false and misleading claim that they possessed scientific studies that proved their concussion-reduction risk claims because, in fact, they did not have such evidence. The consent order prohibits the respondents from misrepresenting that any product will reduce the risk of concussions or reduce the risk of concussions from lower jaw impacts.

*Participants*

For the *Commission*: Victor DeFrancis and Andrew Wone.

For the *Respondents*: Patrick Wolfe, Jr., Zarwin, Baum, DeVito, Kaplan, Schaer & Toddy P.C.; Bridget Calhoun, Crowell & Moring LLP.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Brain-Pad, Inc., a corporation, and Joseph Manzo, an individual (“Respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Brain-Pad, Inc. (“BPI”) is a Pennsylvania corporation with its principal office or place of business at 322 Fayette Street, Conshohocken, Pennsylvania 19428.
2. Respondent Joseph Manzo is the President of BPI. Individually or in concert with others, he formulates, directs,

## Complaint

controls, or participates in the policies, acts, or practices of BPI, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of BPI.

3. Respondents have labeled, advertised, promoted, offered for sale, sold, and distributed, throughout the United States, “Brain-Pad”-branded mouth guards (“Brain-Pad mouth guards”) to consumers. Brain-Pad mouth guards are “devices” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of Respondents, as alleged herein, have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated or caused to be disseminated advertisements for Brain-Pad mouth guards, including, but not limited to, the attached Exhibits A through F. These advertisements contain the following statements and depictions, among others:

- a. **Product Packaging:** Brain-Pad Pro+  
(front of package)



Complaint

Brain-Pad Pro+ (back of package)



**[[ (BRAIN PAD) ]]**  
**PRO+**  
**PROTECTION | PERFORMANCE | ENDURANCE**  
**DOUBLE INJECTION DUAL ARCH DESIGN**

Tested and proven to reduce risk of internal head injuries and concussions from lower jaw impacts

Exclusive high-impact inner material helps absorb concussive blows

Gel form liner molds firmly to teeth supporting entire dental arch

Air Flow Clench & Breathe™ technology enhances breathing and endurance

Protects upper and lower teeth, lips, tongue

Fits over braces

30 second custom fitting instructions inside

Can be worn with or without included strap

Increases helmet safety and effectiveness

Approved for Mandate by: International Kickboxing Federation, International Sport Karate Association, and Kick International

Includes hard shell anti-microbial storage case

Latex Free

**\$12,000 Dental Insurance Warranty**

**Triple Benefits**

- 1. Creates & Maintains Brain Safety Space**
- 2. Lower Channel Jaw Stabilizer**
- 3. Opens Airway**

ALL RIGHTS RESERVED.  
 OTHER U.S. & FOREIGN PATENTS PENDING.  
 MADE IN TAIWAN.

Complaint

- b. **Product Packaging:** Brain Pad LoPro+  
(front of package)



Complaint

Brain Pad LoPro+ (back of package)

**BRAIN-PAD**  
HEAD GEAR THAT FITS IN YOUR MOUTH

The Patented BRAIN-PAD repositions & secures the lower jaw in a safety position, reducing the risk of concussions from lower jaw Impacts.

**With Other Mouthguards:** **With The BRAIN-PAD**

*Protects only the UPPER TEETH!*  
**Brain Injuries!**  
Clench No Air  
IMPACT  
Jaw can Slam the TMJ & base of skull!

*Securely Locks & Cushions Teeth & Jaw!*  
**Brain Safety!**  
CLENCH and BREATHE  
IMPACT  
Helps Prevent Jaw from Slamming TMJ & base of the Skull!  
**CREATES NEW BRAIN SAFETY SPACE!**

Upon Impact, the Lower Jaw can SLAM into the TMJ & the Base of the Skull!

The Patented BRAIN-PAD transmits the impact energy away from the base of the skull to the BRAIN-PAD!

New 'streamline design' Secures & Cushions lower jaw while protecting ALL teeth!

Use 1 strap  
\*NEW STRAP, LANYARD or STRAPLESS attachment system!  
Offers constant mouth breathing - Even while CLENCHING!  
Patented inner injection process creates a shock absorber that helps reduce lower jaw impact concussions!

UPPER ONLY Mouthguards allow clench  
CUSTOM MOLDS TO ALL TEETH!

2 straps included for NEW-LANYARD style "NON-HELMETED" or HELMETED USE!

**Patented "PROTECTION & PERFORMANCE" in 1 Package!**

**System Includes:**  
Boiling Stick, Protective Case  
Warranty, Warnings, Care,  
and Custom Fitting Instructions.

\* Meets & exceeds all youth, high school & Collegiate Regulations

CAN UNLOCK MUSCULAR POTENTIAL! CUSHIONS TEETH!

LPP-05 Black/Clear JUNIOR SIZE  
7 57920 80050 9  
"STRAP / STRAPLES in-one" Model!

Manufactured exclusively by Brain-Pad, Inc., 322 Fayette St., Conshohocken, PA 19428, 810.397.0893 www.brainpads.com  
Copyright 2006-2007 Brain-Pad, Inc.  
Protected under U.S. & Foreign Patents: # 6,936,379, # D493,578S, # D500,866S, # D523,994, # D525,749, # D526,093,  
# D526,095, # D527,848, # D530,863, # D532,559, # D537,986S, # D537,987S, # 000408947-0001, # 000408947-0002, # CA2251672  
All Rights Reserved. Other U.S. & Foreign Patents pending. Made in Taiwan. LPPY 0615 07



Complaint


c. **Product Packaging:** Brain-Pad Pro-Plus Junior  
(front of package)





Complaint

Brain-Pad Pro-Plus Junior (back of package)



**The patented BRAIN-PAD® Positions, Secures & Cushions the lower jaw in a Safety Position, reducing the risk of concussions from the lower jaw slamming into the TMJ, base of the skull and brain.**

**With Other Mouthguards**

Bottom Teeth & Jaw Slide & Slam!

**Brain Injuries!**

Clench No Air!

IMPACT

Jaw Slams TMJ and base of skull!

**Upon Impact, the Lower Jaw can SLAM into the TMJ & the Base of the Skull!**

**With The BRAIN-PAD®**

Secures & Cushions Teeth & Jaw!

**Brain Safety!**

CLENCH and BREATHE!

IMPACT

Helps Prevent Jaw from Slamming TMJ & base of the Skull!

**CREATES NEW BRAIN SAFETY SPACE!**

**The Patented BRAIN-PAD transmits the impact energy away from the brain to the BRAIN-PAD!**

**! MAXIMUM BREATHING !**



Increased airway space WITH THE BRAIN-PAD!

\*UPPER ONLY\* Mouthguards - airway closes.

Only upper & lower channels can secure & stabilize Jaw Position while protecting the upper AND lower teeth!



Use 1 strap

\* NEW: STRAP LANYARD or STRAPLESS attachment system!

Offers constant mouth breathing - Even while CLENCHING!

Patented inner injection process creates a shock absorber that protects against lower jaw impact concussions!

30 sec. Bob-N-Bite CUSTOM FIT

- OR -

2 STRAPS included for:


NEW - LANYARD style "NON-HELMETED" or HELMETED USE!

**Patented "PROTECTION & PERFORMANCE" in 1 Package!**

**System Includes:**


PRO+PLUS, 2 Optional Straps, Storage Case, Warranty, Warnings, Care & Custom Fitting Instructions.

\* Meets & exceeds all youth, high school & Collegiate Regulations



CAN UNLOCK MUSCULAR POTENTIAL!  
CUSHIONS TEETH!

WPRY-2004 JUNIOR SIZE BLACK/GRAY



7 57920 50510 7

Manufactured exclusively by Brain-Pad, Inc., 322 Fayette St., Copstohocken, PA 19426, 610-397-0893, www.brainpads.com  
Copyright 2000-2007 Brain-Pad, Inc.

Protected under U.S. & Foreign Patents: # 5,836,376, # D493,579S, # D500,895S, # D523,914, # D525,748, # D526,063, # D526,085, # D527,548, # D530,863, # D532,560, # D548,403, # D0488947-0001, # D0468947-0002, # CA2251072. All Rights Reserved. Other U.S. & Foreign Patents pending. Made in Taiwan.

PRO+PLUS 08/02/07


Complaint

d. **Product Packaging:** Brain-Pad LoPro Fem  
(front of package)




Complaint

Brain-Pad LoPro Fem (back of package)




The Patented **BRAIN PAD** repositions & secures the lower jaw in a safety position, reducing the risk of concussions from lower jaw Impacts.

**Your Brain With Upper Mouthguards**




**Upper mouthguards can induce internal head injuries & limit breathing!**

**Your Brain With The BRAIN-PAD**

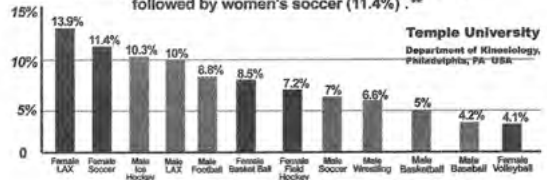


**The Patented BRAIN-PAD transmits the impact energy away from the base of the skull to the BRAIN-PAD!**

**GET MORE AIR!**



**Of all the reported injuries, women lacrosse players (13.9%), reported the highest percentage of suffering a concussion during a game followed by women's soccer (11.4%).<sup>1,2</sup>**



Sport	Concussion Rate (%)
Female LAX	13.9%
Female Soccer	11.4%
Male Top Hockey	10.3%
Male LAX	10%
Male Football	8.8%
Female Basketball	8.5%
Female Field Hockey	7.2%
Male Soccer	7%
Male Wrestling	6.6%
Male Basketball	5%
Male Baseball	4.2%
Female Volleyball	4.1%


<sup>1,2</sup> Female athletes were found to be at a greater risk for suffering concussions during games compared to male athletes<sup>1,2</sup>

**System Includes:** Boiling Stick, Storage Pouch, Warranty, Warnings, Care, & Custom Fitting Instructions.


\* Frank Hillary, Ph.D., Kessler Med. Rehab. Research and Educ. Corp. Colleen Mann, Philip Schatz, Ph.D. Saint Joseph's University, Dept. of Psychology, Philadelphia PA.

\*\* Total Participants' - SGMA INTERNATIONAL 200 CastleWood Dr., North Palm Beach, FL 33408-5696 - .382 concussion ratio per 1000 AES (estimated 35 AES per participant).

1,2 Epidemiological considerations of concussions among intercollegiate athletes. - Covassin T, Swanik CB, Sachs ML. Appl Neuropsychol 2003; 10(1): 12-22. Correspondence: Tracey Covassin, Department of Kinesiology, Temple University, Philadelphia, Pennsylvania, USA, (email: tracey.covassin@temple.edu). (Copyright © 2003, Lawrence Erlbaum Associates).



**UNLOCKS CARDIOVASCULAR & MUSCULAR POTENTIAL!**  
CUSHIONS TEETH!



WFL-200 Blue/Clear  
7 57920 40010 5

Manufactured exclusively by Brain-Pad, Inc., 322 Fayette St., Conshohocken, PA 19428. 610.357.0893. www.brainpads.com  
Copyright 2000-2006 Brain-Pad, Inc. Protected under U.S. & Foreign Patents. # 5,636,379, # D493,578S, # D500,895S,  
# D523,994, # D525,749, # D526,093, # D526,095, # 000468947-0002, # CA2251672.  
All Rights Reserved. Other U.S. & Foreign Patents pending. Made in Taiwan.

LoPro Female  
US 15 96

Complaint

- e. **Product Packaging:** Brain-Pad Double mouth guard (front of package)





## Complaint

f. **Internet Website: [www.brainpads.com](http://www.brainpads.com)**

VIDEO: (Brain-Pad Commercial featuring Joseph Manzo) (Transcript at Exhibit A)

ON SCREEN: BRAIN PAD

Protective & Performance Solutions

BIOMECHANICALLY TESTED

REDUCES RISK OF CONCUSSIONS!

For All CONTACT SPORTS

(Exhibit A at 3).

\* \* \*

MALE ANNOUNCER: So much attention is now being paid to concussions, literally a contusion to the brain.

ON SCREEN: THE IMPORTANCE OF JAW POSITION

MALE ANNOUNCER: And Brain Pad may be on the verge of a huge breakthrough in prevention after 15 years of hard work and belief.

(Exhibit A at 4).

\* \* \*

JOSEPH MANZO: Every time we got a school involved with it, at the end of the year, they would say, wow, man, our concussions went from nine to zero or nine

to one. You know, it was just this constant feedback. My head -- we don't play with the headaches anymore.

(Exhibit A at 5).

## Complaint

g. **Print Advertisement** (Exhibit B) (BP00075)

(depiction of MMA fighter and Brain-Pad mouth guard)

**MMA ORGANIZATIONS**

**FIGHT CONCUSSIONS**

**with BRAIN-PAD!**

h. **Print Advertisement** (Exhibit C) (BP00157)

‘Creates and retains’  
a TMJ/Brain Safety  
Space protecting  
the TMJ AND Base  
of Skull & Brain

Helping Coaches . . .  
REDUCE  
CONCUSSION  
RISK

\* \* \*

**“BIO-MECHANICALLY TESTED & PROVEN”**

**REDUCES THE RISK OF CONCUSSIONS**

**FROM: FACEMASK IMPACTS, CHIN CUP**

**FORCES & DIRECT LOWER JAW IMPACTS!**

i. **Print Advertisement** (Exhibit D) (BP00131)

PROTECTION & PERFORMANCE!

Protects TMJ & Brain from Jaw Impacts

- Reduces the risk of **Concussion**

## Complaint

**Only ‘Jaw Joint Protectors’ Reduce the Risk of  
Concussions & Internal Head Injuries.**

j. **Email Advertisement** (Exhibit E) (BP00254 – 55)

(Headline) Athletes Turn to Brain-Pad Mouth Guards  
for Concussion Protection

\* \* \*

As Congress prepares to examine the issue of concussions in the NFL, NCAA, and high school sports for the second time on January 4, a Pennsylvania company has been successfully marketing a mouth guard device designed to protect players from the probability of a concussion caused by lower jaw impact.

\* \* \*

“We have said for years that concussions are serious injuries and should be avoided at all costs,” says Joe Manzo, President of Brain-Pad. “The devastating effects of concussions can have a lasting impact on athletes and their families. . . . When used properly, there is a 40 percent reduction of impact energy to the base of the skull, these forces can cause a concussion or knock out as boxers call it. Athletes from the NFL to the MMA and at every level from professional to local youth leagues are recognizing the significant health benefits of our Brain-Pad mouth guards to offer protection against these dangerous injuries.”

k. **Point of Purchase Display** (Exhibit F) (BP00308)

**BRAIN PAD**

**BIOMECHANICALLY TESTED:**

**REDUCES RISK OF CONCUSSIONS!**

## Complaint

6. Through the means described Paragraph 5, including the statements and depictions contained in the advertisements attached as Exhibits A through F, among others, Respondents have represented, expressly or by implication, that:

- a. Brain-Pad mouth guards reduce the risk of concussions; and
- b. Brain-Pad mouth guards reduce the risk of concussions from lower jaw impacts.

7. Through the means described in Paragraph 5, Respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.

8. In truth and in fact, Respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Through the means described in Paragraph 5, including the statements and depictions contained in the advertisements attached as Exhibits A through F, among others, Respondents have represented that:

- a. scientific studies prove that Brain-Pad mouth guards reduce the risk of concussions; and
- b. scientific studies prove that Brain-Pad mouth guards reduce the risk of concussions from lower jaw impacts.

10. In truth and in fact, scientific studies do not prove that Brain-Pad mouth guards reduce the risk of concussions or reduce the risk of concussions from lower jaw impacts. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

11. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and



Complaint

the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

**THEREFORE**, the Federal Trade Commission, this fifteenth day of November, 2012, has issued this complaint against Respondents

By the Commission.

Complaint

**Exhibit A****OFFICIAL TRANSCRIPT PROCEEDING****FEDERAL TRADE COMMISSION**

MATTER NO. 1223015

TITLE ANTI-CONCUSSION PRODUCTS

DATE RECORDED: DATE UNKNOWN  
TRANSCRIBED: NOVEMBER 21, 2011  
REVISED: JANUARY 10, 2012

PAGES 1 THROUGH 8

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BRAIN PAD COMMERCIAL

Complaint

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FEDERAL TRADE COMMISSION

I N D E X

RECORDING:

Brain Pad Commercial

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Complaint

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FEDERAL TRADE COMMISSION

In the Matter of:                    )  
Anti-Concussion Products            ) Matter No. 1223015  
  )  
-----)  
  Date Unknown

The following transcript was produced from a  
digital recording provided to For The Record, Inc. on  
November 9, 2011.



## Complaint

4

1           JOSEPH MANZO: The way the product is designed  
2 is that it brings the lower jaw forward about a half a  
3 millimeter in front of your upper teeth and the thickness  
4 of the unit brings your jaw down, so you get this down  
5 and forward motion, creating a safety space here.

6           **ON SCREEN: Actual Lab Impact Test**

7           JOSEPH MANZO: No matter if you're taking  
8 direct hits, lateral hits, it's keeping -- these are the  
9 strongest bones in the skull. So, a lot of that energy  
10 is absorbed there and into the jaw joint protector.

11           **MALE ANNOUNCER:** So much attention is now being  
12 paid to concussions, literally a contusion to the brain.

13           **ON SCREEN: THE IMPORTANCE OF JAW POSITION**

14           ~~MALE ANNOUNCER:~~ And Brain Pad may be on the  
15 verge of a huge breakthrough in prevention after 15 years  
16 of hard work and belief.

17           **ON SCREEN: PROTECTION PERFORMANCE ENDURANCE**

18           **BRAIN PAD ,**

19           **PROTECTION**

20           **Creates this:**

21           **BRAIN SAFETY SPACE!**

22           **PERFORMANCE**

23           **Jaw/TMJ alignment**

24           **promotes Strength &**

25           **Competitive Edge**

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## Complaint

5

1                   **ENDURANCE**  
2                   **Creates Increased**  
3                   **Constant Breathing-**  
4                   **EVEN WHILE CLENCHING!**  
5                   **ON SCREEN: Joseph Manzo**  
6                   **PRESIDENT, CEO**  
7                   **JOSEPH MANZO:** Every time we got a school  
8                   involved with it, at the end of the year, they would say,  
9                   wow, man, our concussions went from nine to zero or nine  
10                   to one. You know, it was just this constant feedback.  
11                   My head -- we don't play with the headaches anymore.  
12                   **MALE ANNOUNCER:** Finally, a big breakthrough  
13                   and now a breakout from Brain Pad's humble beginning in  
14                   Conshohocken.  
15                   **JOSEPH MANZO:** The product is available in all  
16                   500 Sports Authority stores --  
17                   **ON SCREEN: SPORTS AUTHORITY**  
18                   **"Spring into...Sport Safety!"**  
19                   **Brain-Pad's 2011 Jaw-Joint Protector**  
20                   **Mouth Guard Series**  
21                   **Brain-Pad**  
22                   **"Jaw-Joint Protectors" are a patented Sport**  
23                   **Safety Technology!**  
24                   **REDUCES Jaw Impact CONCUSSION Risk!**  
25                   **Includes: Dental Warranty, hard-shell anti-**

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## Complaint

6

1 microbial case, optional strap & custom fitting  
2 instructions  
3 PROTECTION PERFORMANCE ENDURANCE  
4 JOSEPH MANZO: -- and it's in over 1,000  
5 Walmart stores.  
6 ON SCREEN: BRAIN PAD advertisement  
7 JOSEPH MANZO: We have at least 500 mom-and-pop  
8 retailers, single brick and mortar retail outlets.  
9 ON SCREEN: BRAIN PAD  
10 IMPACT PROTECTIVE  
11 ALL AGES  
12 HEADBANDS & WRISTBANDS  
13 WITH IMPACT ABSORBENT INNER MATERIAL  
14 YEAR-ROUND PROTECTION for ALL  
15 SPORTS, ACTIVITIES & ALL AGES!  
16 JOSEPH MANZO: So, the product is easily  
17 accessible now.  
18 ON SCREEN: BRAIN PAD  
19 PROTECTIVE & PERFORMANCE SOLUTIONS  
20 JAW-JOINT PROTECTORS  
21 322 FAYETTE STREET  
22 CONSHOHOCKEN, PA  
23 WWW.BRAINPADS.COM  
24 610-397-0893  
25 MALE ANNOUNCER: Brain Pad is located at 322

For The Record, Inc.  
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Complaint

7

1           Fayette Street and their website will show and tell you  
2           all you need to know at [www.brainpads.com](http://www.brainpads.com). And you can  
3           reach them by phone at (break in recording) 97-0893.

4                           **(The recording was concluded.)**

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FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 154

## Complaint

8

## 1                    C E R T I F I C A T I O N   O F   T Y P I S T

2

3                    MATTER NUMBER: 12230154                    CASE TITLE: ANTI-CONCUSSION PRODUCTS5                    TAPING DATE: DATE UNKNOWN6                    TRANSCRIPTION DATE: NOVEMBER 21, 20117                    REVISED: JANUARY 10, 2012

8                    I HEREBY CERTIFY that the transcript contained  
9                    herein is a full and accurate transcript of the tapes  
10                    transcribed by me on the above cause before the FEDERAL  
11                    TRADE COMMISSION to the best of my knowledge and belief.

12

13                    DATED: JANUARY 10, 2012

14                    

15                    ELIZABETH M. FARRELL

16

## 17                    C E R T I F I C A T I O N   O F   P R O O F R E A D E R

18

19                    I HEREBY CERTIFY that I proofread the transcript for  
20                    accuracy in spelling, hyphenation, punctuation and  
21                    format.

22

23                    

24                    WANDA J. RAVER

25

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Complaint

Exhibit B

11/2009 ~~MMMA~~ <sup>Worldwide</sup> ~~MMA~~ <sup>MAG.</sup>

**BRAIN-PAD**  
PROTECTIVE SOLUTIONS

**MMA ORGANIZATIONS FIGHT CONCUSSIONS with BRAIN-PAD!**

SECURES JAW!  
CUSHIONS JAW!  
PROTECTS TMJ!  
PROTECTS BRAIN!  
UNLOCKS STRENGTH!  
CLENCH for POWER!  
CLENCH & BREATHE DESIGN!

"I've worn The Brain-Pad HP Model for 11 yrs - I WILL NOT FIGHT WITHOUT IT!"  
Champion Cung Le  
Official mouth guard of:

Model: WPR-300  
HIGH PERFORMANCE

**UFL**  
ULTIMATE FIGHT LEAGUE

**BRAIN-PAD: NO LIMIT - PATRONS DISCOUNT - Enter Code: BRMMA**

**15% OFF**  
MOUTH GUARDS  
by Phone or Online

**IS YOUR MOUTH GUARD MAKING YOU SICK?**  
Bacteria on mouth guards can get into your LUNGS STOMACH BLOOD-STREAM  
Case study by: Thomas Gleason, DDS, PhD, Professor at The Academy of General Dentistry

**NATUREZONE**  
ORAL APPLIANCE SANITIZER & DEODORIZER

**3000x MORE EFFECTIVE than chlorine!**

**KILLS DEADLY MRSA, STAFF, Bacteria, Viruses & fungi - IN A FAST 3mins!**

**PERSONAL UV/OZONE GENERATOR**  
Sanitizes  
Deodorizes  
8,000 hr Bulb  
No tablets. No refills.  
Battery Powered - for use anywhere!

**BRAIN-PAD**  
PROTECTIVE SOLUTIONS  
Brain-Pad, Inc.  
810-397-0893  
www.brainpads.com  
info@brainpads.com  
Distributorships available

Designed for: sport guards - night guards - retainers - dental appliances - tooth brush heads

BP00075

Complaint

Exhibit C



**PROTECTION PERFORMANCE ENDURANCE**  
**(((BRAIN PAD)))**  
**JAW JOINT PROTECTORS**

Helping Coaches  
**REDUCE CONCUSSION RISK!**

**PROTECTION PERFORMANCE ENDURANCE**

**"BIO-MECHANICALLY TESTED & PROVEN"**  
**REDUCES THE RISK OF CONCUSSIONS FROM: FACEMASK IMPACTS, CHIN CUP FORCES & DIRECT LOWER JAW IMPACTS!**

WPR-2004 10 3XS-WP 10 LPP-02 10

\*Includes Two Belt Straps, Foam Inserts, Removable Chin Cup, Copied Logo



**NHSCA 10% Discount Promo Code: NHSCA**  
Promo ends 12/31/11 - Call 800-444-0100 or 972-462-1100 for Sales Support or Order new products while stocks last. See path on Order Screen for Page

Available Nationwide at:

**SPORTS AUTHORITY**  
(Call for store location) Call 800-444-0100

See mechanical Head Form Training

**Head Pad 2.0** is a unique, available for Lower Jaw protection, designed to reduce the risk of concussions & TBI from being

Head Pad 2.0 is a unique, available for Lower Jaw protection, designed to reduce the risk of concussions & TBI from being

**(((onlin)))**  
www.onlin.com 800-444-0100

Emailer for National High School coaches Association

July 2011

Complaint

Exhibit D

11/2010 MARI AUTHORITY MARK.

**Brain-Pad®** PROTECTIVE & PERFORMANCE SOLUTIONS **Jaw Joint Protectors™**

**PROTECTION & PERFORMANCE!**  
Protects TMJ & Brain from Jaw Impacts

- Reduces the risk of **Concussion**
- **Dual Arch** protective designs
- Offers **Clench & Breathe** technology
- Protects Upper and Lower Braces

*Create and maintain brain safety space*

3XS-NP (non-strap)  
3XS-WP (with-strap)

*Tapered Channel Ends Remove need to trim!*

*Lower channel jaw stabilizer*

*Opens airway*

PRO+®  
Helmet tether included

**NEW HIGH-IMPACT Gel-pad Inserts!**

Intl. Combat Sport Organizations Mandate Dual Arch Mouth Guard Designs -

**Only 'Jaw Joint Protectors' Reduce the Risk of Concussion & Internal Head Injuries.**

Brain-Pad® Designs create a Jaw Joint / Brain 'Safety Space'!

Protected under U.S. Patent(s), Foreign Patent(s) and/or Patent(s) Pending. ©2010 Brain-Pad, Inc. All Rights Reserved.

**Brain-Pad®** 610 397 0893 www.brainpads.com info@brainpads.com

BP00131

## Complaint

**Exhibit E****Andrew Piacine, Brain-Pad Inc****Subject:** FW: Athletes Turn to Brain-Pad Mouth Guards

Bates # CC-21 from 2009 to 2011 Delivery Date: Wednesday, December 30, 2009 at 3:05 PM EST Sent 2909 opens 569

**Brain-Pad, Inc.**

December 29, 2009 10:00 AM Eastern Time

**Athletes Turn to Brain-Pad Mouth Guards for Concussion Protection**



*Bi-molar mouth guard line is tested and proven to stabilize the jaw and protect the temporomandibular joint during sports-related impact*

CONSHOHOCKEN, Pa.--As Congress prepares to examine the issue of concussions in the NFL, NCAA, and high school sports for the second time on January 4, a Pennsylvania company has been successfully marketing a mouth guard device designed to protect players from the probability of a concussion caused by lower jaw impact.

"I treat many athletes looking for teeth, mouth and jaw protection on the playing field," says Dr. Robert B. Mongrain, DMD. "I recommend Brain-Pad to all my patients who play aggressive contact sports. Protecting the lower jaw and TM joints is critical to minimize the risks of potential concussions. I am glad to see that institutions like the NFL and Congress are finally taking a serious look at the dangers of these injuries and putting more emphasis on protection and recovery."

Unlike traditional mouth guards that offer protection for either the upper or lower teeth only, Brain-Pad is a dual arch, bi-molar, mouth guard. The Brain-Pad technology repositions the lower jaw while protecting both the upper and lower teeth. The jaw is stabilized into a neutral position, creating a safety space that greatly reduces the risk of jaw impact concussions and TMJ injuries. When put into place, the Brain-Pad mouth guards also open the airway in the throat 100 percent, allowing users to breathe better and gain a competitive advantage.

"We have said for years that concussions are serious injuries and should be avoided at all costs," says Joe Manzo, President of Brain-Pad. "The devastating effects of concussions can have a lasting impact on athletes and their families. We have designed these mouth

## Complaint

unprotected area for athletes. When used properly, there is a 40 percent reduction of impact energy to the base of the skull, these forces can cause a concussion or knock out as boxers call it. Athletes from the NFL to the MMA and at every level from professional to local youth leagues are recognizing the significant health benefits of our Brain-Pad mouth guards to offer protection against these dangerous injuries."

The House Judiciary Committee, chaired by Representative John Conyers, D-Michigan, will hear testimony on Monday to examine the NFL's response to concussion injuries and assess the protocols or lack thereof, in place for college and high school football players. Scheduled witnesses include NFL neurologist Ira Casson, DeMaurice Smith, the executive director of the NFL Players Association, David Klossner, the NCAA's director of health and safety and Dr. Bennet Omalu, a neuropathologist and primary researcher into brain damage in football players.

Brain-Pad mouth guards are available at leading athletic retailers including Wal-Mart® stores nationwide, and retail between \$7 and \$30 based on the model.

**ABOUT BRAIN-PAD, INC.**

A privately held corporation, founded in 1995 specifically for the promotion, manufacture, and sale of customized Brain-Pad® dual-arch mouth-guards designed to reduce the risk of concussion from lower jaw impacts while increasing endurance and performance. Brain-Pad, Inc. has become a leader in technology development in this field. Its Brain-Pad® products are available in retail and wholesale outlets as well as through distributors, contact sports leagues, professional organizations, school teams at intermediate, high-school, college, and university level. Brain-Pad® products are well-accepted by professional sports athletes in boxing, mixed martial arts, football and many other contact sports. Brain-Pad® products also include shock-absorbing wrist, arm and head-bands as well as: juniors', women's, men's, and professional athlete's dual-arch protective and high performance mouth-guards.

Additionally, Brain-Pad, Inc. recently developed, patented, and commercially released a premium ultra-violet/ozone oral appliance sanitizer, the NatureZone™, available to the retailers and distributors but exclusively distributed to the professional dental industry by Henry Schein, Inc., the largest global distributor of dental and medical products to dentists, dental laboratories and physicians.

Brain-Pad, Inc.'s corporate headquarters are located in Conshohocken, Pennsylvania. For product or company details contact 610-397-0893, [info@brainpads.com](mailto:info@brainpads.com), or visit [www.brainpads.com](http://www.brainpads.com)

Photos/Multimedia Gallery Available: <http://www.businesswire.com/cgi-bin/mimg.cgi?eid=6127151&lang=en>

**Contacts**

Brain Pad Protective Solutions

Bill Samuel

Director of Sales

[bsamuel@brainpads.com](mailto:bsamuel@brainpads.com)

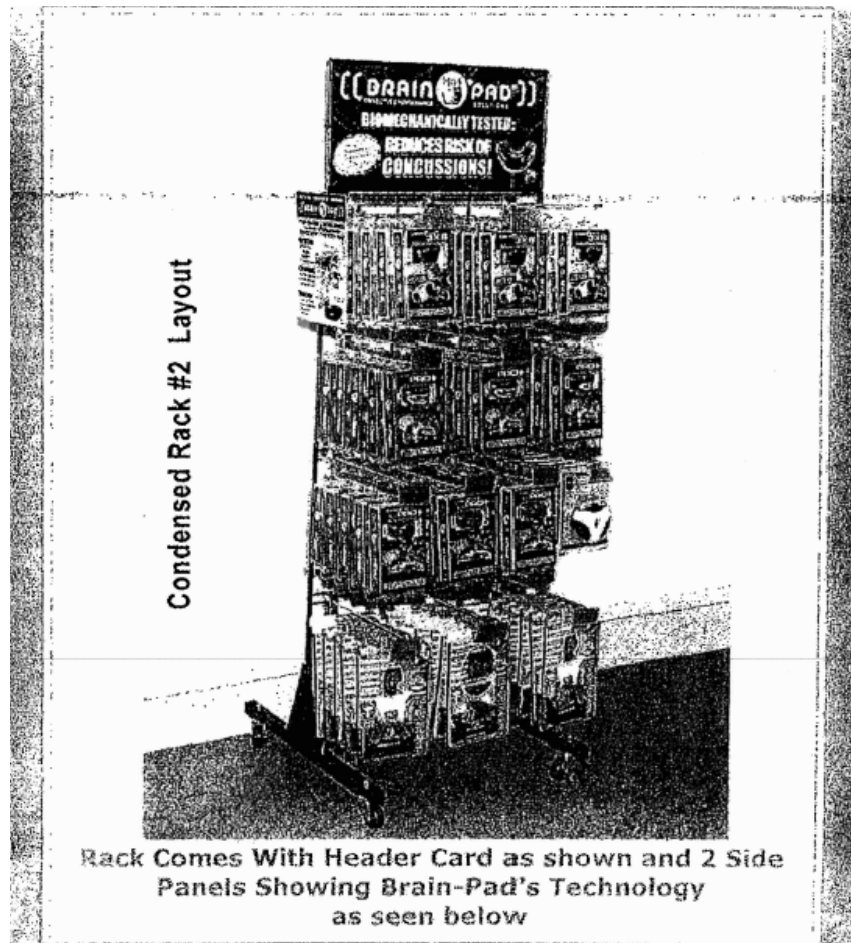
[www.brainpads.com](http://www.brainpads.com)

1-888-424-9477

Forward email

Complaint

**Exhibit F**





## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq.*; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in the complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Brain-Pad, Inc. (“BPI”) is a Pennsylvania corporation with its principal office or place of business at 322 Fayette Street, Conshohocken, Pennsylvania 19428.
2. Respondent Joseph Manzo is the President of BPI. Individually or in concert with others, he formulates,

## Decision and Order

directs, controls, or participates in the policies, acts, or practices of BPI. His principal office or place of business is the same as that of BPI.

**ORDER****DEFINITIONS**

For purposes of this Order, the following definitions shall apply:

- A. Unless otherwise specified, “respondent BPI” shall mean Brain-Pad, Inc., a corporation, its successors and assigns and their officers, and each of the above’s agents, representatives, and employees.
- B. “Respondent Manzo” shall mean Joseph Manzo and his agents, representatives, and employees.
- C. “Respondents” shall mean respondent BPI and respondent Manzo.
- D. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- E. “Competent and reliable scientific evidence” shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.
- F. “Covered Product” shall mean any (1) mouthguard or (2) equipment used in athletic activities that is intended, in whole or in part, to protect the brain from injury.
- G. The term “including” in this Order shall mean “without limitation.”
- H. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

## Decision and Order

**I.**

**IT IS ORDERED** that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a trade name, product name, endorsement, depiction, or illustration, that such product will:

- A. reduce the risk of concussions; or
- B. reduce the risk of concussions from lower jaw impacts,

unless the representation is true, non-misleading, and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

**II.**

**IT IS FURTHER ORDERED** that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, including, but not limited to, any misrepresentation that:

- A. scientific studies prove such product reduces the risk of concussions; or
- B. scientific studies prove such product reduces the risk of concussions from lower jaw impacts.

## Decision and Order

**III.**

**IT IS FURTHER ORDERED** that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any Covered Product, in or affecting commerce, shall not represent in any manner, expressly or by implication, including through the use of a trade name, product name, endorsement, depiction, or illustration, the health benefits, health-related performance, or health-related efficacy of any such product, unless the representation is true, non-misleading, and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

**IV.**

**IT IS FURTHER ORDERED** that respondent BPI, and its successors and assigns, and respondent Manzo shall, for five (5) years after the last date of dissemination of any representation covered by this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

## Decision and Order

**V.**

**IT IS FURTHER ORDERED** that respondent BPI, and its successors and assigns, and respondent Manzo shall deliver a copy of this Order to all current and future principals, officers, directors, and other employees having responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Respondents shall deliver this Order to current personnel within thirty (30) days after date of service of this Order, and to future personnel having responsibilities with respect to the subject matter of this Order within thirty (30) days after the person assumes such position or responsibilities.

**VI.**

**IT IS FURTHER ORDERED** that respondent BPI, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this Order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: Brain-Pad, Inc., FTC File No. 122-3073.

**VII.**

**IT IS FURTHER ORDERED** that respondent Manzo, for ten (10) years after the date of issuance of this Order, shall notify

## Decision and Order

the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: Brain-Pad, Inc., FTC File No. 122-3073.

**VIII.**

**IT IS FURTHER ORDERED** that respondent BPI, and its successors and assigns, and respondent Manzo, within sixty (60) days after the date of service of this Order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this Order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondents shall submit additional true and accurate written reports.

**IX.**

This Order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this Order that terminates in less than twenty (20) years;
- B. This Order's application to any respondent that is not named as a defendant in such complaint; and
- C. This Order if such complaint is filed after the order has terminated pursuant to this Part.

## Analysis to Aid Public Comment

*Provided, further,* that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

### **ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Brain-Pad, Inc. and Joseph Manzo, an officer and director of the corporation (“respondents”).

The proposed consent order (“proposed order”) has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

This matter involves respondents’ advertising and promotion of mouthguards. According to the FTC complaint, respondents did not have a reasonable basis to represent in advertising and on packaging for their mouthguards that they reduced the risk of concussions. The FTC further alleges that the respondents made the false and misleading claim that they possessed scientific studies that proved their concussion-reduction risk claims because, in fact, they did not have such evidence.

## Analysis to Aid Public Comment

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Part I of the proposed order prohibits the proposed respondents from misrepresenting that any product will reduce the risk of concussions or reduce the risk of concussions from lower jaw impacts.

Part II of the proposed order prohibits proposed respondents from misrepresenting, with respect to any Covered Product, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, including, but not limited to, any misrepresentation that scientific studies prove that such product reduces the risk of concussions or reduces the risk of concussions from lower jaw impacts. The proposed order defines “Covered Product” as any (1) mouthguard or (2) equipment used in athletic activities that is intended to protect the brain from injury.

Part III of the proposed order prohibits proposed respondents, in connection with the marketing of any Covered Product, from misrepresenting the health benefits, health-related performance, or health-related efficacy of such product.

Parts IV through VIII of the proposed order require respondents: to keep copies of any documents relating to any representation covered by the order; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; to notify the Commission of changes in corporate business or employment as to proposed respondent Joseph Manzo individually; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.



## Complaint

## IN THE MATTER OF

**ALAN B. MILLER  
AND  
UNIVERSAL HEALTH SERVICES, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND  
SECTION 7 OF THE CLAYTON ACT

*Docket No. C-4372; File No. 121 0157  
Complaint, October 5, 2012 – Decision, November 27, 2012*

This consent order addresses the \$517 million acquisition by Alan B. Miller and Universal Health Services, Inc. of certain assets of Ascend Health Corporation. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing an actual, direct, and substantial competitor from one local market for acute inpatient psychiatric services. The consent order requires UHS to divest its Peak Behavioral Health Services facility, and all relevant assets and real property in the local market encompassing El Paso, Texas and its suburb, Santa Teresa, New Mexico.

*Participants*

For the *Commission: Chester Choi, Michelle Fettennan, Janelle Filson, Jeanne Nichols, and Nancy Park.*

For the *Respondents: Robin Landis and Christine Varney, Cravath, Swaine & Moore LLP.*

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Universal Health Services, Inc. (“UHS”), a corporation controlled by Alan B. Miller and subject to the jurisdiction of the Commission, has agreed to acquire Ascend Health Corp. (“Ascend”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that

## Complaint

a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**Respondents**

1. Respondent Alan B. Miller is a natural person with his offices and principal place of business located at 367 South Gulph Road, P.O. Box 61558, King of Prussia, PA 19406-0958. Alan B. Miller is the ultimate parent entity of Respondent UHS.

2. Respondent UHS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 367 South Gulph Road, P.O. Box 61558, King of Prussia, PA 19406-0958. UHS is controlled by Respondent Alan B. Miller.

3. UHS owns or operates 25 general acute care hospitals and 198 behavioral health facilities located in 36 states, Washington, D.C., Puerto Rico, and the U.S. Virgin Islands. UHS's revenues from all operations totaled approximately \$7.5 billion in 2011. UHS's 198 behavioral health facilities generated approximately \$3.4 billion in revenue (45% of total revenues) from over 19,000 licensed beds and over five million patient days. UHS is, and at all times relevant herein has been, engaged in the sale and provision of acute inpatient psychiatric services.

**The Acquired Company**

4. Ascend is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 32 E. 57th Street, 17th Floor, New York, NY 10022.

5. Ascend operates eight inpatient behavioral health facilities located in four states, namely, Texas, Oregon, Arizona, and Utah, as well as an addiction treatment center in Seattle, Washington. Ascend's revenues for the 12 months ending December 31, 2011 were approximately \$159 million. Ascend is, and at all times relevant herein has been, engaged in the sale and provision of acute inpatient psychiatric services.

## Complaint

### **The Proposed Merger**

6. Pursuant to an Agreement and Plan of Merger dated June 3, 2012, UHS proposes to purchase all of the outstanding voting securities of Ascend (“the Merger”).

7. The Merger would combine the only two significant providers of acute inpatient psychiatric services to commercially insured patients in the relevant geographic market of El Paso, Texas/Santa Teresa, New Mexico. Respondent UHS and Ascend each own and operate a psychiatric facility in this area and compete and promote their businesses based on name recognition, reputation, location, price, range of available services, quality of service, associated product offerings, and the appearance of the facilities.

### **Jurisdiction**

8. Respondents, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

9. The Merger constitutes an acquisition under Section 7 of the Clayton Act.

### **The Relevant Product Market**

10. The relevant line of commerce in which to analyze the Merger is the provision and sale of acute inpatient psychiatric services to commercially insured patients, meaning inpatient psychiatric services for the diagnosis, treatment, and care of patients deemed, due to an acute psychiatric condition, to be a threat to themselves or others or unable to perform basic life functions.

11. Acute inpatient psychiatric care is distinct from other psychiatric services such as partial hospitalization, intensive outpatient programs, outpatient care, and residential treatment. Other, less intensive, psychiatric services are not substitutes for acute inpatient psychiatric services.

## Complaint

**The Relevant Geographic Market**

12. The relevant geographic market in which to assess the competitive effects of the Merger is El Paso, Texas/Santa Teresa, New Mexico. Santa Teresa is a northwestern suburb of El Paso.

13. In general, patients prefer to be treated for acute inpatient psychiatric services close to home or work. Accordingly, most residents of El Paso and Santa Teresa obtain acute inpatient psychiatric services from providers located in El Paso or Santa Teresa.

**Concentration**

14. The affected local market for the provision and sale of acute inpatient psychiatric services already is highly concentrated, and the Merger will substantially increase concentration in this market as measured by the Herfindahl-Hirschman Index (“HHI”).

15. Post-merger, UHS would have a post-merger market share of nearly 100 percent in the relevant line of commerce, based on beds in the El Paso/Santa Teresa market and other information obtained by the Commission. The Merger would increase the HHI by approximately 3806 points, from 6194 to 10,000, combining the only two significant providers of acute inpatient psychiatric services to commercially insured patients.

16. Even if El Paso Psychiatric Hospital, a state-run hospital located in El Paso, Texas that primarily serves indigent, forensic, and long-term patients, competes in the relevant line of commerce, UHS would have a post-merger market share of approximately 75%, based on bed counts. Under this assumption, the Merger would increase the HHI by approximately 2127 points, from 4098 to 6225.

**Entry Conditions**

17. Entry into the relevant market would not be timely, likely, or sufficient to prevent or deter the likely anticompetitive effects of the Merger. Significant entry barriers include the time and costs associated with constructing or expanding an acute care psychiatric services facility, as well as the need to satisfy regulatory and licensing requirements that govern such services.

## Complaint

**Effects of the Acquisition**

18. The Merger, if consummated, may substantially lessen competition for acute inpatient psychiatric services in the relevant geographic market, identified in Paragraph 12, in the following ways, among others:

- a. by eliminating direct and substantial competition between UHS and Ascend; and
- b. by increasing the likelihood that Respondent UHS will unilaterally exercise market power.

19. The ultimate effect of the Merger would be to increase the likelihood that prices of acute inpatient psychiatric services would rise above competitive levels, or that there would be a decrease in the quality or availability of acute inpatient psychiatric services, in the relevant geographic market.

**Violations Charged**

20. The agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and the Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this fifth day of October, 2012, issues its Complaint against said Respondents.

By the Commission.

Order to Hold Separate

**ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS  
[Redacted Public Version]**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of voting securities of Ascend Health Corporation (“Ascend”), by Universal Health Services, Inc. (“UHS”), an entity controlled by Alan B. Miller (UHS and Alan B. Miller hereinafter referred to as Respondents), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent Alan B. Miller is a natural person with his offices and principal place of business located at 367

## Order to Hold Separate

South Gulph Road, PO Box 51448, King of Prussia, PA 19406-0958.

2. Respondent Universal Health Services, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

**ORDER****I.**

**IT IS ORDERED** that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

- A. “Acquisition Date” means the date on which Respondent Universal Health Services, Inc., directly or indirectly, acquires a controlling interest in Ascend.
- B. “Decision and Order” means
  1. the Proposed Decision and Order contained in the Consent Agreement in this matter until issuance and service of a final Decision and Order by the Commission; and
  2. the Final Decision and Order issued by the Commission following issuance and service of a final Decision and Order by the Commission.
- C. “Hold Separate Business” means the Peak Behavioral Health Assets.
- D. “Hold Separate Employees” means all full-time employees, part-time, employees, contract employees,

## Order to Hold Separate

and independent contractors, whose duties, at any time during the ninety (90) days preceding the Acquisition Date or any time after the Acquisition Date related or relates primarily to the Peak Behavioral Health Assets, a complete list of whom has been submitted to and approved by the Hold Separate Trustee, in consultation with the Commission staff, no later than three (3) days after the Acquisition Date; *provided, however*, that the persons listed in Confidential Appendix B shall not be considered Hold Separate Employees, as long as the Hold Separate Business is staffed with a chief executive officer and a military liaison with the necessary skills, expertise, and experience to perform those positions.

- E. “Hold Separate Order” means this Order to Hold Separate and Maintain Assets.
- F. “Hold Separate Period” means the period during which the Hold Separate Order is in effect, which shall begin on the Acquisition Date and terminate pursuant to Paragraph XI. of this Hold Separate Order.
- G. “Hold Separate Trustee” means the Person appointed pursuant to Paragraph II. of this Hold Separate Order.
- H. “Manager” means the Person appointed pursuant to Paragraph IV. of this Hold Separate Order.
- I. “Mesilla Valley Hospital Employees” means all full-time employees, part-time employees, contract employees, and independent contractors, whose duties, at any time during the ninety (90) days preceding the Acquisition Date or any time after the Acquisition Date related or relates primarily to the Mesilla Valley Hospital Assets.
- J. “Orders” means the Decision and Order and this Hold Separate Order.



## Order to Hold Separate

- K. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.
- L. “Support Service Employees” means the persons listed on Confidential Appendix A of this Hold Separate Order; at any time during the Hold Separate Period, Respondents may, in consultation with the Hold Separate Trustee, modify the list of Support Service Employees on Confidential Appendix A.
- M. “Support Services” means assistance with respect to the operation of the Psychiatric Hospital Business, including, but not limited to, (i) human resources and administrative services such as payroll processing and employee benefits; (ii) financial accounting services; (iii) reimbursement department support (i.e., Medicare cost reports); (iv) tax-related support; (v) treasury support; (vi) insurance support; (vii) clinical information systems support; (viii) information technology software and support services; (ix) participation in group purchasing arrangements; (x) online training programs; (xi) legal services; and (xii) federal and state regulatory compliance support.

**II.**

**IT IS FURTHER ORDERED** that during the Hold Separate Period:

- A. With respect to the Hold Separate Business, Respondents shall:
  - 1. Hold the Hold Separate Business separate, apart, and independent of Respondents’ other businesses and assets as required by this Hold Separate Order and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business;
  - 2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business

## Order to Hold Separate

or any of its operations, the Manager, or the Hold Separate Trustee, except to the extent that Respondents must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, and all applicable laws; and

3. Take all actions necessary to maintain and assure the continued viability, marketability, and competitiveness of the Hold Separate Business, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the Peak Behavioral Health Assets, except for ordinary wear and tear, and shall not sell, transfer, encumber, or otherwise impair the Hold Separate Business (except as required by the Decision and Order).
- B. With respect to the Mesilla Valley Hospital Assets, Respondents shall:
1. Maintain the operations of the Mesilla Valley Hospital Assets, in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such Business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Mesilla Valley Hospital Assets and minimize any risk of loss of competitive potential of the Mesilla Valley Hospital Assets;
  2. Use their best efforts, in a manner consistent with past practices, to preserve the existing relationships with third parties, including payors, providers, suppliers, and others having business relations with the Mesilla Valley Hospital Assets; and
  3. Take all actions necessary to maintain the continued viability, marketability, and competitiveness of the Mesilla Valley Hospital Assets, and prevent the destruction, removal,

## Order to Hold Separate

wasting, deterioration, or impairment of any of the Mesilla Valley Hospital Assets, except for ordinary wear and tear, and shall not sell, transfer, encumber, or otherwise impair the Mesilla Valley Hospital Assets (except as required by the Decision and Order), and take no action that lessens the viability, marketability, or competitiveness of the Mesilla Valley Hospital Assets.

- C. The purpose of this Hold Separate Order is to (1) maintain and preserve the Hold Separate Business as a viable, competitive, and ongoing business independent of Respondents until the divestiture required by the Decision and Order is achieved; (2) maintain and preserve the viability, marketability, and competitiveness of the Mesilla Valley Hospital Assets and to minimize any risk to the competitive potential of the Mesilla Valley Hospital Assets during the Hold Separate Period; (3) assure that no Confidential Business Information is exchanged between Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate Order; and (4) prevent interim harm to competition pending the divestiture and other relief.

**III.****IT IS FURTHER ORDERED** that:

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Michael Krupa as Hold Separate Trustee to monitor and supervise the management of the Hold Separate Business and ensure that Respondents comply with their obligations under this Hold Separate Order and the Decision and Order.
- B. Respondents shall enter into an agreement with the Hold Separate Trustee that shall become effective no later than one (1) day after the Acquisition Date, and that, subject to the prior approval of the Commission, transfers to and confers upon the Hold Separate

## Order to Hold Separate

Trustee all rights, powers, and authority necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of this Hold Separate Order and the Decision and Order and in consultation with Commission staff; and shall require that the Hold Separate Trustee act in a fiduciary capacity for the benefit of the Commission:

1. The Hold Separate Trustee shall have the responsibility for monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by the Manager; maintaining the independence of the Hold Separate Business; and monitoring Respondents' compliance with their obligations pursuant to this Hold Separate Order and the Decision and Order.
2. The Hold Separate Trustee shall act in a fiduciary capacity for the benefit of the Commission.
3. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents, and facilities of the Hold Separate Business, and to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. The Hold Separate Trustee shall have access to relevant information of the Mesilla Valley Hospital Assets as is necessary to monitor Respondents' compliance with their obligations pursuant to this Hold Separate Order. Respondents shall develop such financial or other information as the Hold Separate Trustee may reasonably request.
4. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other

## Order to Hold Separate

representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.

5. The Commission may require the Hold Separate Trustee and each of the Hold Separate Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Trustee's duties.
6. Respondents may require the Hold Separate Trustee and each of the Hold Separate Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however*, that such agreement shall not restrict the Hold Separate Trustee from providing any information to the Commission.
7. The Hold Separate Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.
8. Respondents shall indemnify the Hold Separate Trustee and hold him/her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Hold Separate Trustee's gross negligence or willful misconduct.

## Order to Hold Separate

9. Thirty (30) days after the Acquisition Date, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order and Respondents' compliance with their obligations under the Hold Separate Order and the Decision and Order. Included within each report shall be the assessment of the Hold Separate Trustee, consistent with his responsibilities and obligations in this Hold Separate Order, of the extent to which the Hold Separate Business and the Mesilla Valley Hospital Assets are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections, or any other regularly prepared financial statements.
- C. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows:
1. If Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondents of the identity of the proposed substitute Hold Separate Trustee, then Respondents shall be deemed to have consented to the selection of the proposed substitute trustee.
  2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Hold Separate Trustee, enter into an agreement with the substitute Hold Separate Trustee that, subject to the approval of the Commission, confers on the substitute Hold Separate Trustee all the rights, powers, and authority necessary to permit the

## Order to Hold Separate

substitute Hold Separate Trustee to perform his or her duties and responsibilities on the same terms and conditions as provided in Paragraph III. of this Hold Separate Order.

- D. The Hold Separate Trustee shall serve through the Hold Separate Period; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- E. The Commission may on its own initiative or at the request of the Hold Separate Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order.

**IV.****IT IS FURTHER ORDERED** that:

- A. No later than three (3) days after the Acquisition Date, Respondents shall appoint Matthew J. Winchester as the Manager to manage and maintain the operations of the Hold Separate Business in the regular and ordinary course of business and in accordance with past practice.
- B. Respondents shall enter into a management agreement with the Manager that shall become effective no later than three (3) days after the Acquisition Date, and that, subject to the approval of the Hold Separate Trustee, in consultation with the Commission staff, transfers all rights, powers, and authority necessary to permit that Manager to perform his/her duties and responsibilities pursuant to this Hold Separate Order:
  - 1. The Manager shall be responsible for managing the operations of the Hold Separate Business and shall report directly and exclusively to the Hold Separate Trustee and shall manage the Hold Separate

## Order to Hold Separate

Business independently of the management of Respondents and their other businesses.

2. The Manager shall make no material changes in the ongoing operations of the Hold Separate Business except with the approval of the Hold Separate Trustee, in consultation with the Commission staff.
3. The Manager, in consultation with the Hold Separate Trustee, shall have the authority to employ such Persons as are reasonably necessary to assist the Manager in managing the Hold Separate Business, including consultants, accountants, attorneys, and other representatives and assistants. Nothing contained herein shall preclude the Manager from contacting or communicating directly with the staff of the Commission either at the request of the staff of the Commission or in the discretion of the Manager.
4. Respondents shall provide the Manager with reasonable financial incentives to undertake this position. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the Hold Separate Business's viability, marketability, and competitiveness, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.
5. The Manager shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.
6. Respondents shall indemnify the Manager and hold him or her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or



## Order to Hold Separate

in connection with, the performance of the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense, of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Manager's gross negligence or willful misconduct.

- C. The Manager shall have the authority, in consultation with the Hold Separate Trustee, to staff the Hold Separate Business with sufficient employees to maintain the viability and competitiveness of the Hold Separate Business, including:
1. Replacing any departing or departed employee with a person who has similar experience and expertise or determine not to replace such departing or departed employees;
  2. Removing any Hold Separate Employee who ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, and replacing such employee with another person of similar experience or skills;
  3. Ensuring that no Hold Separate Employee shall (i) be involved in any way in the operations of Respondents' other businesses, and (ii) receive or have access to, or use or continue to use, any Confidential Business Information pertaining to Respondents' other businesses;
  4. Providing each Hold Separate Employee with reasonable financial incentives, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Peak Behavioral Health Assets (and the Mesilla Valley Hospital Assets, if the New Mexico Psychiatric Hospital Assets are required to be divested) .

## Order to Hold Separate

- D. The Manager may be removed for cause by the Hold Separate Trustee, in consultation with the Commission staff. If the Manager is removed, resigns, or otherwise ceases to act as Manager, Respondents shall, within three (3) days of such action, subject to the approval of the Hold Separate Trustee and in consultation with Commission staff, on the same terms and conditions as provided in this Hold Separate Order, (i) appoint a substitute Manager, and (ii) enter into an agreement with the substitute Manager.

## V.

**IT IS FURTHER ORDERED** that:

- A. Respondents shall cooperate with, and take no action to interfere with or impede the ability of: (i) the Hold Separate Trustee, (ii) the Manager, (iii) any Hold Separate Employee, or (iv) any Support Services Employee, to perform his or her duties and responsibilities consistent with the terms of this Hold Separate Order and the Decision and Order.
- B. Respondents shall continue to provide, or offer to provide, Support Services and goods to the Hold Separate Business and to the Mesilla Valley Hospital Assets as are being provided to the Hold Separate Business and the Mesilla Valley Hospital Assets by Respondents as of the date the Consent Agreement is signed by Respondents;
1. For Support Services and goods that Respondents provided to the Hold Separate Business or the Mesilla Valley Hospital Assets as of the date the Consent Agreement is signed by Respondents, Respondents may charge no more than the same price, if any, charged by Respondents for such Support Services and goods as of the date the Consent Agreement is signed by Respondents;
  2. For any other Support Services and goods that Respondents may provide to the Hold Separate

## Order to Hold Separate

Business or the Mesilla Valley Hospital Assets, Respondents may charge no more than Respondents' Direct Cost for the same or similar Support Services;

3. Notwithstanding the above, the Hold Separate Business shall have, at the option of the Manager and in consultation with the Hold Separate Trustee, the ability to acquire Support Services from Third Parties.
- C. Respondents shall not permit:
1. Any of its employees, officers, agents, or directors, other than (i) the Manager, (ii) any Hold Separate Employees, and (iii) any Support Services Employees, to be involved in the operations of the Hold Separate Business, except to the extent otherwise provided in this Hold Separate Order.
  2. The Manager or any Hold Separate Employee to be involved, in any way, in the operations of Respondents' businesses other than the Hold Separate Business.
- D. Respondents shall provide the Hold Separate Business and the Mesilla Valley Hospital Assets with sufficient financial and other resources as are appropriate in the judgment of the Hold Separate Trustee, consistent with his obligations and responsibilities in this Hold Separate Order, to:
1. Operate the Hold Separate Business and the Mesilla Valley Hospital Assets at least as they are currently operated (including efforts to generate new business) consistent with the practices of the Hold Separate Business and the Mesilla Valley Hospital Assets in place prior to the Acquisition Date;
  2. Perform all maintenance to, and replacements or remodeling of, the assets of the Hold Separate

## Order to Hold Separate

Business and the Mesilla Valley Hospital Assets in the ordinary course of business and in accordance with past practice and with current plans;

3. Carry on such capital projects, physical plant improvements, and business plans as are already under way or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to existing or planned renovation, remodeling, and expansion projects; and
4. Maintain the viability, competitiveness, and marketability of the Hold Separate Business and the Mesilla Valley Hospital Assets.

Such financial resources to be provided to the Hold Separate Business and the Mesilla Valley Hospital Assets shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however*, that, consistent with the purposes of the Decision and Order and in consultation with the Hold Separate Trustee, the Manager may reduce in scale or pace any capital or research and development project of the Hold Separate Business, or substitute any capital or research and development project of the Hold Separate Business for another of the same cost.

- E. Respondents shall provide each Hold Separate Employee and each Mesilla Valley Hospital Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Peak Behavioral Health Assets and the Mesilla Valley Hospital Assets pending divestiture. Such incentives shall include a continuation of all employee benefits, including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the

## Order to Hold Separate

continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Hold Separate Business and the Mesilla Valley Hospital Assets until the Closing Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.

- F. No later than ten (10) days after the Acquisition Date, Respondents shall establish and implement procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Hold Separate Business and the monitoring of the operations of the Mesilla Valley Hospital Assets consistent with the provisions of this Hold Separate Order.
- G. No later than ten (10) days after the Acquisition Date, Respondents shall circulate to Hold Separate Employees, Mesilla Valley Hospital Employees, and to persons who are employed in Respondents' businesses that compete with the Hold Separate Business in the Relevant Area, a notice of this Hold Separate Order and the Consent Agreement, in a form approved by the Hold Separate Trustee in consultation with Commission staff.

**VI.****IT IS FURTHER ORDERED** that:

- A. After the Acquisition Date, Respondents' employees, other than employees of the Hold Separate Business and Support Services Employees, shall not receive, or have access to, or use or continue to use any Confidential Business Information of the Hold Separate Business except in the course of:
  - 1. Performing their obligations or as permitted under this Hold Separate Order or the Decision and Order;

## Order to Hold Separate

2. Performing their obligations under the Divestiture Agreement;
3. Negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence; and
4. Complying with financial reporting requirements, obtaining legal advice, defending legal claims, conducting investigations, or enforcing actions threatened or brought against the Hold Separate Business, or as required by law. Notwithstanding the above, Respondents may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondents to comply with the requirements and obligations of the laws and regulations of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold Separate Order or in complying with or as permitted by the Decision and Order. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this Order.

For purposes of this Paragraph VI.A., Respondents' employees that provide Support Services or staff the Hold Separate Business shall be deemed to be performing obligations under this Hold Separate Order.

- B. If access to or disclosure of Confidential Business Information of the Hold Separate Business to Respondents' employees is necessary and permitted under Paragraph VI.A. of this Hold Separate Order, Respondents shall:
  1. Implement and maintain a process and procedures, as approved by the Hold Separate Trustee, such approval not to be unreasonably withheld, pursuant

## Order to Hold Separate

to which Confidential Business Information of the Hold Separate Business may be disclosed or used only:

- a. to or by those employees who require such information;
  - b. to the extent such Confidential Business Information is required; and
  - c. after such employees have signed an appropriate agreement in writing to maintain the confidentiality of such information.
2. Enforce the terms of this Paragraph VI. as to any of Respondents' employees and take such action as is necessary to cause each such employee to comply with the terms of this Paragraph VI., including training of Respondents' employees and all other actions that Respondents would take to protect their own trade secrets and proprietary information.
- C. Respondents shall implement, and maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Confidential Business Information of the Hold Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondent, to audit Respondents' networks and systems to verify compliance with this Hold Separate Order.
- D. Neither the Manager nor any Hold Separate Employees shall receive or have access to, or use or continue to use, any confidential business information relating to Respondents' businesses (not subject to the Hold Separate Order), except such information as is necessary to maintain and operate the Hold Separate Business.

Order to Hold Separate

**VII.**

**IT IS FURTHER ORDERED** that Respondents shall:

- A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Relevant Employee, as and to the extent permitted by law:
1. name, job title or position, date of hire, and effective service date;
  2. a specific description of the employee's responsibilities;
  3. the base salary or current wages;
  4. the most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus, if any;
  5. employment status (i.e., active or on leave or disability; full-time or part-time);
  6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
  7. at the Prospective Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.
- B. Within a reasonable time after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make offers of employment to any one or more of the Relevant Employees;



## Order to Hold Separate

- C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by the Prospective Acquirer;
- D. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from the Prospective Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;
- E. Not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with the Commission-approved Acquirer to terminate his or her employment with the Commission-approved Acquirer; *provided, however*, that Respondents may:
1. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or
  2. hire Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph; *provided further*,

## Order to Hold Separate

*however*, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if the Commission-approved Acquirer has notified Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Commission-approved Acquirer.

**VIII.**

**IT IS FURTHER ORDERED** that, within thirty (30) days after this Hold Separate Order becomes final, and every thirty (30) days thereafter until this Hold Separate Order terminates, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all provisions of this Hold Separate Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Hold Separate Order.

**IX.**

**IT IS FURTHER ORDERED** that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of such Respondent;
- B. Any proposed acquisition, merger, or consolidation of such Respondent; and
- C. Any other change in such Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Hold Separate Order.

## Order to Hold Separate

**X.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Hold Separate Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to the applicable Respondent made to its principal United States offices, registered office of its United States subsidiary, or headquarters address, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of such Respondent related to compliance with this Hold Separate Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of such Respondent; and
- B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Hold Separate Order.

**XI.**

**IT IS FURTHER ORDERED** that this Hold Separate Order shall terminate at the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the Closing Date.

By the Commission.

Decision and Order

**Confidential Appendix A****List of Respondents' Support Service Employees****[Redacted From the Public Record Version, But Incorporated  
By Reference]****Confidential Appendix B****Exceptions To Hold Separate Employees Definition****[Redacted From the Public Record Version, But Incorporated  
By Reference]****DECISION AND ORDER**

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of voting securities of Ascend Health Corporation ("Ascend") by Universal Health Services, Inc. ("UHS"), an entity controlled by Alan B. Miller (UHS and Alan B. Miller hereinafter referred to as Respondents), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by

## Decision and Order

Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Alan B. Miller is a natural person with his offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.
2. Respondent Universal Health Services, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

## Decision and Order

**ORDER****I.**

**IT IS ORDERED** that, as used in this Order, the following definitions shall apply:

- A. “Acquisition” means the proposed acquisition described in and contemplated by the Agreement and Plan of Merger by and among UHS and Ascend dated as of June 3, 2012.
- B. “Acute Inpatient Psychiatric Services” means the provision of inpatient psychiatric services for the diagnosis, treatment, and care of patients deemed, due to an acute psychiatric condition, to be a threat to themselves or others or unable to perform basic life functions.
- C. “Alan B. Miller” means Alan B. Miller, a natural person, and all partnerships, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Alan B. Miller, and the respective partners, directors, officers, employees, agents, attorneys, representatives, successors, and assigns of each.
- D. “Ascend” means Ascend Health Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 32 E. 57<sup>th</sup> Street, 17<sup>th</sup> Floor, New York, NY 10022.
- E. “Business Records” means all information, documents, and records, including all electronic records wherever stored, including without limitation, client and customer lists, patient and payor information, referral sources, research and development reports, production reports, service and warranty records, equipment logs, operating guides and manuals, financial and accounting documents, creative materials, advertising materials, promotional materials, studies, reports,

## Decision and Order

correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists, salaries and benefits information, and, subject to legal requirements, copies of all personnel files.

- F. “Closing Date” means the date on which Respondents (or a Divestiture Trustee, if the New Mexico Psychiatric Hospital Assets are required to be divested) consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Peak Behavioral Health Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) to the Commission-approved Acquirer.
- G. “Commission” means the Federal Trade Commission.
- H. “Commission-approved Acquirer” means the Person approved by the Commission to acquire the Peak Behavioral Health Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) pursuant to this Order.
- I. “Confidential Business Information” means information not in the public domain that is primarily related to or primarily used in connection with the Psychiatric Hospital Business, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents, and includes, but is not limited to, pricing information, marketing methods, market intelligence, competitor information, commercial information, management system information, business processes and practices, payor and provider communications, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices.
- J. “Direct Cost” means cost not to exceed the cost of labor, material, travel, and other expenditures to the

## Decision and Order

extent the costs are directly incurred to provide Transitional Services. “Direct Cost” to a Commission-approved Acquirer for its use of any of Respondents’ employees’ labor shall not exceed the then-current average wage rate for such employee, including benefits.

- K. “Divestiture Agreement” means the agreement(s) between Respondents and the Commission-approved Acquirer (or between a Divestiture Trustee and the Commission-approved Acquirer, if the New Mexico Psychiatric Hospital Assets are required to be divested), and all amendments, exhibits, attachments, agreements, and schedules thereto, related to divestiture of the Peak Behavioral Hospital Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) that have been approved by the Commission to accomplish the requirements of this Order.
- L. “Hold Separate Order” means the Order to Hold Separate and Maintain Assets issued by the Commission in this matter.
- M. “Intellectual Property” means, without limitation:
1. all patents, patent applications, and inventions and discoveries that may be patentable;
  2. all know-how, trade secrets, software, technical information, data, registrations, applications for governmental approvals, inventions, processes, best practices (including clinical pathways), formulae, protocols, standards, methods, techniques, designs, quality control practices and information, research and test procedures and information, and safety, environmental and health practices and information;
  3. all confidential or proprietary information, commercial information, management systems, business processes and practices, customer lists,



## Decision and Order

customer information, customer records and files, customer communications, procurement practices and information, supplier qualification and approval practices and information, training materials, sales and marketing materials, customer support materials, advertising and promotional materials; and

4. all rights in any jurisdiction to limit the use or disclosure of any of the foregoing, and rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.
- N. “Mesilla Valley Hospital Assets” means the Psychiatric Hospital Assets associated with and the Psychiatric Hospital Business conducted at the Psychiatric Hospital Facility, doing business as Mesilla Valley Hospital located at 3751 Del Rey Boulevard, Las Cruces, New Mexico 88012.
- O. “New Mexico Psychiatric Hospital Assets” means:
1. Peak Behavioral Health Assets; and
  2. Mesilla Valley Hospital Assets.
- P. “Peak Behavioral Health Assets” means the Psychiatric Hospital Assets associated with and the Psychiatric Hospital Business conducted at the Psychiatric Hospital Facility, doing business as Peak Behavioral Health Services, LLC, located at 5055 McNutt Road, Santa Teresa, New Mexico 88088.
- Q. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.
- R. “Prospective Acquirer” means a Person that Respondents (or the Divestiture Trustee, if the New Mexico Psychiatric Hospital Assets are required to be divested) intend to submit to the Commission for its

## Decision and Order

prior approval pursuant to Paragraph II.A. (or Paragraph VI. if applicable) of this Order.

- S. “Psychiatric Hospital Assets” means all of Respondents’ rights, title, and interest in all property and assets, tangible or intangible, of whatever nature and wherever located, relating to or used in connection with the Psychiatric Hospital Business, including, without limitation, the following:
1. all real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee) to the extent transferable, including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
  2. all Tangible Personal Property, including, without limitation, any Tangible Personal Property removed from and not replaced at the specific Psychiatric Hospital Facility, if such property was used by or in connection with the Psychiatric Hospital Business conducted at such facility on or after the date Respondents execute the Consent Agreement;
  3. all rights under any and all contracts and agreements (e.g., leases, service agreements such as dietary and housekeeping services, supply agreements, procurement contracts) to the extent assignable, including but not limited to contracts and agreements with physicians, other health care providers, unions, third-party payors, HMOs, customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners, and consignees;

## Decision and Order

4. all rights and title in and to use the name of each of the hospitals on a permanent and exclusive basis (even as to Respondents);
5. all Intellectual Property;
6. all intangible rights and property other than Intellectual Property, including, going concern value, goodwill, internet, telephone, telecopy and telephone numbers, domain names, listings, and web sites;
7. all approvals, consents, licenses, certificates, registrations, permits, waivers, or other authorizations issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;
8. all inventories, stores, and supplies;
9. all accounts receivable;
10. all rights under warranties and guarantees, express or implied;
11. all books, records, and files (electronic and hard copy); and
12. all Business Records;

*provided, however,* that the Psychiatric Hospital Assets shall not include Respondents' rights, title, and interest to or in property and assets, tangible or intangible, that are not primarily related to or primarily used in connection with the Psychiatric Hospital Business conducted at the specified Psychiatric Hospital Facility;

*provided, however,* at the option of the Commission-approved Acquirer, that the Psychiatric Hospital Assets need not include any property or assets that the

## Decision and Order

Commission-approved Acquirer determines it does not need or want, if the Commission approves the Divestiture Agreement without such property or assets; and

*provided, however,* that Respondents may retain a copy of all books, records, files, and Business Records to the extent necessary to comply with applicable law, regulations, and other legal requirements.

- T. “Psychiatric Hospital” means a health care facility, licensed or certified as a psychiatric hospital (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides Acute Inpatient Psychiatric Services.
- U. “Psychiatric Hospital Business” means the operation of a Psychiatric Hospital Facility and includes but is not limited to the provision of Acute Inpatient Psychiatric Services, whether provided or performed at the facility or in a different location within the Relevant Area, and also includes all other services, businesses, and operations primarily related to the specified Psychiatric Hospital Facility.
- V. “Psychiatric Hospital Facility” means a Psychiatric Hospital or a Psychiatric Unit.
- W. “Psychiatric Unit” means a department, unit, or other organizational subdivision of a hospital, licensed or certified as a provider of inpatient psychiatric care (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides Acute Inpatient Psychiatric Services.
- X. “Relevant Area” means the El Paso Metropolitan Statistical Area, as defined by the US Office of Management and Budget, and the Las Cruces Metropolitan Statistical Area, as defined by the US Office of Management and Budget.

## Decision and Order

- Y. “Relevant Employees” means any and all full-time employees, part-time employees, contract employees, or independent contractors whose duties, at any time during the ninety (90) days preceding the Acquisition Date or at any time after the Acquisition Date, related or relate primarily to the Peak Behavioral Health Business (or the New Mexico Psychiatric Hospital Assets, if required to be divested); *provided, however*, that the persons listed in the Confidential Appendix shall not be considered Relevant Employees.
- Z. “Respondents” means Alan B. Miller and UHS, collectively or individually.
- AA. “Tangible Personal Property” means all machinery, equipment, tools, fixtures, vehicles, furniture, inventories, computer hardware, and all other items of tangible personal property of every kind owned or leased by Respondents, wherever located, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.
- BB. “Third Parties” means Persons other than Respondents or the Commission-approved Acquirer.
- CC. “Transitional Administrative Services” means administrative assistance with respect to the operation of a Psychiatric Hospital Facility or the provision of Acute Inpatient Psychiatric Services, including but not limited to assistance relating to billing, accounting, governmental regulation, human resources management, information systems, managed care contracting, and purchasing, as well as providing assistance in acquiring, obtaining access, and customizing all software used in the provision of such services.
- DD. “Transitional Clinical Services” means clinical assistance and support services with respect to the

## Decision and Order

operation of a Psychiatric Hospital Facility or the provision of Acute Inpatient Psychiatric Services.

- EE. “Transitional Services” means Transitional Administrative Services and Transitional Clinical Services.
- FF. “UHS” means Universal Health Services, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by UHS, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition, UHS includes Ascend.

**II.****IT IS FURTHER ORDERED** that:

- A. No later than six (6) months after the Order is issued, Respondents shall divest the Peak Behavioral Health Assets, absolutely and in good faith and at no minimum price, as an on-going business, only to a single acquirer that receives the prior approval of the Commission, and only in a manner (including an executed Divestiture Agreement) that receives the prior approval of the Commission.
- B. Respondents shall cooperate with the Commission-approved Acquirer to ensure that the Peak Behavioral Health Assets are transferred to the Commission-approved Acquirer as a financially and competitively viable Psychiatric Hospital Facility, operating as an ongoing business providing Acute Inpatient Psychiatric Services, including but not limited to providing assistance necessary to transfer to the Commission-approved Acquirer all governmental approvals needed to operate the Peak Behavioral Health Assets.

## Decision and Order

- C. Prior to the Closing Date, Respondents shall:
1. secure all consents and waivers from all Third Parties that are necessary for Respondents to divest the Peak Behavioral Health Assets and/or to grant any license(s) to the Commission-approved Acquirer to permit the Commission-approved Acquirer to operate the Peak Behavioral Health Assets; *provided, however*, that Respondents may satisfy this requirement by certifying that such Commission-approved Acquirer has executed all such agreements directly with each of the relevant Third Parties; and
  2. take all actions necessary to ensure that the Peak Behavioral Health Assets meet federal, state, local, and municipal requirements necessary to allow the transfer of the Peak Behavioral Health Assets to the Commission-approved Acquirer.
- D. The purpose of the divestiture is to ensure the continuation of the Peak Behavioral Health Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) as an ongoing, viable Psychiatric Hospital Facility and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

**III.****IT IS FURTHER ORDERED** that:

- A. After the Closing Date, Respondents shall not use, solicit, or access, directly or indirectly, any Confidential Business Information of the Peak Behavioral Health Assets (or of the New Mexico Psychiatric Hospital Assets, if required to be divested), and shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish such Confidential Business Information, directly or indirectly, to or with any Person other than:

## Decision and Order

1. as necessary to comply with the requirements of this Order or the Hold Separate Order;
  2. pursuant to a Divestiture Agreement;
  3. to enforce the terms of a Divestiture Agreement or prosecute or defend against any dispute or legal proceeding; or
  4. to comply with applicable law, regulations and other legal requirements.
- B. No later than five (5) days after the Acquisition Date, Respondents shall provide written notification of the restrictions, prohibitions, and requirements of this Paragraph III. to all of Respondents' employees, agents, and representatives employed at, or with responsibilities relating to, a Psychiatric Hospital Facility located in the Relevant Area or who had or have access to or possession, custody or control of any Confidential Business Information of the Peak Behavioral Health Assets (or of the New Mexico Psychiatric Hospital Assets, if required to be divested).
1. such notification shall include a plain language explanation of the requirements of this Order and a description of the consequences of failing to comply with the requirements.
  2. Respondents shall provide such notification by US mail or by e-mail, with return receipt requested acknowledging receipt of the notification or similar transmission.
  3. Respondents shall maintain complete records of all such notifications at Respondents' corporate headquarters and keep a file of all receipts and acknowledgments for one (1) year after the Closing Date.
  4. Respondents shall provide the Commission-approved Acquirer (and the Hold Separate Trustee,



## Decision and Order

if one is appointed) with a copy of such notification and with copies of all other certifications, notifications, and reminders sent to Respondents' personnel.

## C. Respondents shall:

1. no later than thirty (30) days after the Closing Date, obtain, as a condition of continued employment post-divestiture, from each of Respondents' employees, agents, and representatives employed at or with responsibilities relating to a Psychiatric Hospital Facility located in the Relevant Area or who had or have access to or possession, custody or control of any Confidential Business Information of the Peak Behavioral Health Assets (or of the New Mexico Psychiatric Hospital Assets, if required to be divested) an executed confidentiality agreement that complies with the restrictions, prohibitions and requirements of this Order and the Hold Separate Order; and
2. no later than thirty (30) days after the Closing Date, institute procedures and requirements and take such actions as are necessary to ensure that Respondents' personnel comply with the restrictions, prohibitions and requirements of this Paragraph III., including all actions that Respondents would take to protect their own trade secrets and confidential information.

**IV.**

**IT IS FURTHER ORDERED** that Respondents shall:

- A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Relevant Employee, as and to the extent permitted by law:

## Decision and Order

1. name, job title or position, date of hire, and effective service date;
  2. a specific description of the employee's responsibilities;
  3. the base salary or current wages;
  4. the most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus, if any;
  5. employment status (i.e., active or on leave or disability; full-time or part-time);
  6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
  7. at the Prospective Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.
- B. Within a reasonable time after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make offers of employment to any one or more of the Relevant Employees;
- C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by the Prospective Acquirer;

## Decision and Order

- D. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from the Prospective Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;
- E. Provide all Relevant Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation, until the Closing Date, of all employee benefits, including the funding of regularly scheduled raises and bonuses, and the vesting of pension benefits (as permitted by law and for those Relevant Employees covered by a pension plan), offered by Respondents;
- F. Not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with the Commission-approved Acquirer to terminate his or her employment with the Commission-approved Acquirer; *provided, however*, that Respondents may:
1. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or
  2. hire Relevant Employees who apply for employment with Respondents, as long as such

## Decision and Order

employees were not solicited by Respondents in violation of this Paragraph; *provided further, however*, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if the Commission-approved Acquirer has notified Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Commission-approved Acquirer.

## V.

**IT IS FURTHER ORDERED** that, at the request of a Commission-approved Acquirer, for a period not to exceed twelve (12) months, or as otherwise approved by the Commission, and in a manner (including pursuant to an agreement) that receives the prior approval of the Commission:

- A. Respondents shall provide Transitional Services to the Commission-approved Acquirer sufficient to enable the Commission-approved Acquirer to operate each of the Psychiatric Hospital Facilities to be divested and to provide Acute Inpatient Psychiatric Services in substantially the same manner that Respondents have operated such facilities and provided such services at each of the Psychiatric Hospital Facilities to be divested; and
- B. Respondents shall provide the Transitional Services required by this Paragraph at substantially the same level and quality as such services are provided by Respondents in connection with the operation of each of the Psychiatric Hospital Facilities to be divested.

*Provided, however*, that Respondents shall not (i) require the Commission-approved Acquirer to pay compensation for Transitional Services that exceeds the Direct Cost of providing such goods and services, or (ii) terminate its obligation to provide

## Decision and Order

Transitional Services because of a material breach by the Commission-approved Acquirer of any agreement to provide such assistance unless Respondents are unable to provide such services due to such material breach.

**VI.****IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the obligations imposed by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the New Mexico Psychiatric Hospital Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee,

## Decision and Order

Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

1. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.
2. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
  - a. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.
  - b. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraph II. of this Order, or believes that such obligations can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, that the Commission may extend the period only two (2) times.
  - c. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full

## Decision and Order

and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph VI. for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

- d. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.
- e. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the

## Decision and Order

Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

- f. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.
- g. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.





## Decision and Order

- B. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof.
- C. Respondents shall comply with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a failure to comply with this Order. If any term of the Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order.

**VIII.****IT IS FURTHER ORDERED** that:

- A. For a period of ten (10) years from the date this Order is issued, Respondents shall not, without providing advance written notification to the Commission in the manner described in this Paragraph, directly or indirectly:
  - 1. Acquire any stock, share capital, equity, or other interest in any Person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in or is engaged in providing Acute Inpatient Psychiatric Services in the Relevant Area; or
  - 2. Enter into any agreement or other arrangement to manage or otherwise control a Third Party Psychiatric Facility which, during the twelve (12) months immediately preceding such agreement or arrangement, was engaged or is engaged in providing Acute Inpatient Psychiatric Services in the Relevant Area.

Nothing herein shall be construed to require advance written notification if Respondents seek to open a new Psychiatric Hospital Facility or expand existing Acute

## Decision and Order

## Inpatient Psychiatric Services at one of Respondents' Psychiatric Hospital Facilities in the Relevant Area.

- B. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), 16 C.F.R. § 803 App., and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a. *Provided further, however,* that prior notification shall not be required by this Paragraph for Respondents' continued ownership, management, or operation of the assets required to be divested (i) pursuant to Paragraphs II. or VI. of this Order pending such divestiture; and (ii) pursuant to the Divestiture Agreement.

## Decision and Order

**IX.****IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after this Order is issued, and every sixty (60) days thereafter until Respondents have complied with their obligations in Paragraph II. (or Paragraph VI. of this Order, if the New Mexico Psychiatric Hospital Assets are required to be divested) of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraph II. (or Paragraph VI. of this Order, if the New Mexico Psychiatric Hospital Assets are required to be divested) of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II. (or Paragraph VI. of this Order, if the New Mexico Psychiatric Hospital Assets are required to be divested) of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communication to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.
- B. One (1) year after this Order is issued, annually for the next nine (9) years on the anniversary of that date, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

## Decision and Order

**X.**

**IT IS FURTHER ORDERED** that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of such Respondent;
- B. Any proposed acquisition, merger, or consolidation of such Respondent; and
- C. Any other change in such Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

**XI.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to the applicable Respondent made to their principal United States offices, registered office of their United States subsidiaries, or headquarters addresses, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of such Respondent; and
- B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Order.

Analysis to Aid Public Comment

**XII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on November 27, 2022.

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC  
COMMENT****I. INTRODUCTION AND BACKGROUND**

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Alan B. Miller and Universal Health Services, Inc. (collectively, “UHS”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that otherwise would result from the merger of UHS with Ascend Health Corporation (“Ascend”). Under the terms of the proposed Consent Agreement, UHS is required to divest, within six months after the Decision and Order is issued, its Peak Behavioral Health Services facility (“Peak”), and all relevant assets and real property in the local market encompassing El Paso, Texas and its suburb, Santa Teresa, New Mexico (“El Paso/Santa Teresa”), to an acquirer that receives the approval of the Commission. UHS will acquire University Behavioral Health of El Paso, the Ascend facility, when the merger closes. To ensure that the divested assets attract a buyer that can adequately compete with UHS post-divestiture, the Consent Agreement requires a second UHS hospital, Mesilla Valley Hospital (“Mesilla Valley”), located in Las Cruces, New Mexico, to be divested if the original divestiture assets are not sold to an approved buyer within the six-month timeframe. UHS and Ascend have also agreed to hold the to-be-divested assets separate, and to maintain the economic viability, marketability, and competitiveness of both the Peak and Mesilla Valley assets

*Analysis to Aid Public Comment*

until the potential acquirer is approved by the Commission and the divestiture is complete.

The proposed Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission again will review the proposed Consent Agreement and comments received, and decide whether it should withdraw the Consent Agreement, modify the Consent Agreement, or make it final.

On June 3, 2012, UHS agreed to acquire Ascend in a transaction valued at approximately \$517 million. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, by removing an actual, direct, and substantial competitor from one local market for acute inpatient psychiatric services. The proposed Consent Agreement would remedy the alleged violations by requiring a complete divestiture in the affected market. The divestiture will replace the competition that otherwise would be lost in the El Paso/Santa Teresa market as a result of the proposed acquisition.

**II. THE PARTIES**

UHS, headquartered in King of Prussia, Pennsylvania, owns or operates 25 general acute care hospitals and 198 behavioral health facilities located in 36 states, Washington, D.C., Puerto Rico, and the U.S. Virgin Islands. It is one of the largest hospital management companies in the United States, with 2011 revenues totaling approximately \$7.5 billion. In 2011, UHS's 198 behavioral health facilities generated approximately \$3.4 billion in revenue (25% of total revenues) from nearly 19,000 licensed beds and over 5 million patient days. The top revenue sources for its behavioral health centers are commercial payors (38% of 2011 net revenue), Medicaid (24%), and Medicare (17%). In November 2010, UHS completed its acquisition of Psychiatric Solutions, Inc., which had operated the nation's largest network of freestanding inpatient behavioral health facilities, subject to an FTC consent order that required UHS to divest facilities in Nevada, Delaware, and Puerto Rico.

## Analysis to Aid Public Comment

Ascend, headquartered in New York, New York, owns or operates nine behavioral health facilities located in Arizona, Oregon, Texas, Utah, and Washington, including seven acute inpatient psychiatric hospitals, a substance abuse residential treatment center, and an addiction treatment center.

**III. ACUTE INPATIENT PSYCHIATRIC SERVICES**

UHS's proposed acquisition of Ascend poses substantial antitrust concerns in the relevant product market of acute inpatient psychiatric services provided to commercially insured patients. Acute inpatient psychiatric services are those provided for the diagnosis, treatment, and care of patients deemed to be a threat to themselves or others or unable to perform basic life functions, due to an acute psychiatric condition. Acute inpatient psychiatric care is distinct from other psychiatric services such as partial hospitalization, intensive outpatient programs, outpatient care, and residential treatment. Other, less intensive, psychiatric services are not substitutes for acute inpatient psychiatric services.

The acute inpatient psychiatric services market is local in nature. Analysis of patient flow data and evidence gathered from market participants indicate that patients and their families prefer to find care as close to home as possible and to stay within the city where they live or work. Accordingly, most residents of El Paso and Santa Teresa obtain acute inpatient psychiatric services from providers located in El Paso or Santa Teresa. Health plans also have internal guidelines or regulatory "geo-access" standards requiring that services be made available within a certain, usually short, distance from their members. The acute inpatient psychiatric services market affected by the proposed acquisition is thus limited to the El Paso/Santa Teresa market.

The proposed acquisition would lead to a virtual monopoly in the provision of acute inpatient psychiatric services provided to commercially insured patients in the El Paso/Santa Teresa market, which creates a strong presumption that the acquisition would create or enhance market power or facilitate its exercise. The presumption of anticompetitive harm is further supported by evidence of the close competition between the UHS- and Ascend-owned facilities that would be eliminated by the proposed merger. Consumers in El Paso/Santa Teresa have benefitted from the



## Analysis to Aid Public Comment

head-to-head competition in the form of lower health care costs, higher quality of care, and improved service offerings. Left unremedied, the proposed acquisition likely would cause anticompetitive harm by enabling UHS to profit by unilaterally raising the reimbursement rates negotiated with commercial health plans. These costs are ultimately borne by consumers in the form of higher premiums, co-pays, and other out-of-pocket costs. The loss of competition also reduces UHS's incentive to improve quality and provide better service.

New entry or expansion is unlikely to deter or counteract the anticompetitive effects of the proposed acquisition. While regulatory barriers to opening a new psychiatric facility or unit are lower in Texas and New Mexico than in other states (*e.g.*, there are no Certificate of Need regulations in either state), local zoning regulations, Medicaid and Medicare certifications, and the need to develop strong relationships with local patient referral sources hinder the ability of firms to enter the market. Cuts to Medicaid funding may also affect the financial incentive of a provider to offer inpatient psychiatric services. Thus, it is unlikely that new entry or expansion sufficient to achieve a significant market impact will occur in a timely manner.

#### **IV. THE PROPOSED CONSENT AGREEMENT**

The proposed Consent Agreement wholly remedies the anticompetitive effects in the El Paso/Santa Teresa market by requiring UHS to divest Peak, located in Santa Teresa, New Mexico, and its associated operations and businesses within six months after issuance of the Decision and Order. The potential acquirer of Peak is subject to prior approval of the Commission. The Consent Agreement also provides that, if Peak is not sold to an approved acquirer within six months, a Divestiture Trustee will be appointed and empowered to divest both Peak and Mesilla Valley. The purpose of this provision is to address the uncertainty of whether Peak alone is sufficient to attract an acquirer that would compete as effectively as UHS competed prior to the merger.

Until completion of the requisite divestiture(s), UHS is required to abide by the Order to Hold Separate and Maintain Assets, which includes a requirement that UHS hold Peak

## Analysis to Aid Public Comment

separate from its other businesses and facilities, and a requirement to take all actions necessary to maintain the economic viability, marketability, and competitiveness of the both the Peak and Mesilla Valley assets. The Consent Agreement also requires UHS to provide transitional services to the approved acquirer for one year, as needed to assist the acquirer with operating the divested assets as a viable and ongoing business. In addition, the proposed order allows the Commission to appoint a Hold Separate Trustee to oversee UHS's compliance with the Order to Hold Separate and Maintain Assets. Finally, the proposed order contains a ten-year prior notice requirement for acquisitions of acute inpatient psychiatric service providers in the local area, as well as compliance reporting requirements.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement. This analysis does not constitute an official interpretation of the Consent Agreement or modify its terms in any way.