

IN THE MATTER OF

LEE M. MABEE, JR., M.D.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9214. Complaint, July 12, 1988—Decision, Nov. 15, 1989*

This consent order prohibits, among other things, a Sioux Falls, S.D. physician from conspiring to refuse to deal with the Medical School's residency program or physicians affiliated with the school, or to interfere with the operation of the Medical School's OB/GYN department or faculty, or from preventing or restricting competition in the provision of OB/GYN care in the Sioux Falls, S.D., area.

Appearances

For the Commission: *Michael E. Antalics* and *Michael McNeely*.

For the respondent: *Robert L. Mabee*, Sioux Falls, S.D. and *John A. Cotler, Larkin, Hoffman, Daly & Lindgren, LTD*, Minneapolis, Mn.

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 respondent has violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The address of a respondent Lee M. Mabee, Jr., M.D., is 1201 South Euclid Avenue, Suite 306, Sioux Falls, South Dakota.

PAR. 2. Respondent is a physician licensed by the State of South Dakota who specializes in the practice of obstetrics and gynecology, and who practices medicine in Sioux Falls, South Dakota (hereinafter "Sioux Falls").

PAR. 3. Fees and other payments for respondent's medical services are paid, at times, by patients or third-party payors that are located in states other than South Dakota. Respondent purchases and uses drugs, supplies and equipment manufactured outside of South Dakota,

and treats patients who are residents of neighboring states. Respondent also recruits obstetricians/gynecologists who reside outside of South Dakota to practice in his medical practice. As a result, respondent's general business practices, and the conduct described below, affect the interstate purchase of medical supplies and products, the treatment of patients from out of state, the interstate billing of patients, and the interstate recruitment of physicians who practice or teach obstetrics and gynecology or subspecialties of those disciplines. Respondent's general business practices, and the acts and practices described below, are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45 (a)(1).

PAR. 4. Except to the extent that competition has been restrained as alleged herein, respondent has been and is now in actual or potential competition with other obstetrician/gynecologists in the provision of obstetrical/gynecological ("OB/GYN") care and in the provision of OB/GYN instruction in Sioux Falls.

PAR. 5. The University of South Dakota School of Medicine is the only medical school in South Dakota; its main campus is located in Sioux Falls. In addition to its program of medical education that leads to the M.D. degree, the Medical School offers several residency training programs, which provide education in medical specialties. The Medical School utilizes both full-time and part-time faculty members in its medical education programs, and uses its part-time faculty, called "clinical" faculty, to perform a much greater share of teaching duties than do most medical schools. Using clinical instructors gives students exposure to physicians with extensive practical experience, and makes some or all of the clinical faculty's patients available to the students for instructional purposes; it also reduces the Medical School's operating budget, as it is usually far more costly to hire full-time instructors than to hire clinical instructors to provide the equivalent amount of instruction.

PAR. 6. The physicians on the Medical School's clinical faculty have as their principal occupation the private practice of medicine in their respective communities. Most members of the Medical School's full-time faculty also treat some private patients by participating in the University of South Dakota Medical Service Plan ("MSP"), a multidisciplinary group practice that is controlled by the Medical School. Through the MSP, full-time faculty members treat both indigent and paying patients, with the Medical School and the physician who treats

a paying patient sharing any fees received by the MSP. Although they treated private patients, prior to 1984 the vast majority of the physicians on the full-time faculty did not compete in any significant way with clinical faculty members or other private practitioners for paying patients. Instead, they practiced in a manner that was "complementary" to local private practitioners, generally confining their treatment of paying patients to specialties or subspecialties not served by the local, private medical community. The full-time faculty members generally did not, and still do not, attempt to attract patients directly, but instead primarily receive their paying patients through referrals from physicians in private practice.

PAR. 7. The Medical School has operated an OB/GYN residency program since 1956. The program is headquartered in Yankton, South Dakota, a city with a population of 19,000, located eighty-two miles south of Sioux Falls. Originally, the Yankton campus was the program's only year-round location, with residents doing short rotations at Sioux Falls and other sites to receive specialized training. In the early 1980's, however, in response to evolving accreditation standards requiring additional subspecialty training, the Medical School gradually increased the length of rotations at its Sioux Falls campus, because Sioux Falls is the only location in the State with the facilities, personnel and patients needed to give residents sufficient OB/GYN subspecialty experience. Expanding the residency program in Sioux Falls raised the prospect of increasing the supply of OB/GYN specialists in Sioux Falls, because residents sometimes find it desirable to establish their practices in the community where they receive their residency training.

PAR. 8. Because of the expansion of the residency program in Sioux Falls, the Medical School needed to increase its OB/GYN faculty there. In July 1984, to prepare for longer rotations by residents in the 1984-1985 school year, the Medical School hired James R. Thomas, Ph.D., M.D., a perinatologist, to serve on its OB/GYN full-time faculty in Sioux Falls. Perinatology is an OB/GYN subspecialty that focuses on maternal-fetal medicine and high-risk pregnancies. Then, to accommodate the further expansion of the Sioux Falls residency program to a year-round schedule in the 1985-1986 school year, the Medical School added another full-time OB/GYN instructor, Robert W. Wilson, M.D., and increased the clinical faculty teaching OB/GYN residents in Sioux Falls from two to eight members.

PAR. 9. The Medical School hired Dr. Thomas both to teach medical

students and to start a perinatal center in Sioux Falls, which the Medical School hoped would eventually have a staff of three or four perinatologists. His recruitment was a first step in the Medical School's plan to recruit for its full-time faculty physicians trained in three OB/GYN subspecialty fields that the Medical School believes are inadequately served by South Dakota's private practitioners: perinatology, gynecologic oncology, and reproductive endocrinology. These subspecialists would not only teach and do research, but would also spend a substantial portion of their time caring for patients in treatment centers located in the two major Sioux Falls hospitals.

PAR. 10. Dr. Thomas was the first practicing perinatologist in Sioux Falls. Prior to the arrival of Dr. Thomas in Sioux Falls, women in South Dakota who were experiencing a high-risk pregnancy were referred out of state, or were treated locally by obstetricians who are not perinatologists.

PAR. 11. Unlike other members of the full-time faculty, Dr. Thomas began to advertise and directly solicit patients shortly after he joined the faculty, indicating his availability to provide general OB/GYN services as well as perinatal services. Specifically, in October 1984, Dr. Thomas placed an advertisement in the local daily newspaper, which ran weekly for ten weeks and which stated that he was an "Obstetrician, Gynecologist and Perinatologist," and offered the "new special service" of perinatology. Dr. Thomas also placed a large personal yellow pages advertisement, which appeared in the edition that was distributed in April 1985, and contained similar information under a banner reading "Comprehensive Women's Health Care."

PAR. 12. From the autumn of 1984 through the spring of 1985, respondent along with several other local private practice obstetricians, complained to Medical School officials, in at least two meetings and through telephone calls, direct conversations and written communications, about Dr. Thomas's seeking to treat private patients. They wanted Dr. Thomas to stop competing with private practitioners and to limit his practice to the full-time faculty's traditional "complementary" role, as described above in Paragraph Six. In addition, after his yellow pages advertisement appeared, respondent and some or all of the other local obstetricians stopped or decreased their referring of paying patients to Dr. Thomas, treating high-risk pregnancies themselves, or sending such patients to perinatologists in other states.

PAR. 13. In August 1985 the Medical School continued its plan to recruit subspecialists it considered to be needed in South Dakota. hv

placing in The Journal of Obstetrics/Gynecology a recruitment advertisement for additional perinatologists. The Medical School's recruitment of such full-time OB/GYN faculty members in Sioux Falls posed and continues to pose a competitive threat to respondent because (a) subspecialists on the full-time faculty may treat paying patients, with or without complex problems, that respondent would otherwise treat; and (b) recruitment by the Medical School may make it more difficult or less profitable for respondent to expand his medical practice by recruiting OB/GYN subspecialists.

PAR. 14. In personal conversations and medical staff meetings, respondent, along with other local obstetricians, complained to the Medical School about the recruitment advertisement and demanded that the Medical School do no recruiting for its full-time OB/GYN faculty without consulting with its clinical OB/GYN faculty. In addition, respondent and some of the other obstetricians met several times to discuss and draft a written presentation to the Medical School. On September 24, 1985, respondent and eleven other physicians, who constituted every private practice obstetrician/gynecologist in Sioux Falls, sent a letter signed by each of them (the "resignation letter") to officials of the Medical School and of the two major Sioux Falls hospitals, withdrawing their support from the Medical School's OB/GYN residency program because of the actions of the Medical School and its faculty described in paragraphs nine, ten, eleven and thirteen. The letter stated that local "private sector physicians" were capable of providing all high-risk pregnancy care needed in the Sioux Falls region and that the Medical School was seeking to hire additional perinatologists for a perinatal center to be located at Sioux Valley Hospital, despite implied promises that the Medical School would not actively enter into the "private sector of health care." The letter also said it was "incongruous" that Sioux Valley Hospital would "subsidize" the Medical School's Obstetrical Department through purported rent, staffing and marketing subsidies, and a referral system for high risk obstetrical patients that would give preferential treatment to the Medical School's perinatologists. The other obstetricians subsequently told the Medical School that they would stop participating in the residency program as of June 30, 1986. The letter indicated, however, that those obstetricians currently teaching undergraduate medical students would continue to do so.

PAR. 15. The resignation letter constituted an explicit attempt by

respondent and the other obstetricians to use their power as the only physicians available to serve on the clinical OB/GYN faculty in Sioux Falls to force the Medical School to limit the medical practice of Dr. Thomas and any additional full-time OB/GYN faculty members residing in Sioux Falls. Thereafter, respondent and the other obstetricians agreed to negotiate only collectively as to the terms upon which they would teach in the residency program and demanded as a condition to the agreement of any of them to teach in the residency program (a) that Dr. Thomas and the Medical School not advertise; (b) that full-time faculty members treat only those paying patients referred to them by Sioux Falls private practitioners; (c) that the Medical School either stop all recruitment of full-time OB/GYN faculty members and all plans to establish OB/GYN subspecialty centers, or establish a board, controlled by the respondent and the other obstetricians, that would have veto power over OB/GYN recruiting decisions; and (d) that Dr. Thomas, the dean and the OB/GYN residency director be fired.

PAR. 16. Early in 1986, in response to demands and threats by respondent and the other obstetricians, the Medical School dean instructed full-time OB/GYN faculty not to place individual advertisements in the newspapers or the yellow pages, and, for a while, not to see private patients outside their subspecialty areas. Nevertheless, respondent and the other obstetricians continued to make the demands listed in paragraph fifteen and also took joint actions aimed at closing down the year-round OB/GYN residency program in Sioux Falls. These actions included attempts to induce the two Sioux Falls hospitals, which had been paying stipends to four OB/GYN residents, to stop such payments after June 30, 1986. Due to these efforts, only one resident received funding in Sioux Falls for the 1986-1987 school year. Some or all of the other obstetricians also sought to prevent the Medical School's hiring of full-time OB/GYN faculty members needed to continue the residency program in Sioux Falls. For example, they successfully deterred two applicants from accepting positions on the full-time faculty by telling them, in interviews arranged by the Medical School, that they would receive no referrals if they joined the full-time faculty, and by indicating generally that the applicants would face an antagonistic local medical community.

PAR. 17. On June 30, 1986, the other obstetricians who were on the clinical faculty stopped teaching in the residency program.

PAR. 18. The actions of respondent and the other obstetricians have

significantly hindered the operation of the Medical School's OB/GYN residency program. Because there were no other obstetrician/gynecologists in Sioux Falls to teach as clinical faculty members, and because the Medical School was unable to hire full-time faculty members before the start of the 1986-1987 school term, the Medical School was forced to assume considerable added expenses and to find alternative locations for its OB/GYN residents, sending them to Indian Health Service facilities in western South Dakota and Alaska. The geographic dispersion of the residents, the loss of experienced faculty members, the inadequacy of subspecialty experience in locations other than Sioux Falls and the lack of funding all threaten the program's accreditation status. The program has recently been placed on probation for four years by the Accreditation Council for Graduate Medical Education because of these deficiencies. The Medical School has decided not to accept any new residents for the 1987-1988 school year, indicating that the program may be phased out over the next three years. The uncertainty over the future of the residency program makes it more difficult to attract high quality residents and faculty and has caused three of the six remaining OB/GYN residents to transfer to programs at other medical schools. If the OB/GYN residency program is forced to close, South Dakota would also lose an important source of new OB/GYN specialists, and many members of the OB/GYN full-time faculty may also leave the State.

PAR. 19. The acts and practices described in paragraphs twelve through seventeen were undertaken as part of a combination or conspiracy by and among respondent and the other obstetricians to eliminate or limit competition in the provision of OB/GYN care through the use of coercive practices, including threats to boycott and actual boycotts. The combination or conspiracy was directed at restricting competition in Sioux Falls from (1) members of the Medical School's full-time faculty, (2) any clinic or medical center established by the Medical School or the local hospitals, and (3) graduating residents of the Medical School's OB/GYN residency program.

PAR. 20. The purposes, effects, tendency, or capacity of the combination or conspiracy alleged in paragraph nineteen and the acts and practices alleged in paragraph twelve through seventeen are or have been to restrict competition for the provision of OB/GYN care and for the provision of OB/GYN instruction among obstetricians/gynecologists in the Sioux Falls area, and thereby to deprive

consumers of the benefits of competition, in the following ways, among others:

A. With respect to the provision of OB/GYN care,

(a) Members of the Medical School's full-time faculty have been restrained from competing for patients and from receiving referrals of patients from respondents;

(b) The Medical School has been restrained (i) from competing through its Medical Service Plan for private patients in the Sioux Falls area needing general or subspecialty OB/GYN care, and (ii) from hiring full-time OB/GYN faculty members and establishing research and treatment centers to satisfy the medical needs of both indigent and paying patients in South Dakota and neighboring states for subspecialty OB/GYN care;

(c) OB/GYN subspecialists who wish to practice in Sioux Falls face increased entry barriers due to threatened or actual withholding or referrals; and

(d) Consumers in South Dakota and neighboring states have been, are or may be: (i) limited in their ability to choose freely among obstetricians/gynecologists in Sioux Falls, (ii) restricted in their ability to obtain subspecialty treatment, and (iii) if the OB/GYN residency program closes, deprived of the competition and treatment options created in Sioux Falls by members of the Medical School's full-time faculty or by graduates of the residency program;

B. With respect to the provision of OB/GYN instruction,

(a) The refusal by respondent and the other obstetricians to provide OB/GYN instruction to residents has eliminated competition among them to serve on the clinical faculty of the Medical School;

(b) The Medical School, as a buyer of OB/GYN instruction, has been, is or may be (i) prevented from hiring clinical faculty members, (ii) hindered in its attempts to hire full-time faculty members, (iii) forced to pay stipends to its residents that would otherwise have been paid by sponsoring hospitals in Sioux Falls, and (iv) restrained from operating its OB/GYN residency program in the manner that it deems most appropriate, which may in turn lower the quality of the program, and force it to lose its accreditation and close;

(c) Current and future students of the Medical School may (i) pay increased tuition or accept reduced stipends to offset higher operating costs incurred by the Medical School, and (ii) find that the Medical

School offers lower quality OB/GYN training, especially in subspecialty fields, or no OB/GYN residency training; and

(d) Consumers in South Dakota and neighboring regions may (i) receive lower quality OB/GYN care, and (ii) may have to pay increased medical fees to offset higher education costs for the Medical School's undergraduate and graduate students.

PAR. 21. The combination, conspiracy, acts and practices described above constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such combination or conspiracy, or the effects thereof, is continuing and will continue absent the entry against the respondent of appropriate relief.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been furnished with a copy of that complaint, together with a notice of contemplated relief; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all of the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedures prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent is a licensed physician and doing business under and by virtue of the laws of the State of South Dakota, with his office and

principal place of business located at the address listed in the complaint attached hereto.

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.

For purposes of this order, the following definitions shall apply:

A. "*Respondent*" means Lee M. Mabee, Jr., M.D.

B. "*Medical School*" means University of South Dakota School of Medicine.

C. "*OB/GYN Center*" means any medical facility or program established to provide obstetrical or gynecological care, research or education.

II.

It is ordered, That the respondent shall forthwith, directly, indirectly, or through any corporate or other device, in connection with the provision of health care services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, cease and desist from entering into, attempting to enter into, organizing, continuing or acting in furtherance of any agreement or combination, either express or implied, with any physician(s), to refuse or threaten to refuse to deal with, or otherwise coerce, any person or entity for the purpose or with the effect of interfering with the operation of the academic or clinical programs of the Medical School's obstetrical/gynecological ("OB/GYN") department or faculty, or of preventing or restricting competition from any person or entity for the provision of OB/GYN care in the Sioux Falls, South Dakota, area, including, but not limited to any agreement or combination to:

(1) Refuse or threaten to refuse to serve on the faculty of the Medical School;

(2) Make joint demands or joint decisions as to any term or condition for serving on the faculty of the Medical School;

(3) Refuse, or threaten to refuse, to refer patients to, receive

referrals of patients from, or provide any other form of professional cooperation to, any physician, based on his or her affiliation or prospective affiliation with the Medical School, or with any OB/GYN center, or on his or her treatment of, or attempts to attract, private patients;

(4) Interfere in a coercive manner with any attempt by the Medical School to recruit physicians to work in the Sioux Falls area, or to negotiate jointly with the Medical School concerning any term or condition with respect to its recruitment or hiring of such physicians;

(5) Refuse or threaten to refuse to admit patients to any hospital or other medical facility, based on the relationship of the hospital or facility with the Medical School, or based on the actual or prospective operation or funding, in whole or part, of any OB/GYN center by the hospital or facility; or

(6) Coerce the Medical School, any physician, or any other entity to eliminate, limit or restrict advertising for OB/GYN services in the Sioux Falls area.

Provided, that nothing in this order shall prohibit respondent from entering into an agreement or combination with any physician with whom respondent practices medicine in partnership or in a professional corporation, or who is employed by the same person as respondent.

III.

It is further ordered, That:

A. Respondent shall, within thirty (30) days after this order becomes final, mail a copy of this order and of the complaint in this proceeding to the Administrator, the Chairman of the Board of Directors, and the chief officer of the medical staff of Sioux Valley Medical Center and McKennan Hospital, in Sioux Falls.

B. Respondent shall, within sixty (60) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which respondent has complied with this order.

C. If respondent, at any time, discontinues his present business or employment, he shall promptly notify the Commission of such discontinuance. In addition, for a period of seven (7) years after this order becomes final, respondent shall promptly notify the Commission

whenever he enters into any new business or employment whose activities involve the provision of OB/GYN services in the Sioux Falls area. Each such notice shall include respondent's new business address and a statement of the nature of the business or employment in which respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

Commissioner Owen not participating.

IN THE MATTER OF
LOUISIANA-PACIFIC CORPORATION

Docket C-2956. Interlocutory Order, November 15, 1989

ORDER

This matter having been heard by the Commission on the briefs and oral argument of Louisiana-Pacific Corporation and of the Bureau of Competition in support of and in opposition to modification of the order in Docket No. C-2956, for the reasons stated in the accompanying opinion, the Commission has determined to deny the petitions to modify the order. Accordingly,

It is ordered, That the petitions to modify the order in Docket No. C-2956 be, and they hereby are, denied.

By the Commission.*

OPINION OF THE COMMISSION

BY AZCUENAGA, *Commissioner*:

The 1979 consent order in this matter was designed to resolve the Commission's concern that Louisiana-Pacific's proposed acquisition of Fibreboard Corporation would, if consummated, violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The order required Louisiana-Pacific, among other things, to divest within two years from the date of the order a fiberboard plant at Rocklin, California, and to obtain prior Commission approval of any acquisitions in the defined market for a period of ten years. In 1980 and in 1981, Louisiana-Pacific asked the Commission to set aside these provisions of the order.

The Commission in 1980 and in 1981 denied the two petitions to reopen and modify the consent order filed by Louisiana-Pacific, on the ground that Louisiana-Pacific had failed to make a satisfactory showing of changed conditions of law or fact or public interest considerations sufficient to require reopening. In the subsequent civil penalty action, initiated by the Commission in 1981 for Louisiana-Pacific's failure to divest as required by the order, the District Court

*Prior to leaving the Commission, former Commissioner Machol registered her vote in the affirmative for the Order and the Opinion of the Commission in this matter. Commission Owen did not register a vote in this matter.