ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of Práxedes E. Alvarez San

facilitate the provision of medical services to Mi Salud members and payments to participating providers. Humana administers the Mi Salud program in the southwestern region of Puerto Rico, where the Respondents do business.

The Mi Salud reimbursement program was modified in October 2010 for Mi Salud members who are also covered by Medicare ("dual eligibles"). Under the previous program Medicare paid 80 percent of its established rate, and payers administering the Mi Salud program paid the remaining 20 percent, known as the coordination of benefits amount ("20 percent COB"). After October 2010, providers no longer received a coordination of benefits amount for dual eligibles, except in rare circumstances. As a result of this change, providers' reimbursements decreased for dual eligibles under the Mi Salud program.

The proposed complaint alleges that Respondents collectively (1) negotiated in an attempt to extract higher reimbursement rates by fixing the prices upon which Respondents would contract with Humana and (2) terminated their contracts with Humana and refused to treat Humana patients enrolled in the Mi Salud program because Humana would not acquiesce to Respondents' price-related demands.

The joint price negotiations and collective refusals to deal commenced in late 2011. On October 28, 2011, Dr. Jorge Grillasca sent an email to Humana stating that Humana's failure to reimburse the full 20 percent COB would force him to discontinue his treatment of Humana's Mi Salud members and create a dangerous situation for these patients. He requested that Humana "hold an urgent meeting with me and other colleagues that share the same concern." He copied all of the other Respondents on this email.

The meeting occurred on December 8, 2011, when two of the Respondents, Dr. Angel Rivera Santos and Dr. Daniel Perez, met with Humana representatives to discuss the 20 percent COB. During that meeting, Dr. Daniel Perez presented to Humana a fee schedule that proposed higher reimbursement rates. The next day Dr. Rivera Santos wrote an email to Humana stating, "I understand as well that I have the right to receive the 20% that had been denied. It will depend on these issues if I decide to continue my professional relationship with Humana Mi Salud. Also remember that I am waiting for your response related to the newly proposed rates that were handed to you yesterday by my colleague Dr. Daniel Perez." Dr. Rivera Santos copied all the other Respondents on this email.

The following February 2012, ASES and Humana met with Respondents to discuss the 20 percent COB rule. At the conclusion of the meeting, Dr. Grillasca presented to Humana a fee schedule proposing increased rates. On February 28, 2012, Dr. Grillasca stated in an email to Humana that the payer had until March 1, 2012, to respond to the Respondents' proposed fee schedule. He copied the other Respondents on this email. When Humana did not respond by the March 1 deadline, all eight Respondents terminated their Mi Salud service agreements with

significant and real consequences to patients. In one instance, a patient with critical renal failure arrived at an area hospital in need of immediate care and likely long-term dialysis treatment. All of the nephrologists refused to treat the patient, whose condition worsened and who was later transferred to a hospital 74 miles away in San Juan. Dr. Grillasca told hospital personnel that the nephrologists were not taking Mi Salud patients due to a disagreement with Humana over rates. On the same day, Respondents refused to treat another Humana Mi Salud patient admitted to another area hospital with a renal illness. The patient's family objected to the patient's transfer to a hospital with nephrology services that was 67 miles away. Respondents eventually began treating patients again only after being ordered to do so by Puerto Rico's Office of the Health Advocate.

ASES ultimately agreed to Respondents' demand for higher reimbursement rates. ASES believed it had no choice but to acquiesce to Respondents' demands because of its concerns over access to nephrology services for Mi Salud patients. On June 13, 2012, ASES abandoned the new reimbursement formula and reinstated the 20 percent COB. The requirement that payers reimburse providers the full 20 percent COB, retroactive to March 16, 2012, is estimated to cost ASES and the Mi Salud program an additional $4 million to $6 million annually. Thus, the denial of nephrology services and the demands for higher reimbursement rates caused substantial harm to the consumers of Puerto Rico.

Finally, the proposed complaint alleges that Respondents' actions were a naked agreement to fix prices and a collective refusal to deal, not related to any efficiency-enhancing justification or any efforts at clinical or financial integration. Respondents, at all times relevant to the proposed complaint, maintained separate, independent nephrology practices and made no attempt to share the financial risk in the provision of nephrology services or to clinically integrate the delivery of care to patients, which might justify the otherwise illegal joint activity.

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 not prohibiting the Respondents to engage in legitimate joint conduct in the future, if they so choose.

Paragraph II of the proposed consent order prevents Respondents from continuing the challenged conduct. In particular, Paragraph II.A prevents Respondents from entering into or participating in agreements: (1) to negotiate on behalf of another physician with any payer, (2) to refuse to deal, or threaten to refuse to deal with any payer, or (3) regarding any term, condition, or requirement upon which another physician deals, or is willing to deal, with any payer, including, but not limited to, price terms.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Respondents from exchanging information with another physician concerning whether and on what terms that other physician is willing to contract with a payer. Paragraph II.C prevents Respondents from entering into agreements to withhold services from any person. Paragraph II.D bars Respondents from exchanging information among physicians concerning

any physician's willingness to offer or withhold services from any person. Paragraph II.E prohibits attempts to engage in the actions precluded by Paragraphs II.A, II.B, II.C, or II.D. Paragraph II.F proscribes encouraging or attempting to induce any action that would be prohibited by Paragraph II. Nothing in Paragraph II prohibits any agreement or conduct among Respondents that is reasonably necessary to a Qualified Arrangement.

Paragraph III requires Respondents to provide the Commission with notice and certain information before entering into a Qualified Arrangement. Paragraph III.A requires Respondents to notify the Commission 60 days prior to entering into any Qualified Arrangement. Paragraph III.B requires Respondents to provide information about the nature and effects of the proposed agreement as part of the Paragraph III.A notification. Paragraph III.C allows the Commission to make a written request for additional information within 60 days, which then prevents the participating Respondents from entering into the proposed agreement until 30 days after substantially complying with the request for additional information. Paragraphs III.D through F state that certain actions with respect to a proposed Qualified Arrangement should not be construed as a determination by the Commission that the action violates the law, is approved, or violates this order.

Paragraph IV is similarly designed to prevent the challenged conduct from recurring by requiring Respondents to send copies of the complaint and consent order to those impacted by its terms. Paragraph IV.A requires each Respondent to send a copy of the complaint and consent order to every physician, officer, manager, and staff member in each Respondent's medical practice group at any time since January 1, 2010. Paragraph IV.A also requires each Respondent to send a copy of the complaint and consent order to every payer whom Respondent had contacted regarding contracting for physician services at any time since January 1, 2010. Paragraph IV.B carries the provisions in Paragraph IV.A forward for three years from the date of the order.

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