

FILED
COUNTY CLERK
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WHATCOM COUNTY
WASHINGTON
BY _____

STATE OF WASHINGTON
WHATCOM COUNTY SUPERIOR COURT

THE STATE OF WASHINGTON,
Plaintiff,
v.
Bellingham Anesthesia Associates, P.S.,
Defendant

No. **21 2 00882 37**

CONSENT DECREE AGAINST
BELLINGHAM ANESTHESIA
ASSOCIATES, P.S.

CLERK'S ACTION REQUIRED

ROBERT E. OLSON

I. SETTLEMENT SUMMARY

- 1.1 Plaintiff: State of Washington
- 1.2 Defendant: Bellingham Anesthesia Associates, P.S.
- 1.3 Monetary Payment: \$110,000 (*see* Section VII)
- 1.4 Attorney for Plaintiff: Rahul Rao
Travis A. Kennedy
State of Washington Attorney General's Office
- 1.5 Attorney for Defendant: David Maas
Davis Wright Tremaine

II. INTRODUCTION

2.1 Plaintiff State of Washington, by and through its Attorney General, has commenced an action under RCW 19.86, the Unfair Business Practices-Consumer Protection Act (CPA), against Defendant Bellingham Anesthesia Associates, P.S.

CONSENT DECREE AGAINST
BELLINGHAM ANESTHESIA
ASSOCIATES

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744



1 2.2 The State initiated an investigation under the CPA into Defendant’s use of
2 both (1) exclusive agreements with health care facilities to provide anesthesia services
3 (“Facility Contracts”), and (2) overbroad and restrictive non-compete agreements with its
4 employed and shareholder physicians. As to the Facility Contracts, Defendant is the
5 exclusive provider of anesthesia to a number of acute care hospitals in Whatcom, Skagit,
6 San Juan, and Snohomish counties. On top of the acute care hospitals, Defendant is also the
7 exclusive provider at a multi-specialty ambulatory surgical center (ASC) and a single-
8 specialty ASCs in Bellingham. Defendant also provides services to a single-specialty ASC
9 in Skagit County. As to the non-compete agreements, prior to the enactment of
10 Washington’s new law limiting an employer’s use of non-compete agreements, *see*
11 RCW 49.62, *et seq.*, Defendants required 3-year non-compete agreements with all of its
12 doctors, whether employed or a shareholder. After the enactment of RCW 49.62, Defendant
13 reduced the restriction to 18 months for employed doctors, but kept the 3-year restriction on
14 its shareholders. The State’s complaint alleges that Defendant’s combined use of exclusive
15 Facility Contracts with ASCs and its non-compete agreements foreclosed the market to new
16 competition in violation of RCW 19.86.040.

17 2.3 Plaintiff and Defendant have engaged in arms-length negotiations and have
18 agreed on a basis for settlement of all Plaintiff’s claims against Defendant and to the entry of
19 this Consent Decree without trial or adjudication of any issue of fact or law.

20 2.4 Defendant does not admit the allegations of the Complaint or any liability or
21 violation of law, and believes it has valid defenses to Plaintiff’s claims and any potential claims
22 that have been or could be asserted by Plaintiff against Defendant. Nevertheless, Defendant
23 agrees to entry of this Consent Decree to: (a) avoid the expense, inconvenience, and distraction
24 of burdensome and protracted litigation; (b) obtain the releases, orders, and final judgment
25 contemplated by this Consent Decree; and (c) put to rest and terminate with finality all claims
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1 that Plaintiff has asserted against Defendant that relates in any way to or arise out of the
2 allegations in the Complaint, as more particularly set forth below.

3 2.5 Defendant recognizes and states that it enters into this Consent Decree voluntarily
4 and that other than the promises contained here, no promises have been made by the Attorney
5 General's Office or any member, officer, agent or representative thereof to induce Defendant to
6 enter into this Consent Decree.

7 2.6 All parties agree that this Consent Decree is entered voluntarily and represents
8 the entire agreement of the parties. All parties agree and represent that any persons signing this
9 Consent Decree have been authorized to execute this Consent Decree.

10 2.7 Plaintiff and Defendant waive any right they may have to appeal from this
11 Consent Decree and from the Order adopting it, provided that no substantive changes are made
12 to the Consent Decree after it has been presented to the Court.

13 **NOW, THEREFORE**, there being no just reason for delay for resolving the claims
14 alleged in Plaintiff's Complaint against Defendant, and before the taking of any testimony, and
15 without trial or adjudication of any issue of any fact or law, and upon consent of the parties
16 hereto, it is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

17 **III. JURISDICTION AND SCOPE**

18 3.1 The Court has jurisdiction over the parties and the subject matter of the
19 Complaint, as well as the implementation, enforcement, and performance of the terms included
20 in this Consent Decree.

21 3.2 The Washington State Attorney General has the authority to bring this Action
22 under to RCW 19.86.080. Venue is proper in Whatcom County Superior Court because the
23 Defendant conducts business in Whatcom County.

24 **IV. DEFINITIONS**

25 **THE COURT ORDERS** that the following definitions shall be used in interpreting the
26 terms of this Consent Decree:
27

1 4.1 “Defendant” shall refer to Bellingham Anesthesia Associates (BAA), with its
2 principal place of business located 909 Squalicum Way, Suite 102, Bellingham, Washington,
3 98225.

4 4.2 “Effective Date” shall mean the date the Court enters this Consent Decree.

5 4.3 “Facility Contract” shall mean agreements with acute care and non-acute care
6 facilities to provide anesthesia services.

7 4.4 “Non-Compete Agreement” shall mean a standalone contract or a clause in an
8 employment or shareholder agreement that requires the worker who signed the agreement, after
9 their employment or ownership interest has ended, to refrain from working in a similar line of
10 work or opening a competing business for a specified period in a certain geographic area

11 4.5 “Acute care facility” shall mean any healthcare facility where patients with acute
12 medical conditions—i.e., those that are not medically stable or have not attained a satisfactory
13 level of rehabilitation—are seen and treated.

14 4.6 “Non-acute care facility” shall mean any healthcare facility that is not an acute
15 care facility, such as ambulatory surgery centers and clinics.

16 4.7 “State” shall mean the Plaintiff, State of Washington, by and through the
17 Attorney General.

18 4.8 “Complaint” shall mean the Complaint filed against Defendant in *State of*
19 *Washington v. Bellingham Anesthesia Associates*.

20 V. APPLICABILITY

21 5.1 Within 30 days after the Effective Date, Defendant shall make copies of this
22 Consent Decree available to each of its current employees and shareholders. This may be
23 satisfied either by providing electronic copies of the Consent Decree to individuals.

24 5.2 Within 30 days after the Effective Date, Defendant shall forward copies of this
25 Consent Decree to each of its former employees and shareholders whose employment or
26 ownership interest terminated within the three years preceding the Effective Date and against
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1 any individual against whom Defendant is enforcing a non-compete. This may be satisfied either
2 by mailing the Consent Decree through the U.S. Postal Service to the former employee's last
3 known address, or by email to the employee's last known email address.

4 5.3 The obligations in this Consent Decree shall apply to Defendant, its successors
5 and assigns, subsidiaries, affiliates, directors, officers, managers, agents, and employees.

6 5.4 Defendant shall notify the State in writing at least 30 days prior to any proposed
7 change that may affect its compliance obligations under this Consent Decree, such as dissolution,
8 assignment for the benefit of creditors, sale resulting in emergency of a successor entity, creation
9 or dissolution of subsidiaries, changes to or addition of any non-compete agreement to which
10 Defendant is a party, or any other change that may affect compliance obligations under this
11 Consent Decree. A copy of this Consent Decree shall be given to any successor entity.

12 VI. INJUNCTION

13 6.1 The following terms shall apply for the duration of the Consent Decree.

14 6.2 Facility Contracts.

15 6.2.1 Defendant shall not include or agree to any provision or clause in a
16 Facility Contract with a non-acute care facility located in either Whatcom or Skagit counties
17 that would make or have the effect of making Defendant the exclusive provider of anesthesia
18 services at that non-acute care facility. This prohibition applies to ASCs or other non-acute care
19 facilities associated with or owned by an acute-care facility.

20 6.2.2 Defendant shall not enforce the provision found at section 2(c), or any
21 other provision explicitly or implicitly suggesting exclusivity, in the Facility Contract with
22 Bellingham Ambulatory Surgery Center if BASC takes action that would otherwise be in breach
23 of that provision explicitly or implicitly suggesting exclusivity.

24 6.2.3 Defendant shall not enforce the provision found at section 1, or any other
25 provision explicitly or implicitly suggesting exclusivity, in the Facility Contract with Cascade
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1 Outpatient Spice Center (COSC) if COSC takes action that would otherwise be in breach of
2 that provision explicitly or implicitly suggesting exclusivity.

3 6.2.4 Defendant shall give notice to BASC and COSC that it will not enforce
4 the provisions of the respective Facility Contracts identified in Paragraphs 6.2.2 and 6.2.3.

5 6.2.5 Section 6.2 shall not prevent a non-acute care facility from voluntarily
6 choosing to use BAA exclusively for anesthesia services, so long as (1) BAA does not expressly
7 or impliedly require such exclusivity, and (2) BAA does not have an enforceable right to such
8 exclusivity.

9 6.3 Non-Compete Agreements

10 6.3.1 Defendant shall not require any employed physician to sign a
11 non-compete agreement with a time restriction longer than 9 months.

12 6.3.2 Defendant shall modify all existing and in-effect non-compete
13 agreements with current or former employed physicians to a term no longer than 9 months.

14 6.3.3 Defendant shall not require any shareholder physician to sign a
15 non-compete agreement with a time restriction longer than 12 months.

16 6.3.4 Defendant shall modify all existing and in-effect non-compete
17 agreements with current or former shareholder physicians to a term no longer than 12 months.

18 6.3.5 If future changes in state or federal law eliminates entirely or reduces
19 restrictive terms in non-compete agreements to time periods shorter than those in this Consent
20 Decree, then Defendant shall modify all then in-effect non-competes to be consistent with new
21 law. If, however, future federal or state law permits restrictive time periods in non-competes to
22 be longer than those in this Consent Decree, Defendant shall continue to be bound by the agreed
23 terms in this Consent Decree.

24 6.4 Nothing in this Consent Decree shall be construed as deeming any conduct
25 required or permitted as presumptively legal. The Attorney General takes no position on the
26 validity or enforceability under common law, the CPA, or any other state or federal law of any
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1 Facility Contract or non-compete agreement that Defendant enters under terms consistent with
2 this Consent Decree, and nothing in this Consent Decree shall be construed to limit or bar any
3 private party or other governmental entity (other than Plaintiff and its officials and agencies)
4 from challenging the validity or enforceability of a Facility Contract or non-compete agreement.

5 **VII. MONETARY PAYMENT**

6 7.1 Defendant agrees to settle this matter for \$110,000 payable to the State of
7 Washington.

8 7.2 Under RCW 19.86.080, the Attorney General shall use the funds for recovery of
9 the costs and attorneys' fees incurred in this matter, future monitoring and enforcement of the
10 Consumer Protection Act, or for any lawful purpose in the discharge of the Attorney General's
11 duties at the sole discretion of the Attorney General.

12 7.3 Defendant shall make payment to the State of Washington by wire transfer to the
13 Attorney General within 30 days of the Effective Date of this Consent Decree. If Defendant fails
14 to timely make this payment, without prior written agreement by the Attorney General's office,
15 Defendant shall be in material breach of this Consent Decree. Defendant will bear the Attorney
16 General's costs and fees associated with any action to recover the monetary payment or enforce
17 this Consent Decree as well as be liable for interest on any amounts owing at 12% per year.

18 **VIII. NO EFFECT IF THIS CONSENT DECREE IS NOT ENTERED**

19 8.1 In the event that this Consent Decree is not approved and entered by the Court,
20 then this Consent Decree shall be of no force or effect. Defendant and Plaintiff expressly reserve
21 all of their rights if this Consent Decree does not become final.

22 **IX. COMPLIANCE AND ENFORCEMENT**

23 9.1 The Court will retain jurisdiction for 10 years for the purpose of enabling any of
24 the parties to this Consent Decree to apply to this Court at any time for such further orders and
25 directions as may be necessary or appropriate for the construction or implementation of any of
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1 the provisions of this Consent Decree, for the enforcement of compliance, and for the
2 punishment of any violations.

3 9.2 On an annual basis until the expiration of this Consent Decree, Defendant shall
4 certify in writing to the Washington Attorney General that it has complied and is complying with
5 the provisions of this Consent Decree.

6 9.3 A violation of any of the terms of this Consent Decree shall, if proven, constitute
7 a violation of an injunction for which the Attorney General may seek the maximum allowable
8 civil penalties under RCW 19.86.140.

9 9.4 In any contempt of court proceeding initiated to enforce this Consent Decree due
10 to a violation of its terms, Plaintiff or Defendant may seek, and the Court shall have the authority
11 to grant, all remedies available in such a proceeding.

12 9.5 Nothing here precludes Plaintiff from enforcing the provisions of this Consent
13 Decree, or from pursuing any law enforcement action with respect to the acts or practices of
14 Defendant not covered by this Consent Decree or any acts or practices conducted after the
15 Effective Date.

16 9.6 The State releases Defendant from all claims that the State asserted or could assert
17 based on the past conduct alleged in the Complaint.

18 9.7 Nothing in this Consent Decree shall be construed to limit or bar any other
19 governmental entity (other than Plaintiff and its officials and agencies) from pursuing other
20 available remedies, if any, against Defendant.

21 9.8 This Consent Decree shall be construed and interpreted to effectuate the intent of
22 the parties, which is to provide for a complete and final resolution of Plaintiff's claims that were
23 asserted, or could have been asserted, with respect to Defendant in this Consent Decree.

24 9.9 This Consent Decree shall be governed by and interpreted according to the
25 substantive laws of the State of Washington without regard to its choice of law or conflict of
26 laws principles.

1 9.10 Neither Plaintiff nor Defendant shall be considered the drafter of this Consent
2 Decree or any of its provisions for the purpose of any statute, case law or rule of interpretation
3 of construction that would or might cause any provision to be construed against the drafter of
4 this Consent Decree.

5 9.11 Solely for the purpose of determining or securing compliance with this Consent
6 Decree, Defendant authorizes its attorneys to accept service of a motion by Plaintiff to enforce
7 or interpret this Consent Decree.

8 **X. GENERAL PROVISIONS**

9 10.1 This Consent Decree shall expire ten years from the date of entry; provided,
10 however, that this Consent Decree may remain in effect after completion of such 10-year period
11 solely for the purpose of determining or enforcing compliance during its 10-year period.

12 10.2 Plaintiff and Defendant have read and understand this Consent Decree and enter
13 into it voluntarily, each having been advised by its undersigned counsel of the meaning and
14 effect of each provision of this Consent Decree.

15 10.3 This Consent Decree may be executed in counterparts by the Attorney General
16 and Defendant, and a signature page sent electronically shall be deemed an original signature
17 for purposes of executing this Consent Decree.

18 10.4 This Consent Decree shall not be construed to provide any rights to third parties.

19 **XI. NOTIFICATIONS**

20 11.1 All notices issued under this Consent Decree shall be issued with a reference to
21 the caption and number, to the following:

22 To Plaintiff State of Washington:

23 Rahul Rao
24 Travis Kennedy
25 Assistant Attorneys General
26 Antitrust Division
27 State of Washington Attorney General's Office
800 5th Avenue, Suite 2000
Seattle, WA 98104

1 206.464.7744
2 rahul.rao@atg.wa.gov
3 travis.kennedy@atg.wa.gov

4 To Defendant:

5 David Maas
6 Davis Wright Tremaine
7 920 Fifth Avenue, Suite 3300
8 Seattle, WA 98104-1610
9 206.757.8184
10 davidmaas@dwt.com

11 **XII. APPROVAL AND ORDER**

12 12.1 This Consent Decree is approved and hereby entered under RCW 19.86.080. This
13 proceeding in all other respects is hereby dismissed with prejudice with all parties to bear their
14 own attorneys' fees and costs.

15 IT IS SO ORDERED this _____ day of _____, 2021.

16 WHATCOM COUNTY SUPERIOR COURT JUDGE

17 Presented By:

18 Agreed to, Approved for Entry, and
19 Notice of Presentation Waived;

20 ROBERT W. FERGUSON
21 Attorney General

22 DAVIS WRIGHT TREMAINE

23 
24 _____
25 RAHUL RAO, WSBA No. 53375
26 TRAVIS KENNEDY, WSBA No. 47742
27 Assistant Attorney General
800 Fifth Avenue, suite 2000
Seattle, WA 98104-3188
206.442.4499
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rahul.rao@atg.wa.gov
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Attorneys for the Plaintiff

28 
29 _____
30 DAVID MAAS, WSBA No. 50694
31 920 Fifth Avenue, Suite 3300
32 Seattle, WA 98104-1610
33 206.757.8184
34 davidmaas@dwt.com

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Electronic Mail and/or ABC Legal Messenger:

DAVID MAAS, WSBA No. 50694
Davis Wright Tremaine
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.757.8184
davidmaas@dwt.com

DATED this 25th day of August _____, 2021, at Seattle, Washington.

s/ Rahul Rao

RAHUL RAO, WSBA No. 53375