

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
J. Thomas Rosch
Edith Ramirez
Julie Brill
Maureen K. Ohlhausen

<hr/>	
In the Matter of)
)
Cooperativa de Farmacias Puertorriqueñas)
("Coopharma"),)
a corporation.)
)
)
)
<hr/>)

Docket No. C-

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

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.

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 traditionally has been a percentage of Average Wholesale Price (“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 Bylaws, 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 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 Bylaws, 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 . . .”

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. This 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.

20. In 2008, Caremark paid all pharmacies in Puerto Rico, including Coopharma's members, 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" 000 TD (mbe)Tj 20.6.

24. Coopharm 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.

26. Coopharm 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** [instr

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

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.

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. § 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 Corporación para la Supervisión y Seguro de Cooperativas de Puerto Rico, known as COSSEC, to regulate cooperatives.

42. COSSEC has no process for reviewing cooperatives' negotiations with purchaser 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 1140.

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 (6 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 service 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 ac

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 ____ day ____, 2012.

By the Commission.

Donald S. Clark
Secretary

SEAL