response costs incurred by the United States in connection with the Alaskan Battery Enterprises Superfund Site in Fairbanks, Alaska. The Decree also resolves the counterclaims brought by Sears against the United States.

The Decree requires, *inter alia*, that Sears reimburse the United States' response costs in the amount of $664,759.00 plus prejudgment interest from May 1, 1994 through the date of payment. Sears is obligated, ten days after entry of the Decree, to stipulate to the dismissal with prejudice of its counterclaims against the United States; the United States is obligated, ten days after all payments have been received, to dismiss its claims against Sears with prejudice, however the Decree does contain a reopener that permits the United States to institute additional proceedings to require that Sears perform further response actions or to reimburse the United States for additional costs of response in certain situations. The Decree provides Sears the contribution protection afforded by Section 113(f)(2) of CERCLA, 42 U.S.C. 9613(f)(2).

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Alaskan Battery Enterprises, Inc.*, D.J. No. 90–11–3–726A.

The proposed Consent Decree may be examined at the Office of the United States Attorney for the District of Alaska, Room 253, Federal Building and U.S. Courthouse, 222 West Seventh Avenue, Anchorage, Alaska 99513–7567; the Region 10 Office of the Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington 98101; and at the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005 (Tel: 202–624–0892). A copy of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy, please enclose a check in the amount of $5.75 (25 cents per page reproduction cost) payable to Consent Decree Library.

Joel Gross,

Acting Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 95–1997 Filed 1–25–95; 8:45 am]

BILLING CODE 4410–01–M

Antitrust Division

U.S. v. Vision Service Plan; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. section 16(b) through (h), that a proposed Final Judgment, a Stipulation, and a Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in United States of America v. Vision Service Plan, Case No. 1:49CV02693.

The Complaint in the case alleges that Vision Service Plan (VSP) entered into so-called ''most favored nation'' agreements with its panel doctors in unreasonable restraint of trade, in violation of section 1 of the Sherman Act, 15 U.S.C. 1, by effectively restricting the willingness of panel doctors to discount fees for vision care services and substantially reducing discounted fees for vision care services.

The proposed Final Judgment eliminates VSP's most favored nation clause and enjoins VSP from engaging in other actions that would limit future discounting by its participating doctors.

Public comment on the proposed Final Judgment is invited within the statutory 60-day comment period. Such comments and responses thereto will be published in the **Federal Register** and filed with the Court. Comments should be directed to Gail Kursh, Chief; Professions & Intellectual Property Section, Department of Justice, Antitrust Division; 600 E Street, NW., Room 9300; Washington, DC 20530 (telephone: (202) 307–5799).

Constance K. Robinson,

Director of Operations, Antitrust Division.

In the United States District Court for the District of Columbia

United States of America, c/o Antitrust Division, Department of Justice, 600 E Street, NW., Washington, DC 20530, Plaintiff, vs. Vision Service Plan, 3333 Quality Drive, Ranch Cordova, CA 95670, Defendant. Case Number 1:94CV02693. Judge: Thomas Penfield Jackson. Deck Type: Antitrust. Date Stamp: 12/15/94.

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable and other relief against the defendant named herein, and complains and alleges as follows:

I

Jurisdiction and Venue

1. This Complaint is filed by the United States under section 4 of the Sherman Act, 15 U.S.C. 4, as amended, to prevent and restrain a continuing violation by the Defendant of section 1 of the Sherman Act, 15 U.S.C. 1.

2. The Defendant transacts business and is found within the District of Columbia, within the meaning of 15 U.S.C. 22.

II

Defendant

3. Vision Service Plan (''VSP''), is a California not-for-profit corporation with its principal place of business in Rancho Cordova, California. The Defendant offers vision care insurance plans. To obtain services for covered patients, the Defendant enters into agreements with member optometrists and ophthalmologists in private practice (panel doctors), that govern their provision of vision care services to VSP patients.

4. Whenever this Complaint refers to any corporation's act, deed, or transaction, it means that such corporation engaged in the act, deed, or transaction by or through its members, officers, directors, agents, employees, or other representatives while they actively were engaged in the management, direction, control, or transaction of its business or affairs.

III

Concerted Action

5. Various firms and individuals, not named as defendants in this Complaint, have participated with the Defendant in the violation alleged in this Complaint, and have performed acts and made statements in furtherance thereof.

IV

Trade and Commerce

6. At material times, the Defendant has engaged in the business of underwriting or administering vision care insurance plans (''VSP plans'') in 42 states (46 effective January 1, 1995) and the District of Columbia. The Defendant obtains vision care services for persons covered by VSP plans by establishing panels of contracting doctors, who each sign and agree to comply with the Panel Doctor's Agreement with VSP, which, among other things, governs payment for covered services rendered to VSP patients. The Defendant contracts with approximately 17,000 panel doctors.

7. At material times, the Panel Doctor's Agreement between each panel

doctor and the Defendant has contained a ''most favored nation'' clause, characterized by VSP as a Fee Non-Discrimination Clause, pursuant to which each panel doctor agrees:

(a) Not to charge fees to VSP that are any higher than those charged to the doctor's non-VSP patients, nor those that the doctor accepts from any other non-governmental group, group plan, or panel;

(b) If a published VSP fee schedule would cause payment in excess of the doctor's usual and customary fee, to notify VSP and accept such lower fee as is consistent with the doctor's usual and customary fees; and

(c) If VSP determines that the doctor is charging fees to VSP that are higher than those charged non-VSP patients, VSP shall reduce the doctor's fees accordingly.

8. At material times, in all or parts of many states in which the Defendant does business, it has contracted with a relatively high percentage of optometrists in private practice. In all or parts of many states in which the Defendant does business, payments from the Defendant have constituted a significant portion of most panel doctors' revenue from the provision of vision care services to patients having some form of vision care insurance coverage.

9. Vision care insurance plans seeking to market their plans to employers and other potential patient groups, in competition with the Defendant, need to attract or retain at competitive prices a geographically varied panel comprising a substantial number of qualified optometrists. After the Defendant began actively enforcing the most favored nation clause in its Panel Doctor's Agreement, in all or parts of many states in which the Defendant does business, many of its panel doctors refused to discount their fees to competing vision care insurance plans or to uninsured patients because VSP's most favored nation clause would have required them similarly to lower all of their charges to the Defendant. Because many of the Defendant's panel doctors receive a substantial portion of their professional income from serving VSP patients, the costs to the doctors of having to lower the fees they charge VSP would have been too great. Consequently, the Defendant's most favored nation clause has, in effect, caused many of its panel doctors to charge all of their other patients and other vision care insurance plans, in competition with VSP, fees as high as or higher than those charged to VSP.

10. In all or parts of many states in which the Defendant does business, the Defendant's most favored nation clause has caused large numbers of panel doctors, who otherwise would have discounted their fees to participate in competing vision care insurance plans, to drop out of such plans or to refuse to join such plans. The Defendant's most favored nation clause also has caused a large number of panel doctors, who do contract with vision care insurance plans competing with VSP, to insist, as a condition of continuing such participation, that the plans increase their payments to the levels paid by VSP.

11. Because in all or parts of many states in which the Defendant does business, a relatively large percentage of optometrists in private practice are VSP panel doctors, and because revenue from serving the patients covered by VSP plans is a significant portion of many of those panel doctors' professional income, among other reasons, the Defendant's most favored nation clause has resulted in many competing vision care insurance plans being unable to attract or retain sufficient numbers of panel doctors to serve their members at fee levels below those paid by VSP. In all or parts of many states in which the Defendant does business, the Defendant's most favored nation clause has substantially restricted many competing plans' ability to attract and serve groups of patients on competitive terms.

12. Many corporate employers remit across state lines not insubstantial premium payments to the Defendant for underwriting or administering vision care insurance for their employees.

13. Many corporate employers that remit premiums to the Defendant are businesses that sell products and services in interstate commerce, and the premium levels paid by such businesses affect the prices of the products and services they sell.

14. At material times, the Defendant has used interstate banking facilities and purchased not insubstantial quantities of goods and services across state lines, for use in providing vision care insurance coverage or vision care services to patients.

15. The activities of the Defendant that are the subject of this Complaint have been within the flow of, and have substantially affected, interstate trade and commerce.

V

Violation Alleged

16. Beginning at a time unknown to the Plaintiffs and continuing through at least November, 1994, in all or parts of many states in which Defendant does business, the Defendant entered into agreements with its panel doctors in unreasonable restraint of interstate trade and commerce in violation of section 1 of the Sherman Act, 15 U.S.C. 1. This offense is likely to recur unless the relief hereinafter sought is granted.

17. For the purpose of forming and effectuating these agreements, the Defendant did the following things, among others:

(a) Required panel doctors to agree to the most favored nation clause in the VSP Panel Doctor Agreement, with the effect of restricting the willingness of panel doctors to discount fees for vision care services and substantially reducing discounted fees for vision care services;

(b) Enforced the most favored nation clause in the VSP Panel Doctor agreement; and

(c) Coerced many panel doctors into dropping out of, or charging higher fees to, vision care insurance plans that attempt to compete with the Defendant.

18. These agreements had the following effects, among others, in all or parts of many states in which the Defendant does business:

(a) Price competition among vision care insurance plans has been unreasonably restrained because many competing vision care insurance plans have been unable to obtain or retain a sufficient number of optometrists to provide services to their members at competitive prices because panel doctors have withdrawn from, refused to participate in, or insisted on higher fees from vision care insurance plans that seek to pay them less than the Defendant;

(b) Prices for the provision of vision care services to non-VSP patients and plans in competition with the Defendant have been raised because many VSP panel doctors have opted not to discount their fees to competing vision care insurance plans or to uninsured patients; and

(c) Consumers of vision care services have been deprived of the benefits of free and open competition.

VI

Prayer

Wherefore, the Plaintiff prays:

1. That the Court adjudge and decree that the Defendant entered into unlawful agreements in unreasonable restraint of interstate trade and commerce in violation of section 1 of the Sherman Act, 15 U.S.C. 1.

2. That the Defendant, its members, officers, directors, agents, employees, and successors and all other persons acting or claiming to act on its behalf be enjoined, restrained and prohibited for

a period of five years from, in any manner, directly or indirectly, continuing, maintaining, or renewing these agreements, or from engaging in any other combination, conspiracy, agreement, understanding, plan, program, or other arrangement having the same effect as the alleged violation.

3. That the United States have such other relief as the nature of the case may require and the Court may deem just and proper.

Dated: December 15, 1994.

For Plaintiff:

Anne K. Bingaman,

Assistant Attorney General.

Robert E. Litan,

Deputy Assistant Attorney General.

Mark C. Schechter,

Deputy Director, Office of Operations.

Gail Kursh, D.C. Bar #293118,

Chief, Professions and Intellectual Property Section.

David C. Jordan, D.C. Bar #914093,

Ass't Chief, Professions and Intellectual Property Section, Antitrust Division, Department of Justice.

Steven Kramer,

Richard S. Martin,

Attorneys, Antitrust Division, U.S. Dept. of Justice, 600 E Street, NW., Room 9420, Washington, DC 20530, (202) 307–0997.

In the United States District Court for the District of Columbia

United States of America, Plaintiff, vs. Vision Service Plan, Defendant. Civil Action No. 942693.

Stipulation

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the Eastern District of California;

2. The parties consent that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendant and by filing that notice with the Court; and

3. Defendant agrees to be bound by the provisions of the proposed Final Judgment pending its approval by the Court. If plaintiff withdraws its consent, or if the proposed Final Judgment is not entered pursuant to the terms of the Stipulation, this Stipulation shall be of no effect whatsoever, and the making of this Stipulation shall be without prejudice to any party in this or in any other proceeding.

4. Defendant agrees to send, within 15 days of the filing of the proposed Final Judgment, a copy of the attached letter, which has been approved by the Antitrust Division, by first-class mail to every VSP Panel Doctor participating at any time since January 1, 1993.

5. Defendant agrees to provide to plaintiff a certificate of compliance with the preceding paragraph within 20 days of the filing of the proposed Final Judgment.

For Plaintiff:

Anne K. Bingaman,

Assistant Attorney General.

Robert E. Litan,

Deputy Assistant Attorney General.

Mark C. Schechter,

Deputy Director, Office of Operations.

Gail Kursh, D.C. Bar #293118,

Chief.

David C. Jordan, D.C. Bar #914093,

Ass't. Chief, Professions and Intellectual Property Section, Antitrust Division, Department of Justice.

For Defendant:

John J. Miles,

D.C. Bar #364054, Ober, Kaler, Grimes & Shriver, Fifth Floor, 1401 Floor, 1401 H Street, NW., Washington, DC 20005–2202, (202) 326–5008.

Steven Kramer,

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Attorneys, Antitrust Division, U.S. Dept. of Justice, 600 E Street, NW., Room 9420, BICN Bldg. Washington, DC 20530, (202) 307–0997.

Barclay L. Westerfeld,

General Counsel, Vision Service Plan, 3333 Quality Drive, Rancho Cordova, CA 95670, (916) 851–5000.

In the United States District Court for the District of Columbia

United States of America, Plaintiff, vs. Vision Service Plan, Defendant. Civil Action No. 94 2693.

Final Judgment

Plaintiff, United States of America, filed its Complaint on December 15, 1994. Plaintiff and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law. This Final Judgment shall not be evidence against or an admission by any party about any issue of fact or law or that any violation of law has occurred. Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby

Ordered, Adjudged, and Decreed, as follows:

I

Jurisdiction

This Court has jurisdiction over the subject matter of this action and over each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against the Defendant under section 1 of the Sherman Act, 15 U.S.C. 1.

II

Definitions

As used herein, the term:

(A) ''Defendant'' or ''VSP'' means Vision Service Plan;

(B) ''Panel Doctor's Agreement'' means the VSP Panel Member Agreement by which Defendant contracts with optometrists or ophthalmologists, including all amendments and additions, in effect at any time since January 1, 1992, and during the term of this Final Judgment;

(C) ''Most Favored Nation Clause'' means:

(1) The clause characterized as a Fee Non-Discrimination Clause in paragraph 6 of the VSP Panel Doctor's Agreement, pursuant to which each VSP member doctor agrees:

(a) Not to charge fees to VSP that are any higher than those charged to the doctor's non-VSP patients, nor those that the doctor accepts from any other non-governmental group, group plan, or panel;

(b) If a published VSP fee schedule would cause payment in excess of the doctor's usual and customary fee, to notify VSP and accept such lower fee as is consistent with the doctor's usual and customary fees; and

(c) If VSP determines that the doctor is charging fees to VSP that are higher than those charged non-VSP patients, VSP shall reduce the doctor's fees accordingly; or

(2) Any other existing or future clause in the VSP Panel Doctor's Agreement, VSP policy, or VSP practice having the same purpose or effect, in whole or in part.

(D) ''Non-VSP patients'' means patients who are not members of a plan insured or administered by VSP.

(E) ''Non-VSP plan'' means any plan (other than VSP) responsible for all or part of any expense for vision care services, provided to plan members, pursuant to contractual terms with providers of vision services limiting the fees that providers collect for serving the plan's members.

(F) ''Modal fee'' means the fee charged most frequently during a calendar year by a VSP panel doctor for each service rendered to non-VSP patients and for each service rendered to VSP patients that is not covered by a plan insured or administered by VSP. For example, if in 1993, a VSP panel doctor performed a total of 12 eye examinations on non-VSP patients and charged 3 of those patients $40, 5 of those patients $50, and 4 of those patients $60 for the eye examination, the doctor's modal fee for eye examinations provided to non-VSP patients would be $50.

(G) ''Median fee'' means, considering all fees charged in a calendar year for each service rendered to non-VSP patients and for each service rendered to VSP patients that is not covered by a plan insured or administered by VSP, the fee below and above which there are an equal number of fees (or, if there are an overall equal number of fees under consideration, the fee that is the arithmetic mean of the tow middle fees.)

III

Applicability

This Final Judgment applies to:

(A) The Defendant and to its successors and assigns, and to all other persons (including VSP panel doctors) in active concert or participation with any of them, who have received actual notice of the Final Judgment by personal service or otherwise; and

(B) The Most Favored Nation Clause, as defined in Section II(C) of this Final Judgment, but to no other clause of the VSP Panel Doctor's Agreement, VSP policy, or VSP practice.

IV

Prohibited Conduct

Except as permitted in Section V, Defendant is enjoined and restrained from:

(A) Maintaining, adopting, or enforcing a Most Favored Nation Clause in any VSP Panel Doctor's Agreement, corporate bylaws, policies, rules, regulations, or by any other means or methods;

(B) Maintaining, adopting, or enforcing any policy or practice linking payments made by VSP to any VSP panel doctor to fees charged by the doctor to any non-VSP patient or any non-VSP plan;

(C) Differentiating VSP's payments to, or other treatment of, any VSP panel doctor because the doctor charges any fee lower than that charged by the doctor to VSP, to any non-VSP patient or to any non-VSP plan;

(D) Taking any action to discourage any VSP panel doctor from participating in any non-VSP plan or from offering or charging any fee lower than that paid to the doctor by VSP to any non-VSP patient or any non-VSP plan;

(E) Monitoring or auditing the fees any VSP panel doctor charges any non-VSP patient or any non-VSP plan; and

(F) Communicating in any fashion with any VSP panel doctor regarding the doctor's participation in any non-VSP plan or regarding the doctor's fees charged to any non-VSP patient or to any non-VSP plan.

V

Permitted Activities

Despite any prohibition contained in Section IV of this Final Judgment,

(A) For the purpose of calculating payments to be made to its panel doctors, defendant may request annually that a VSP panel doctor report sufficient information—provided such information is requested uniformly from all panel doctors within a meaningful geographic area comprising zip codes—from which Defendant is able to calculate either the doctor's modal or median fee, for each applicable service, provided by the doctor during the preceding calendar year;

(B) Defendant may calculate the fees that it pays to a VSP panel doctor for services rendered to VSP patients based on either the panel doctor's modal or median fees, provided that Defendant employs a uniform method of calculation at least within each meaningful geographic area, comprising zip codes, in which it does business;

(C) Only for the purposes of verifying whether the information reported by a VSP panel doctor, pursuant to Section V(A), is accurate or of investigating a VSP panel doctor's suspected excessive billing to VSP, upon reasonable belief that the reported fees may be inaccurate or excessive, and subject to the reasonable convenience of the VSP panel doctor, Defendant may audit the VSP panel doctor's charges to non-VSP patients;

(D) Consistently with Sections IV(C) and (D), Defendant may devise and utilize a fee system for doctors who apply for VSP panel membership after the date of this Final Judgment that is different from the system used to compensate current panel doctors, and that system may be based on the average fees VSP pays in a meaningful geographic area comprising zip codes;

(E) Consistently with Sections IV(C) and (D), Defendant may elect to maintain current fees for panel doctors at their existing levels and may base any future fee increases on the Consumer Price Index, VSP's own financial growth, or any other meaningful economic indicator; and

(F) Consistently with Sections IV(C) and (D), Defendant may impose penalties on panel doctors who have misrepresented their fees or the frequency with which they charge those fees.

VI

Nullification

The Most Favored Nation Clause shall be null and void and Defendant shall impose no further obligation arising from it on any VSP panel doctor. Within 60 days of entry of this Final Judgment, Defendant shall disseminate to each present VSP panel doctor an addendum to the Panel Doctor's Agreement, nullifying the Most Favored Nation Clause, and Defendant shall eliminate the Most Favored Nation Clause from all Panel Doctor's Agreements entered into after entry of this Final Judgment.

VII

Complance Measures

The Defendant shall:

(A) Distribute, within 60 days of the entry of this Final Judgment, a copy of this Final Judgment to: (1) All VSP officers and directors; (2) VSP employees who have any responsibility for approving, disapproving, monitoring, recommending, or implementing any provisions in agreements with VSP panel doctors; and (3) all present VSP panel doctors and all former VSP panel doctors whom VSP should reasonably know have resigned because of the Most Favored Nation Clause;

(B) Distribute in a timely manner a copy of this Final Judgment to any officer, director, or employee who succeeds to a position described in Section VII(A) (1) or (2);

(C) Obtain from each present or future officer, director, or employee designated in Section VII(A) (1) or (2), within 60 days of entry of this Final Judgment or of the person's succession to a designated position, a written certification that he or she: (1) Has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

(D) Maintain a record of persons to whom the Final Judgment has been distributed and from whom, pursuant to Section VI(D), the certification has been obtained;

(E) The Defendant shall notify all former VSP panel doctors whom it should reasonably know have resigned

because of the Most Favored Nation Clause, that they are reinstated, on terms and conditions that VSP may establish consistently with this Final Judgment, unless they do not desire reinstatement; and

(F) Report to the Plaintiff any violation of the Final Judgment.

VIII

Certification

(A) Within 75 days of the entry of this Final Judgment, the Defendant shall certify to the Plaintiff whether it has: (1) Disseminated contractual addenda pursuant to Section VI, (2) distributed the Final Judgment in accordance with Section VII(A), and (3) obtained certifications in accordance with Section VII(C).

(B) For five years after the entry of this Final Judgment, on or before its anniversary date, the Defendant shall file with the Plaintiff an annual Declaration as to the fact and manner of its compliance with the provisions of Sections IV, V, VI, and VII.

IX

Plaintiff's Access

(A) To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Plaintiff, upon written request of the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to the Defendant made to its principal office, shall be permitted, subject to any legally recognized privilege.

(1) Access during the Defendant's office hours to inspect and copy all documents in the possession or under the control of the Defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) subject to the reasonable convenience of the Defendant and without restraint or interference from it, to interview officers, employees or agents of the Defendant, who may have Defendant's counsel and/or their own counsel present, regarding such matters.

(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to the Defendant's principal office, the Defendant shall submit such written reports, under oath if requested, relating to any matters contained in this Final Judgment as may be reasonably requested, subject to any legally recognized privilege.

(C) No information or documents obtained by the means provided in Section IX shall be divulged by the Plaintiff to any person other than duly authorized representatives of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by the Defendant to Plaintiff, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and the Defendant marks each pertinent page of such material, ''subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then 10 days notice shall be given by Plaintiff to the Defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which the Defendant is not a party.

X

Further Elements of the Final Judgment

(A) This Final Judgment shall expire five years from the date of its entry.

(B) Jurisdiction is retained by this Court for the purpose of enabling either of the parties to this Final Judgment, but no other person, to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

(C) Entry of this Final Judgment is in the public interest.

United States District Judge

In the United States District Court for the District of Columbia

United States of America, Plaintiff, vs. Vision Service Plan, Defendant. Case No. 1:94CV02693 TPJ.

Competitive Impact Statement

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I

Nature and Purpose of the Proceeding

On December 15, 1994, the United States filed a civil antitrust Complaint alleging that Vision Service Plan (VSP), in all or parts of many states in which VSP does business, entered into agreements with its panel doctors that unreasonably restrain competition by restraining discounting of fees for vision care services in violation of section 1 of the Sherman Act, 15 U.S.C. 1. The Complaint seeks injunctive relief to enjoin continuance of the violation.

Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction over the matter for further proceedings that may be required to interpret, enforce or modify the Judgment or to punish violations of any of its provisions.

II

Practices Giving Rise to the Alleged Violation

Defendant VSP is a California not-for-profit corporation headquartered in Rancho Cordova, California. It controls the operations of vision care insurance plans, operated under the name of Vision Service Plan, in 46 states and the District of Columbia. VSP contracts with businesses, government agencies, health care insurers, and other organizations to provide pre-paid vision care coverage to their employees or beneficiaries. In 1994, VSP plans covered about 15 million persons; VSP revenues in 1994 totalled about $650 million.

VSP contracts directly with doctors—primarily optometrists but also with a relatively small number of ophthalmologists—in private practice, whom it refers to as panel doctors, to provide vision care services—consisting essentially of diagnostic and dispensing services and optical materials, such as corrective lenses and frames—to patients covered by VSP plans. VSP's agreements with its panel doctors (termed the Panel Doctor's Agreement) require its panel doctors to report to VSP periodically a listing of the doctor's usual and customary fees charged to non-VSP patients. VSP typically has paid panel doctors fees that are derived from those usual and customary fees, subject to a discount and area-specific fee caps that VSP imposes.

During 1994, VSP contracted with about 17,000 panel doctors. In all or parts of many states in which VSP does business, it contracts with a high percentage of an area's optometrists. For example, in 1993, VSP reported that 98% of all optometrists licensed in Nevada were VSP panel doctors. In California, VSP contracts with approximately 4,000 panel doctors, constituting about 90% of California optometrists in independent private practice. Moreover, in all or parts of many states, VSP's payments to optometrists constitute a significant part

of their professional income. In California, for example, VSP plans cover over 5.7 million members accounting for total annual revenue of approximately $200 million.

Against this background, Defendant VSP's Panel Doctor's Agreement contains a so-called fee non-discrimination clause, which is similar, in substance, to clauses commonly characterized in the health care industry as most favored nation (MFN) clauses. VSP's MFN clause requires that each panel doctor charge VSP no more than the lowest price that the doctor charges any non-VSP patient or any other vision care group or insurance plan. Accordingly, if a VSP panel doctor wishes to reduce the fees that the doctor charges to any non-VSP plan or patient below the amounts that VSP pays the doctor, the MFN requires the doctor to reduce to that same level the fees the doctor charges to VSP. For the reasons described below, however, VSP's MFN clause has actually caused many doctors not to reduce their fees to VSP, but instead to charge other vision care insurance plans and non-VSP patients fees that are at least as high as those paid to the doctor by VSP.

The Complaint alleges that, beginning at a time unknown to Plaintiff and continuing through at least November, 1994, in all or parts of many states in which VSP does business, VSP entered into agreements with its panel doctors that had the effect of unreasonably restraining optometrists' discounting of fees for vision care services to vision care insurance plans competing with VSP or to other purchasers of vision care services, in violation of section 1 of the Sherman Act. The Complaint alleges that, for the purpose of forming and effectuating these agreements, (1) VSP required its panel doctors to agree to the MFN clause in VSP's Panel Doctor's Agreement, which had the effect of restricting the willingness of its panel doctors to discount fees for vision care services and substantially reducing discounted fees for vision care services; (2) VSP enforced the MFN clause; and (3) VSP coerced many panel doctors into dropping out of, or charging higher fees to, vision care insurance plans that compete with VSP.

The Complaint further alleges that, in all or parts of many states, the challenged agreements have had the effect of (1) unreasonably restraining price competition among vision care insurance plans because many competing vision care insurance plans have been unable to obtain or retain a sufficient number of optometrists to provide services to their members at competitive prices because panel doctors have withdrawn from, refused to participate in, or insisted on higher fees from vision care insurance plans that seek to pay them less than the Defendant; and (2) raising prices for the provision of vision care services to non-VSP patients and plans in competition with VSP because, as a result of the MFN, many VSP panel doctors have opted not to discount their fees to competing vision care insurance plans or to uninsured patients.

VSP's adoption and enforcement of the MFN in its Panel Doctor's Agreement has reduced the willingness of many optometrists to discount their fees for the following reasons. Since many VSP panel doctors in all or parts of many states receive a significant portion of their professional income from treating VSP patients, they have found that discounting their fees below VSP payments to non-VSP patients or competing vision care programs, and consequently reducing their income from VSP by virtue of the MFN clause, is unprofitable. For the same reason, VSP panel doctors are unwilling to drop their participation in VSP to avoid the MFN and be able to discount their fees to competing discount vision care plans.

In a number of reported situations, optometrists had reduced their fees in a range of 20–40% below their usual fees to participate in vision care insurance plans competing with VSP. Subsequently, fearing VSP's enforcement of the MFN clause, however, many VSP panel doctors resigned from such competing plans or insisted that the plans pay them fees that are at least as high as VSP's to avoid having to lower their fees charged to VSP. Consequently, VSP's MFN clause has substantially restrained both discounting arrangements that were already in place and potential discounting that otherwise would have occurred but for the MFN. Thus, VSP's MFN clause has severely hampered competing vision care insurance plans' efforts to attract or retain, at competitive prices, a sufficient, geographically dispersed panel of qualified optometrists to make their plans commercially marketable.

In all or parts of many states, VSP's MFN clause has effectively deprived vision care consumers of the benefits of free and open competition. VSP's MFN clause has deprived uninsured patients of price competition among optometrists who—because of the MFN clause—are unwilling to discount their fees below VSP levels. VSP's MFN clause has also reduced purchasers' opportunities to choose among competing vision care insurance plans offering different combinations of optometrists and prices. This reduction in the scope of vision care coverage alternatives, such as managed care and other discount plans, has substantially reduced the cost savings to consumers that such competing plans could provide if they were able to contract for optometrists' services at fees below VSP levels. Indeed, claims data suggest generally that average claims, based on panel doctor's usual charges, filed with VSP for services rendered in all or parts of many states where VSP contracts with a substantial percentage of optometrists in private practice and does a substantial amount of business range between $95–110, compared to $70–80 in some other areas where VSP has less of a market presence.

III

Explanation of the Proposed Final Judgment

The Plaintiff and VSP have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h). The proposed Final Judgment provides that its entry does not constitute any evidence against or admission of any party concerning any issue of fact or law.

Under the provisions of section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(e), the proposed Final Judgment may not be entered unless the Court finds that entry is in the public interest. Section X(C) of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is intended to ensure that VSP eliminates its MFN clause and stops all similar practices that unreasonably restrain competition among optometrists and vision care insurance plans.

A. Scope of the Proposed Final Judgment

Section III (A) of the proposed Final Judgment provides that the Final Judgment shall apply to VSP and to its successors and assigns, and to all other persons (including VSP panel doctors) in active concert or participation with any of them, who shall have received actual notice of the Final Judgment by personal service or otherwise. Section III(B) of the proposed Final Judgment limits application of the Judgment to VSP's MFN clause, as defined in Section II(C) of the Judgment, but to no other clause in the VSP Panel Doctor's Agreement, VSP policy, or VSP practice.

In the Stipulation to the proposed Final Judgment, VSP has agreed to be bound by the provisions of the proposed Final Judgment, pending its approval by the Court. VSP has also agreed to send,

within 15 days of the filing of the proposed Final Judgment, a copy of the attached letter, which has been approved by the Antitrust Division, to every VSP panel doctor participating at any time since January 1, 1993.

B. Prohibitions and Obligations

Under Section IV(A) of the proposed Final Judgment, VSP is enjoined and restrained for a period of five years from maintaining, adopting, or enforcing an MFN clause in any VSP Panel Doctor's Agreement, or in its corporate by-laws, policies, rules, regulations, or by any other means or methods.

Subject to activities permitted in Section V of the proposed Final Judgment, other provisions of the Final Judgment seek to ensure that the MFN clause's anticompetitive effects cannot be achieved in other ways. Specifically, Section IV(B) enjoins VSP from maintaining, adopting, or enforcing any policy or practice linking payments made by VSP to any VSP panel doctor to fees charged by the doctor to any non-VSP patient or any non-VSP plan; Section IV(C) enjoins VSP from differentiating VSP's payments to, or other treatment of, any VSP panel doctor because the doctor charges any fee lower than that charged by the doctor to VSP, to any non-VSP patient or to any non-VSP plan; Section IV(D) enjoins VSP from taking any action to discourage any VSP panel doctor from participating in any non-VSP plan or from offering or charging any fee lower than that paid to the doctor by VSP to any non-VSP patient or any non-VSP plan; Section IV(E) enjoins VSP from monitoring or auditing the fees any VSP panel doctor charges to any non-VSP patient or any non-VSP plan; and Section IV(F) enjoins VSP from communicating in any fashion with any VSP panel doctor regarding the doctor's participation in any non-VSP plan or regarding the doctor's fees charged to any non-VSP patient or to any non-VSP plan.

Section V of the Proposed Final Judgment describes several activities that VSP may elect to undertake in calculating the payments it makes in the future to its panel doctors that, if carried out consistently with the restrictions of Section V and applicable injunctive provisions contained in Section IV, will not constitute a violation of the Judgment. Essentially, the restrictions of Section V seek to ensure that VSP does not discriminate against VSP panel doctors who choose to discount fees to non-VSP insurance plans or to uninsured patients, with the effect of discouraging such discounting. Section V(A) allows VSP to request annually sufficient information to enable VSP to calculate either a doctor's modal fee (the doctor's most frequently charged fee) or median fee (the fee above and below which the doctor charges other fees an equal number of times) for each service provided by all VSP panel doctors in a meaningful geographic area specified by zip codes; Section V(C) allows VSP to verify, through reasonable audit procedures, the information provided to it by its panel doctors pursuant to Section V(A) and to check into any reasonable suspicions VSP might have of excessive billings by panel doctors; and under Section V(F), VSP may impose penalties in a nondiscriminatory manner on panel doctors for billing misrepresentations.

Section V(D) permits VSP, if it chooses, to devise and use a new fee system for doctors who become VSP panel doctors after the entry of the Judgment, based on the average fees that VSP pays its existing panel doctors within a meaningful area specified by zip codes. Under Section V(E), VSP also may elect to maintain its current fee levels for its current panel doctors and base any future fee increases on the Consumer Price Index, VSP's own financial growth or any other meaningful economic indicator.

Section VI of the Final Judgment declares that VSP's MFN clause, or any future clause, policy or practice having the same purpose or effect, null and void.

Section VII of the Final Judgment sets forth several compliance measures that VSP must fulfill. Section VII(A) requires that, within 60 days of entry of the Final Judgment, VSP provide a copy of the Final Judgment to all VSP officers and directors, VSP employees having responsibility for VSP Panel Doctor Agreements, and all present VSP panel doctors or former panel doctors whom VSP reasonably believes resigned from the VSP plan because of the MFN. Sections VII(B), (C) and (D) require VSP to provide a copy of the Final Judgment to future officers, directors and employees having responsibility for VSP Panel Doctor Agreements and to obtain and maintain records of such persons' written certifications that they have read, understand and will abide by the terms of the Final Judgment. Section VII(E) requires VSP to notify all former VSP panel doctors whom VSP reasonably believes resigned from a VSP plan because of the MFN and to reinstate them as panel doctors if they so desire; Section VII(F) obligates VSP to report to Plaintiff any violation of the Final Judgment.

The Final Judgment also contains provisions, in Section VIII, obligating VSP to certify its compliance with specified obligations of Sections IV, V, VI and VII of the Final Judgment. In addition, Section IX of the Final Judgment sets forth a series of measures by which the Plaintiff may have access to information needed to determine or secure VSP's compliance with the Final Judgment.

C. Effect of the Proposed Final Judgment on Competition

By eliminating the MFN clause, the relief ordered by the proposed Final Judgment will enjoin and eliminate a substantial restraint on price competition between VSP and other vision care insurance plans and among optometrists, in all or parts of many states. It will do so by eliminating the disincentives created by the MFN clause that inhibit optometrists' willingness to discount their fees and to join non-VSP plans offering payments below VSP levels. The Judgment also prevents VSP from taking any other action to dissuade or discourage optometrists from discounting or participating in competing vision care insurance plans. Consequently, non-VSP plans' efforts to attract and maintain viable panels of optometrists to serve their members will no longer be hampered.

On the other hand, VSP will be able to compete on the same terms with other vision care insurance plans because it will not be restricted from seeking and obtaining lower fees through activities permitted in Section V of the Judgment or by other means, such as a fee schedule—an approach used by other vision care insurance plans—that are unlikely to have anticompetitive effects. Though Section V does not allow VSP routinely to base its payments on the lowest fee charged by its panel doctors to any non-VSP plan or patient—as VSP has done through its MFN clause—Section V does permit VSP to base its payments to panel doctors on their median or modal fees charged to non-VSP plans and patients, two measures of usual and customary fees that are not linked directly to the lowest fee charged.

In view of the substantial percentage of vision care patients who are not covered by a vision care insurance plan, a VSP panel doctor's median or modal fee is not likely to be the lowest fee charged by the doctor to any non-VSP plan or patient. Thus, VSP's possible use of median or modal fees, to set payments to panel doctors, is unlikely to create disincentives to discount. The activities that Section V permits VSP to engage in are unlikely, therefore, to replicate the effects of VSP's MFN clause or consequently to perpetuate the

competitive concerns raised by the MFN clause.

The proposed Final Judgment's elimination of VSP's MFN clause will restore to vision care insurance plans and consumers, in all or parts of many states, the benefits of free and open competition. Consequently, vision care insurance plans should be able to achieve cost savings that they can pass on to consumers, and consumers should have access to a more competitive selection of vision care insurance alternatives and optometrists.

IV

Alternatives to the Proposed Final Judgment

The alternative to the proposed Final Judgment would be a full trial on the merits of the case. In the view of the Department of Justice, such a trial would involve substantial costs to both the United States and VSP and is not warranted because the proposed Final Judgment provides all of the relief that appears necessary to remedy the violations of the Sherman Act alleged in the Complaint.

V

Remedies Available to Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist in the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the Final Judgment has no *prima facie* effect in any subsequent lawsuits that may be brought against the Defendant in this matter.

VI

Procedures Available for Modification of the Proposed Final Judgment

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Judgment should be modified may submit written comments to Gail Kursh, Chief; Professions & Intellectual Property Section, Department of Justice; Antitrust Division, 600 E Street, NW., Room 9300; Washington, DC 20530, within the 60-day period provided by the Act. Comments received, and the Government's responses to them, will be filed with the Court and published in the **Federal Register**. All comments will be given due consideration by the Department of Justice, which remains free, pursuant to Paragraph 2 of the Stipulation, to withdraw its consent to the proposed Final Judgment at any time before its entry if the Department should determine that some modification of the Judgment is necessary to the public interest. The proposed Judgment itself provides that the Court will retain jurisdiction over this action, and that the parties may apply to the Court for such orders as may be necessary or appropriate for the modification, interpretation, or enforcement of the Judgment.

VII

Determinative Documents

No materials and documents of the type described in section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b), were considered in formulating the proposed Judgment. Consequently, none are filed herewith.

Dated: January 13, 1995.

Respectfully submitted,

Steven Kramer,

Richard S. Martin,

Attorneys, Antitrust Division, U.S. Dept. of Justice, 600 E Street, NW., Room 9420, Washington, DC 20530, (202) 307–0997.

Attachment

Vision Service Plan,
3333 Quality Drive, Rancho Cordova, CA 95670–7985, (916) 851–5000—(800) 852–7600, Telefax (916) 851–4855

Dear VSP Doctor: VSP has entered into an agreement with the United States Department of Justice which will require VSP to eliminate its fee non-discrimination (FND) policy. This is the policy which is sometimes called a most favored nations clause and prohibits a member doctor from charging VSP more for services than the doctors accepts from any other source for the same services. As you know, VSP has always contended it has consistently enforced the fee non-discrimination policy to ensure our groups are provided the most cost effective services that may be obtained from VSP member doctors. Without cost effectiveness, the groups have little incentive to buy from Vision Service Plan.

Effective immediately, VSP will no longer reduce a doctor's fee because that doctor accepts a lower fee for the same service from another source and, your Panel Doctor's Agreement with Vision Service Plan is amended to eliminate Paragraph 6. Please keep this letter with your VSP agreement and consider it as an addendum. The Justice Department has agreed that existing fees may stay at their current levels until a new fee payment mechanism can be put in place. In the future, VSP's payments will be based on the range of fees the doctor accepts, rather than the lowest fee.

We have agreed to eliminate the FND policy to avoid long and expensive litigation with the United States Department of Justice. We feel our resources need to be maintained to support our mission of providing our member doctors with more VSP patients and providing the best vision care in the nation. The vision care market is changing rapidly. Institutions like insurance companies, HMOs, Medicaid and the government in general are having a tremendous effect on health care and its costs. VSP is striving, more than any other organization, to look out for the interests of our member doctors and their patients. VSP is, and will continue to be, the best source of patients for our member doctors.

This policy change may have significant impact on some VSP member doctors. We will need to develop new fee-setting systems which will make VSP more competitive but are not based on the lowest fee which a doctor accepts.

We will be in further communication with you when a new fee system has been established. Our Board is confident we will be able to devise a system which will meet your needs and meet VSP's competitive needs for the future while satisfying the Justice Department's guidelines.

Thank you for your patience, understanding and continued support of VSP.

Denis Humphreys,

Chairman of the Board.

In the United States District Court for the District of Columbia

United States of America, Plaintiff, vs. Vision Service Plan, Defendant. Civil Action No. .

Certificate of Service

I certify that I caused a copy of the United States' Competitive Impact Statement to be served on January 13, 1995, by Federal Express to:

Barclay L. Westerfeld, General Counsel, Vision Service Plan, 3333 Quality Drive, Rancho Cordova, California 95670

and by courier to:

John J. Miles, Ober, Kaler, Grimes & Shriver, 1401 H Street NW., Fifth Floor, Washington, DC 20005–2110

Dated: January 13, 1995.

Steven Kramer,

Attorney, Antitrust Division, Department of Justice, 600 E Street NW., Room 9420, Washington, DC 20530, (202) 307–1029.

[FR Doc. 95–1988 Filed 1–25–95; 8:45 am]

BILLING CODE 4410–01–M

United States v. El Paso Natural Gas Co.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of