

IN THE MATTER OF

GERALD S. FRIEDMAN, M.D., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3290. Complaint, June 18, 1990—Decision, June 18, 1990*

This consent order prohibits, among other things, the California physician and his dialysis centers from: requiring physicians to use his in-patient dialysis service for their patients as a condition for using respondents' out-patient dialysis facilities; barring physicians who want to treat their patients at respondents' out-patient dialysis facilities from owning or operating a competing in-patient dialysis service; and denying, revoking, suspending, or otherwise impairing a physician's staff privileges at one of respondents' out-patient dialysis facilities because the physician has used or operated an in-patient dialysis service other than one owned by respondents. In addition, the consent order requires that respondents distribute a copy of the order and complaint to each physician with privileges at any of the dialysis facilities.

Appearances

For the Commission: *Garry Gibbs.*

For the respondents: *Kendall H. MacVey, Best, Best & Krieger,*
Riverside, CA.

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 Gerald S. Friedman, M.D., individually and doing business as the Dialysis Center of Upland, the Dialysis and Transplant Center of Pomona Valley, and the Dialysis Center of Pomona, has violated and is violating 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:

RESPONDENTS

PARAGRAPH 1. Respondent Gerald S. Friedman, M.D. ("Dr. Friedman") is a physician licensed to practice medicine in the State of

California. Dr. Friedman engages in the practice of nephrology in the Upland and Pomona areas of California. Nephrology is a sub-specialty of internal medicine that concerns the diagnosis of patients with impaired kidney function and their treatment using dialysis. Dialysis is the removal of fluids and waste products from the bloodstream by artificial methods, such as by using an artificial kidney machine. Dr. Friedman's principal office is located at 600 N. 13th Avenue, Upland, California.

PAR. 2. Dialysis Center of Upland ("DCU") is an outpatient dialysis facility located at 600 N. 13th Avenue, in Upland, California. Outpatient dialysis facilities provide dialysis to patients on an outpatient basis, most of whom have chronic renal failure, using an artificial kidney machine that is permanently fixed to a dialysis facility. Chronic renal failure is the permanent impairment of normal kidney function which requires dialysis treatments several times each week, usually for the rest of a patient's life. DCU is a 25 "station" facility, which means that it has the space, dialysis machines, and auxiliary equipment capable of dialyzing 25 patients at one time. DCU is a sole proprietorship owned by Dr. Friedman.

PAR. 3. Dialysis and Transplant Center of Pomona Valley ("DTCP") is an outpatient dialysis facility located at 2475 North Garey Avenue, in Pomona, California. DTCP began operations in August 1987 as a replacement facility for the Dialysis Center of Pomona. DTCP is a 36-station facility that provides outpatient dialysis services to patients with chronic renal failure. DTCP is a sole proprietorship owned by Dr. Friedman.

PAR. 4. Dialysis Center of Pomona ("DCP") is an outpatient dialysis facility located at 800 N. Park Avenue, in Pomona, California. DCP is a 19-station facility that provided outpatient dialysis services to patients with chronic renal failure. Although still standing, DCP ceased operations in August 1987 when it was replaced by DTCP. DCP is a sole proprietorship owned by Dr. Friedman.

PAR. 5. Inland Dialysis Services is an inpatient dialysis service located at 600 N. 13th Avenue in Upland, California. Inpatient dialysis services provide dialysis, using a portable artificial kidney machine, to hospital inpatients who have chronic or acute renal failure. Acute renal failure is the temporary loss of kidney function. Inland Dialysis Services ("IDS" or "Dr. Friedman's inpatient dialysis service") has contracts or agreements with approximately eight hospitals in the Upland and Pomona area to provide inpatient dialysis

services to patients who have been hospitalized and who have acute or chronic renal failure. IDS is a sole proprietorship owned by Dr. Friedman.

JURISDICTION

PAR. 6. Dr. Friedman is a person within the meaning of the Federal Trade Commission Act and derives substantial revenues from his dialysis business. Dr. Friedman and his dialysis facilities at all times relevant herein, have been and are now in or affect commerce as commerce is defined in the Federal Trade Commission Act.

THE RELEVANT MARKETS

PAR. 7. The provision of outpatient dialysis services constitutes a relevant product market. Outpatient dialysis services are provided to patients with chronic renal failure who need to be dialyzed several times each week. Outpatient dialysis services are generally provided by artificial kidney machines that are permanently fixed to a location. Patients with chronic renal failure are generally cared for by a nephrologist who oversees their outpatient dialysis treatments. Medicare provides coverage for outpatient dialysis treatments provided to any person, regardless of age, who has chronic renal failure and has required dialysis treatments for at least three consecutive months. Approximately 90 percent of all outpatient dialysis treatments in the United States are provided to such persons and are covered by Medicare. Medicare sets a maximum price for outpatient dialysis treatments that providers will receive. Medicare also pays a separate medical fee to nephrologists for their medical services in treating patients with chronic renal failure.

PAR. 8. The provision of inpatient dialysis services constitutes a relevant product market that is separate from the market for outpatient dialysis services. Inpatient dialysis services are provided to hospital inpatients who have impaired kidney function. Inpatient dialysis services are generally provided by portable artificial kidney machines which can be transported from hospital to hospital. Inpatient dialysis services typically cost about three times as much as outpatient dialysis services. Medicare does not reimburse providers for inpatient dialysis services apart from the payments it makes to hospitals for each patient admission under its prospective payment system.

PAR. 9. The Upland and Pomona areas is the geographic area consisting of the cities of Upland, California and Pomona, California

as well as the surrounding towns of Etiwanda, Alta Loma, Cucamonga, Ontario, Chino, Diamond Bar, Claremont, La Verne and Montclair, California. The Upland and Pomona area constitutes a relevant geographic market for outpatient dialysis services. People residing in the Upland and Pomona area who have chronic renal failure generally use outpatient dialysis facilities in the Upland and Pomona area and do not consider other outpatient dialysis facilities as alternatives for several reasons. Medi-Cal, California's Medicaid program, will only supply patients with ambulance transportation to the outpatient dialysis facility nearest their residence. Because a large percentage of outpatient dialysis patients in the Upland and Pomona area use Medi-Cal ambulances to transport them to outpatient dialysis facilities, many patients have no practical alternative and must go to the nearest facility. In addition, patients requiring outpatient dialysis services are often unable, because of their physical condition, to travel long distances. Furthermore, nephrologists generally see their patients at an outpatient dialysis facility before, during, or after dialysis, and generally limit their practice to a local area because of the inconvenience of traveling great distances. Consequently, nephrologists will usually recommend that their patients use a particular outpatient dialysis facility that is convenient for both patient and physician.

PAR. 10. Through the Dialysis Center of Upland, the Dialysis and Transplant Center of Pomona Valley, and the Dialysis Center of Pomona ("Dr. Friedman's outpatient dialysis facilities" or "the outpatient dialysis facilities"), Dr. Friedman owns a substantial share of the outpatient dialysis services market in the Upland and Pomona area. Dr. Friedman currently owns approximately 80 percent of the capacity of outpatient dialysis facilities in the Upland and Pomona area, measured by number of stations. In 1987, Dr. Friedman's outpatient dialysis facilities provided approximately 90 percent of the outpatient dialysis services in the Upland and Pomona area, measured by number of outpatient dialysis treatments.

RESPONDENT'S OPERATIONS IN THE OUTPATIENT DIALYSIS MARKET

PAR. 11. Dr. Friedman's outpatient dialysis facilities have granted some nephrologists "medical staff privileges." Such privileges allow the nephrologists to order dialysis services at the outpatient dialysis facilities for their patients and to visit their patients at the outpatient dialysis facilities before, during, or after their dialysis treatments. Each of these outpatient dialysis facilities allows only nephrologists

with privileges at the facility to order dialysis treatments for their patients at the facility.

PAR. 12. There are five nephrologists, other than Dr. Friedman, who currently practice in the Upland and Pomona area. One or more of Dr. Friedman's outpatient dialysis facilities have granted medical staff privileges to all five of these nephrologists at one time or another. Currently, four of these five nephrologists have staff privileges at one or more of Dr. Friedman's outpatient dialysis facilities.

PAR. 13. Since 1982, Dr. Friedman, through his professional corporation, has entered into contracts with four of the five nephrologists to whom Dr. Friedman's outpatient dialysis facilities have granted medical staff privileges. Pursuant to these contracts, Dr. Friedman pays the nephrologists, as independent contractors, to provide medical services to Dr. Friedman's patients. These four contracts contain provisions whereby the nephrologist agrees, for the duration of the contract and for two years afterward, not to compete with Dr. Friedman's outpatient dialysis facilities or inpatient dialysis service in the provision of outpatient or inpatient dialysis services and to refer all patients needing outpatient or inpatient dialysis services to Dr. Friedman's outpatient or inpatient dialysis facilities. The contractual restrictions on the ability to compete with Dr. Friedman's outpatient dialysis facilities and the requirement that the nephrologists refer all their patients to these facilities have impeded independent entry into the outpatient dialysis services market in this area.

PAR. 14. Additional impediments to entry to the outpatient dialysis services market in the Upland and Pomona area exist for the following reasons:

- (a) Substantial excess capacity currently exists in the market;
- (b) Economies of scale make entry with less than 12-15 stations, or approximately 15-20 percent of current supply, unprofitable;
- (c) Substantial "sunk costs" of entry exist due to the extensive plumbing and other installation costs necessary for outpatient dialysis stations; and
- (d) An outpatient dialysis facility must be designed, licensed and constructed. This process usually takes one to two years. To be profitable, a facility must then develop a sufficient physician and patient base.

ILLEGAL TYING ARRANGEMENT

PAR. 15. As a result of Dr. Friedman's 90 percent share of the

outpatient dialysis services market in the Upland and Pomona area, by virtue of his ownership of DCU, DTCP, and DCP, and the impediments to entry that exist in this market, Dr. Friedman has market power in the market for outpatient dialysis services in the Upland and Pomona area.

PAR. 16. Dr. Friedman is unable to exercise his market power in the outpatient dialysis services market directly by raising his outpatient dialysis prices because Medicare, which pays for approximately 90 percent of all outpatient dialysis services, sets the maximum price it will reimburse for outpatient dialysis services.

PAR. 17. Dr. Friedman has indirectly exercised his market power in the outpatient dialysis services market by tying the use of his inpatient dialysis service, the price of which is not set by Medicare, to the use of his outpatient dialysis facilities. Since 1984, Dr. Friedman's outpatient dialysis facilities have required all four of the nephrologists who presently have medical staff privileges at these facilities to sign a statement whereby they agree to adhere to the policies and procedures of the outpatient dialysis facilities. One of these policies requires, as a condition of using Dr. Friedman's outpatient dialysis facilities, that the nephrologist agrees to use IDS (Dr. Friedman's inpatient dialysis service) whenever any of his or her patients are in a hospital with which IDS has a contract to provide inpatient dialysis services.

PAR. 18. The purpose, effect, tendency, or capacity of Dr. Friedman's tying arrangement described in paragraph 17 above, given Dr. Friedman's market power in the outpatient dialysis services market in the Upland and Pomona area, has been to restrain trade unreasonably, and injure consumers of inpatient dialysis services in the Upland and Pomona area in the following ways, among others:

(a) By enabling Dr. Friedman to exercise his market power and, in effect, to evade the price ceiling Medicare has set for outpatient dialysis services, by tying inpatient dialysis services to outpatient dialysis services and charging higher than competitive prices for inpatient dialysis services in the Upland and Pomona area;

(b) By forcing nephrologists to select IDS (Dr. Friedman's inpatient dialysis service) for their patients when the nephrologists might otherwise choose a competing inpatient dialysis service; and

(c) By preventing inpatient dialysis services other than IDS from competing for the business generated by nephrologists in the Upland and Pomona area unless such competing inpatient dialysis services also enter the outpatient dialysis services market in Upland and

Pomona, thereby providing nephrologists with a source of outpatient dialysis services other than Dr. Friedman's facilities.

PAR. 19. The acts and practices alleged herein constitute an illegal tying arrangement and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the proposed respondent, and the proposed respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The proposed respondent, and counsel for the Federal Trade 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 aforesaid 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 the 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, now in further conformity with the procedures 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. Proposed respondent Gerald S. Friedman, M.D. is a physician licensed and doing business under and by virtue of the laws of the State of California. The Dialysis Center of Upland, Dialysis and Transplant Center of Pomona Valley, Dialysis Center of Pomona, and Inland Dialysis Services are sole proprietorships owned and operated by proposed respondent Gerald S. Friedman, M.D., doing business under and by virtue of the laws of the State of California. The mailing

address and principal place of business of proposed respondent Gerald S. Friedman, M.D. is: 600 North 13th Avenue, Upland, California.

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

1. "*Respondent*" or "*Dr. Friedman*" means Gerald S. Friedman, M.D., individually and doing business as the Dialysis Center of Upland, the Dialysis and Transplant Center of Pomona Valley, and the Dialysis Center of Pomona;

2. "*Dialysis*" means the use of an artificial kidney machine to remove waste products from the bloodstream;

3. "*Outpatient dialysis services*" mean the provision of dialysis on an outpatient basis, to persons who have permanently impaired kidney function and require regular dialysis;

4. "*Dr. Friedman's outpatient dialysis facilities*" mean all facilities that provide outpatient dialysis services and, in whole or in part, are managed, operated, or owned by Dr. Friedman, including, but not limited to, the Dialysis Center of Upland, the Dialysis and Transplant Center of Pomona Valley, and the Dialysis Center of Pomona;

5. "*Staff privileges*" mean the privileges granted to a physician to use Dr. Friedman's outpatient dialysis facilities;

6. "*Inpatient dialysis service*" means an entity that provides dialysis to hospital inpatients and emergency room patients who have impaired kidney function; and

7. "*Dr. Friedman's inpatient dialysis services*" mean all inpatient dialysis services that, in whole or in part, are managed, operated, or owned by Dr. Friedman, including, but not limited to, Inland Dialysis Services.

II.

It is further ordered, That respondent, and his successors and

assigns, in connection with the provision of outpatient dialysis services and inpatient dialysis services in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith directly or indirectly, or through any corporation or other device, cease and desist from:

A. Entering into, attempting to enter into, offering, renewing, or continuing any contract, agreement, policy, or understanding with any physician, either express or implied, which requires, as a condition of using any of Dr. Friedman's outpatient dialysis facilities to treat the physician's patients, that the physician, or any member of the physician's medical practice (1) use Dr. Friedman's inpatient dialysis services for any patients of the physician or of the physician's medical practice or (2) not operate, acquire an interest in, or maintain an interest in an inpatient dialysis service; and

B. Denying, revoking, suspending, or otherwise impairing staff privileges, in whole or in part, or threatening to deny, revoke, suspend, or otherwise impair staff privileges, in whole or in part, of any physician or any member of the physician's medical practice because that physician (1) in treating his own patients, has used an inpatient dialysis service other than one of Dr. Friedman's inpatient dialysis services, or (2) operates, has an interest in, or proposes to operate or acquire an interest in, an inpatient dialysis service.

Provided that nothing in this order shall prohibit Dr. Friedman from entering into an agreement with any physician with whom Dr. Friedman practices medicine in partnership or in a professional corporation, or who is employed by Dr. Friedman, which requires that such partner or employee use Dr. Friedman's outpatient dialysis facilities and Dr. Friedman's inpatient dialysis service or prohibits such partner or employee from operating or acquiring an interest in a dialysis service or facility other than Dr. Friedman's outpatient dialysis facilities and Dr. Friedman's inpatient dialysis service.

III.

It is further ordered, That respondent Dr. Friedman:

A. Distribute a copy of this order and the accompanying complaint, by first class mail within thirty (30) days after this order becomes final, to each physician with staff privileges at any of Dr. Friedman's outpatient dialysis facilities and to each hospital administrator of a

hospital with which any of Dr. Friedman's inpatient dialysis services has entered into a contract to provide inpatient dialysis services.

B. For a period of three (3) years after the date this order becomes final, provide a copy of this order and the accompanying complaint to (1) each physician who has completed an application for or is granted staff privileges at any of Dr. Friedman's outpatient dialysis facilities, within thirty (30) days after such physician has submitted a completed application for staff privileges, or within thirty (30) days after such physician has obtained staff privileges, whichever is sooner, and (2) to each hospital administrator of a hospital with which Dr. Friedman or any of Dr. Friedman's inpatient dialysis facilities enters into a contract to provide inpatient dialysis services, within thirty (30) days of the date such inpatient dialysis facility signs such a contract.

C. File a written report with the Commission within sixty (60) days after this order becomes final, and annually for three (3) years on the anniversary of the date this order becomes final, and at any other time the Commission, by written notice, may require, setting forth in detail the manner and form in which he has complied and is complying with this order.

D. For a period of five (5) years after this order becomes final, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order.

E. For a period of seven (7) years from the date this order becomes final, notify the Commission at least thirty (30) days prior to (1) any affiliation with a dialysis related business or employment; (2) any change in his business address set forth in this order; (3) any change to any of Dr. Friedman's outpatient dialysis facilities or inpatient dialysis services, such as incorporation, discontinuance, dissolution, assignment, or sale resulting in the emergence of a successor organization; or (4) any other change which may affect compliance with this order. Notice under subsections (1) and (2) of this paragraph 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 the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision in this paragraph shall not affect any other obligation arising under this order.

IN THE MATTER OF
EMERSON ELECTRIC CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3291. Complaint, June 22, 1990—Decision, June 22, 1990

This consent order requires, among other things, a Missouri producer of mounted ball bearings to divest McGill Manufacturing Company's mounted ball bearing business to a Commission approved acquirer, within twelve months after the consent order becomes final, or else consent to the appointment of a trustee by the Commission. Respondents are also required to offer to the prospective acquirer a contract to buy from respondents any necessary machinery, equipment and tooling. In addition, respondents are prohibited from selling, for a period of 18 months, mounted ball bearings under the McGill name.

Appearances

For the Commission: *Howard M. Morse* and *Steven A. Newborn*.

For the respondents: *Arthur F. Golden, Davis, Polk & Wardwell*,
New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, Emerson Electric Company, a corporation, and Emerson Power Transmission Co., a corporation, (collectively "Emerson"), both subject to the jurisdiction of the Federal Trade Commission, propose to acquire substantially all of the common stock of McGill Manufacturing Co., Inc. ("McGill") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Emerson Electric Co. is a corporation organized and existing under the laws of the State of Missouri with its office and