

IN THE MATTER OF

MEDICAL STAFF OF MEMORIAL MEDICAL CENTER

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-3231. Complaint, June 1, 1988—Decision, June 1, 1988*

This consent order prohibits, among other things, the medical staff of a Savannah, Ga. medical center from denying, restricting, or recommending denial or restriction of hospital privileges for any nurse-midwife, unless the staff has a reasonable basis for believing that such restriction serves the interest of the hospital in providing health care services. Respondent will also be prohibited from refusing to deal with or coercing the hospital or any person, organization, or institution, if the purpose or effect is to restrict the practice of nurse-midwifery.

Appearances

For the Commission: *Harold Kirtz.*

For the respondent: *John Horthy and Linda Haddad, Horthy, Springer & Mattern, Pittsburgh, PA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Medical Staff of Memorial Medical Center ("the Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Georgia, with its mailing address at 4700 Waters Avenue, Savannah, Georgia.

It is composed of all physicians, dentists and podiatrists who have been granted privileges to attend patients at Memorial Medical Center.

PAR. 2. Memorial Medical Center is a 465-bed general, acute-care hospital and is the largest hospital in the Savannah metropolitan area. It is one of three hospitals in the Savannah metropolitan area that provide obstetrical services, and it accounts for nearly half of the births in that area.

PAR. 3. Most, if not all, members of the Medical Staff are engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as herein alleged, most, if not all, members of the Medical Staff have been and are now in competition among themselves and with other health care practitioners in the Savannah metropolitan area. The Medical Staff's physician members constitute the majority of the practicing physicians in the Savannah metropolitan area.

PAR. 4. The Medical Staff engages in substantial activities for the economic benefit of its members. It is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act.

PAR. 5. Members of the Medical Staff charge fees and collect payments for their services that, in substantial part, are paid directly or indirectly with federal funds or funds received interstate from insurance companies and from other payers. The flow of such funds is affected by competition among health care practitioners in the Savannah metropolitan area, and by the acts and practices of the Medical Staff and its members as herein alleged. Health care practitioners in the Savannah metropolitan area treat out-of-state patients, and purchase goods and supplies from out-of-state vendors, and the ability of a practitioner, including a nurse-midwife, to obtain hospital privileges may influence his or her decision to move to and practice in the Savannah metropolitan area. The acts and practices described herein are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act.

PAR. 6. Pursuant to its bylaws, the Medical Staff has organized itself into various departments and committees, including a Credentials Committee. The Credentials Committee reviews the credentials of all applicants for privileges at Memorial Medical Center and receives recommendations from the clinical department in which an applicant requests privileges. The Credentials Committee is the final decisionmaker when it denies or limits privileges to "medical assistants," who are defined under the Medical Staff bylaws as "individuals who are licensed or certified and who provide services within the scope of their license and certification as employees of physicians or dentists who are presently appointed to the medical staff." Under the bylaws of the Medical Staff, nurse-midwives would be considered as a category of "medical assistants." Accordingly, a nurse-midwife seeking to practice at Memorial Medical Center as an employee of a member of the Medical Staff must have such privileges approved by the Medical Staff's Credentials Committee.

PAR. 7. A nurse-midwife is a registered nurse who has received additional training in the care and management of normal pregnancies and deliveries. Under the laws of the State of Georgia, a nurse-

midwife who satisfies the State's educational and credentials requirements is authorized to practice in accordance with the standards defined by the American College of Nurse-Midwives. Georgia law requires that a nurse-midwife must practice in collaboration with a physician, but does not require that a physician be physically present while a nurse-midwife provides services, including services in connection with delivery.

PAR. 8. Because nurse-midwifery services can substitute for certain kinds of obstetrical services provided by physicians, the availability of nurse-midwifery services, whether provided by self-employed nurse-midwives or by those working as employees of physicians or others, can offer a greater range of choices for consumers and increase competition in the provision of obstetrical care. For example, a nurse-midwife working as an employee of a physician may allow the physician to concentrate on patients whose conditions require the care of a physician, and thereby increase the efficiency with which obstetrical services are provided and increase the availability of such services.

PAR. 9. Some members of the Medical Staff provide obstetrical services, and are actual or potential competitors of nurse-midwives and of physicians who affiliate with nurse-midwives.

PAR. 10. Nurse-midwives and physicians who provide obstetrical services usually consider it necessary to have privileges at a hospital convenient to their patients. A practitioner who does not have such privileges may be at a significant competitive disadvantage vis-a-vis those who do.

PAR. 11. Rebecca Almand is a registered nurse who is authorized under Georgia state law to practice as a nurse-midwife, and was employed by obstetricians who are members of the Medical Staff. In January 1983, Almand requested privileges at Memorial Medical Center, among other things, to perform spontaneous vaginal deliveries with a physician in attendance. Almand was the first nurse-midwife ever to apply for privileges at Memorial Medical Center. The Medical Staff's Department of Obstetrics and Gynecology recommended against Almand's request on the grounds that no nurse-midwife should be permitted to deliver babies at Memorial Medical Center and that there was "no shortage of obstetricians in the Savannah area." The Department of Obstetrics and Gynecology did not, however, offer any evidence that Almand was not qualified to provide the services for which she sought privileges. The Credentials Committee found that Almand had acceptable credentials and met all applicable criteria set forth in the Medical Staff's bylaws, and that there was no basis for denying Almand's request for privileges. Accordingly, in August 1983, the Credentials Committee voted unanimously to approve Almand's request for privileges.

PAR. 12. Within weeks after the Credentials Committee's decision to approve Almand's request for privileges, eleven of the nineteen physicians with active privileges in the Medical Staff's Department of Obstetrics and Gynecology petitioned the Credentials Committee, "protesting and opposing" the Committee's decision to approve privileges despite the fact that the Department of Obstetrics and Gynecology had "turned down" Almand's application, and objecting that not all Committee members had been present when the Committee decided to approve Almand's request for privileges. Members of the Credentials Committee also were told that some obstetricians had threatened to shift patient admissions from Memorial Medical Center to another hospital because of the Committee's decision to approve Almand's request for privileges. The Committee members decided to reconsider their approval of privileges for Almand.

PAR. 13. In September 1983 the Credentials Committee met to reconsider their approval of Almand's request for privileges. Two representatives of the Department of Obstetrics and Gynecology attended the meeting and presented the Department's objection to the granting of any delivery privileges to a nurse-midwife. The Department's representatives said, among other things, that granting nurse-midwives delivery privileges would create an "economic problem" for obstetricians and that there was "no need in the community" for such nurse-midwifery services. The Department's representatives offered no evidence that Almand was not competent to provide the delivery services for which she had been approved. During this meeting, one of the physicians representing the Department of Obstetrics and Gynecology threatened to shift his patient admissions from Memorial Medical Center to another hospital if Almand were granted delivery privileges. At the conclusion of the meeting, the Credentials Committee voted to reverse its earlier decision and to deny Almand's request for delivery privileges, manifesting a policy against granting delivery privileges under any terms to any nurse-midwife. Under the Medical Staff's bylaws, Almand had no right to appeal the Credentials Committee's adverse decision.

PAR. 14. In January 1984 Almand reapplied for delivery privileges with a physician in attendance. In May 1984, after receiving a recommendation from the Department of Obstetrics and Gynecology opposing such privileges, the Credentials Committee denied Almand's application.

PAR. 15. There was no reasonable justification for the actions of the Credentials Committee described in paragraphs thirteen and fourteen.

PAR. 16. In engaging in the acts and practices described above, respondent Medical Staff, acting through its Credentials Committee,

has acted as a combination of its physician members or in conspiracy with some of them.

PAR. 17. The purpose, effects, tendency or capacity of the acts and practices described in paragraphs eleven through sixteen is and has been to restrain trade unreasonably and hinder competition in the provision of health care services in the Savannah metropolitan area, and to deprive consumers of the benefits of competition in the following ways, among others:

A. Consumers have been limited in their ability to choose among alternative types of health care providers competing on the basis of price and service;

B. Physicians have been restricted from offering the services of nurse-midwives to their patients; and

C. Nurse-midwives have been restrained from offering their services to patients and may be deterred from entering into practice in the Savannah metropolitan area.

PAR. 18. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Medical Staff of Memorial Medical Center is an unincorporated association, organized and existing under and by virtue of the laws of the State of Georgia, with its mailing address at 4700 Waters Avenue, in the City of Savannah, State of Georgia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order, the following definitions shall apply:

A. "*The hospital*" means Memorial Medical Center, Inc., its trustees, officers, representatives, agents, employees, successors and assigns.

B. "*Respondent*" means the respondent Medical Staff of Memorial Medical Center, its officers, committees, representatives, agents, employees, successors and assigns.

C. A "*nurse-midwife*" means a registered nurse who is authorized under Georgia state law to practice nurse-midwifery.

II.

It is further ordered, That respondent, directly or indirectly or through any device, in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Deciding or recommending to deny, limit or otherwise restrict hospital privileges for any nurse-midwife, without a reasonable basis for believing that the denial, limitation or restriction serves the interest of the hospital in providing for the efficient and competent delivery of health care services.

B. Refusing or threatening to refuse to deal with, or otherwise

coercing or attempting to coerce, the hospital or any other person or entity for the purpose or with the effect or likely effect of restricting the practice of nurse-midwifery or of any nurse-midwife.

III.

It is further ordered, That, for a period of five years from the date of service of this order, whenever a nurse-midwife applies for privileges at the hospital, within thirty (30) days after respondent takes any action with respect to such application, respondent shall provide the hospital's governing body with a written statement of respondent's action and its reasons therefor.

IV.

It is further ordered, That respondent shall act upon any reapplication for privileges within four months after receiving a complete application from any nurse-midwife who, since January 1, 1982, has formally or informally sought privileges at the hospital.

V.

It is further ordered, That:

A. Within thirty (30) days after the date of service of this order, respondent shall provide a copy of this order and of the complaint in this proceeding to each officer of respondent and to each member of respondent who was an officer or a member on the date of service of this order and, for a period of five (5) years after that date, provide a copy of such order and complaint to each person who applies or requests an application to become a member of respondent, at the time that each such person applies or requests an application;

B. Within ninety (90) days after the date of service of this order, respondent shall file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with this order; and

C. In addition to the report required by Section V(B), respondent shall file, one (1) year after the date of service of this order and at such other times as the Commission may by written notice require, a written report setting forth in detail the manner and form in which respondent has complied and is complying with this order.

VI.

It is further ordered, That respondent shall notify the Commission of any proposed change in its organization that may affect compliance obligations arising out of this order at least thirty (30) days prior to the effective date of any such proposed change.

Commissioner Bailey not participating.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted for final acceptance of the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years."¹ The Commission determined that such provisions will in most cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."² For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

¹ *Hercules, Inc.*, 100 FTC 531 (1982) (modifying order); see also, e.g., *MidCon Corp.*, 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America*, 106 FTC 361, 524 (1985) (ten years), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1975 (1987); *Columbian Enterprises, Inc.*, 106 FTC 551, 554 (1985) (consent order) (five years).

² *Hercules, Inc.*, 100 FTC at 531.

IN THE MATTER OF

MASSACHUSETTS BOARD OF
REGISTRATION IN OPTOMETRYFINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9195. Complaint, July 8, 1985—Final Order, June 13, 1988

This Final Order requires the Massachusetts board to allow truthful advertising by optometrists in the state, requires the optometry board to repeal its current regulation banning advertising of affiliations between optometrists and optical retailers, and also requires respondent to send a copy of the order to all optometrists currently licensed in Massachusetts and to all new applicants for five years.

Appearances

For the Commission: *Elizabeth Hilder.*

For the respondent: *Thomas A. Barnico and Steven H. Goldberg,*
Assistant Attorneys General, Boston, MA.

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, having reason to believe that the named respondent has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

Respondent

1. Respondent Massachusetts Board of Registration in Optometry (hereinafter "the Board") is organized, exists, and transacts business under the laws of the Commonwealth of Massachusetts (Mass. Gen. Laws Ann. ch. 13 §§16 *et seq.* and ch. 112 §§66 *et seq.*), with its principal office at 100 Cambridge Street, Boston, MA. The Board is subject to the Commission's jurisdiction under the Federal Trade Commission Act.

2. The Board is composed of four optometrists and one public member, as provided in Mass. Gen. Laws Ann. ch. 13 §16.

3. While serving their membership terms, optometrist members of the Board may, and do, continue to engage in the business of providing