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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of	)	
Cooperativa de Farmacias Puertorriqueñas ("Coopharma"), a corporation.	)	**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 appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges in that respect as follows:

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.

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 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 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.

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 singe [*sic*] institution, **'<u>COOPHARMA THE BIGGEST CHAIN OF PHARMACIES IN ALL OF PUERTO RICO</u>.'**" [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.

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 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 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.

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.

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 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 ____ day of ____, 2012.

By the Commission.

Donald S. Clark
Secretary

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