

IN THE MATTER OF
MEDICAL STAFF OF BROWARD GENERAL
MEDICAL CENTER

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

Docket C-3344. Complaint, Sept. 10, 1991—Decision, Sept. 10, 1991

This consent order prohibits, among other things, the medical staff of a Florida Hospital from entering, or attempting to enter, into any agreement which would prevent or restrict the offering or delivery of health care services by Broward General Hospital, Cleveland Clinic Florida (CCF), any CCF physician, or any other provider of health care services.

Appearances

For the Commission: *Paul J. Nolan* and *Mark J. Horoschak*.

For the respondent: *Davis W. Duke, Gunser, Yoakley & Stewart, P.A.*, Fort Lauderdale, FL.

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 Medical Staff of Broward General Medical Center has violated and is violating 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 this complaint stating its charges in that respect as follows:

RESPONDENT MEDICAL STAFF

PARAGRAPH 1. Respondent Medical Staff of Broward General Medical Center ("respondent Medical Staff" or "Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Florida, with its mailing address at 1600 South Andrews Avenue, Fort Lauderdale, Fl. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Broward General Medical Center ("Broward

General” or “the Hospital”). Appointment to the Medical Staff is a prerequisite for physicians who seek to admit, diagnose, or treat patients at Broward General. Since 1987, Diran M. Seropian, M.D., has been the Chief of the Medical Staff.

OTHER HEALTH CARE PROVIDERS

PAR. 2. The North Broward Hospital District (“NBHD”) is a public hospital district chartered under Florida law to serve the northern two-thirds of Broward County, Florida. The NBHD is licensed by the State of Florida to operate 1567 general acute care beds. NBHD owns and operates four hospitals including Broward General, which is licensed to operate 744 general acute care beds. Broward General offers subspecialty services such as cardiac surgery, and is one of the few tertiary care hospitals in the Northern Broward County area.

PAR. 3. The Cleveland Clinic Foundation (“Cleveland Clinic” or “the Clinic”), located in Cleveland, Ohio, is a major provider of comprehensive health care services to patients requiring complex medical care. The Clinic is organized and operated as a multispecialty group medical practice and, as such, provides consumers an alternative to traditional individual and single specialty group forms of practice. Under the Clinic’s multispecialty group practice format, patients can obtain all necessary specialized medical care and ancillary services from employees of the Clinic, including salaried physicians.

COMPETITION AMONG RESPONDENT MEDICAL STAFF’S MEMBERS

PAR. 4. The overwhelming majority of physicians in Northern Broward County and on the Medical Staff practice medicine in individual or small group practices on a fee-for-service basis. Under this traditional form of practice, when a patient’s illness is beyond the capability or outside the medical specialty of an individual physician, the physician refers the patient to another independent physician.

PAR. 5. The Medical Staff, which includes approximately 650 members, is engaged in substantial activities for the economic benefit of its members. By virtue of its purposes and activities, the Medical Staff is a “corporation” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. 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 Northern Broward County area.

PAR. 6. The acts and practices of the respondent Medical Staff, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COMPETITION FACED BY RESPONDENT MEDICAL STAFF'S MEMBERS

PAR. 7. Beginning in 1984, Cleveland Clinic sought to establish in Northern Broward County a regional clinic that would operate as a fully integrated, multispecialty group practice, a form of practice which Cleveland Clinic officials believed would be attractive to consumers in that area. Cleveland Clinic officials had concluded that its form of practice controls medical care utilization and costs in a way that is not possible when patient care is provided on a fee-for-service basis by independent physicians, ancillary services providers, and hospitals. For example, the Clinic offers large employers and other third-party payors the alternative of all-inclusive prospective pricing for certain medical procedures requiring the services of a variety of medical and surgical specialists as well as hospital and ancillary services. In order to offer all of the features of Cleveland Clinic's form of practice, the Clinic needed access to a tertiary care hospital in the Northern Broward County area.

PAR. 8. As early as 1984, NBHD sought to offer consumers efficient, high quality alternatives to the traditional fee-for-service form of medical practice, such as a preferred provider organization, a hospital-owned primary care clinic, and a joint venture with the Cleveland Clinic to open a regional model of the Clinic's multispecialty group practice on Broward General's campus. NBHD officials believed that, in part because of the Cleveland Clinic's national reputation for providing high quality care, the proposed relationship with the Clinic would distinguish Broward General from other area hospitals and would help Broward General compete more effectively for patients. The NBHD proposed developing an affiliation at Broward General under which physicians on the Hospital's Medical Staff would be invited to participate in a joint venture with NBHD and the Clinic's Florida branch ("CCF"). During September 1985, the existence of discussions between the Clinic and NBHD became generally known to respondent Medical Staff.

PAR. 9. Respondent Medical Staff and Dr. Seropian considered the proposed affiliation between CCF and Broward General to be a competitive threat to the individual and small group fee-for-service

form of medical practice existing in Northern Broward County. CCF would offer consumers an alternative form of practice, integrating medical specialties and ancillary services into one economic unit with salaried physicians, and providing information to consumers by marketing, advertising, and using a trade name. Respondent Medical Staff was concerned that enough consumers would find CCF's alternative form of practice attractive to disrupt existing patterns of patient referrals among individual physicians and small single specialty groups.

THE CONSPIRACY TO RESTRICT COMPETITION

PAR. 10. Respondent Medical Staff, acting as a combination of its members and in conspiracy with at least some of its members, Dr. Seropian, and others, attempted to and did prevent, delay and limit competition from CCF through the use of boycott threats and other anticompetitive practices. The conspiracy contemplated that respondent Medical Staff would thwart or obstruct Cleveland Clinic from establishing CCF in Northern Broward County by all means necessary, including agreements to act collectively rather than competitively in deciding whether and on what terms to admit patients to Broward General or to make patient referrals to CCF's physicians. At various times during and in furtherance of the combination and conspiracy, respondent Medical Staff and Dr. Seropian have:

A. Agreed to boycott and threatened to boycott Broward General in order to coerce NBHD and Broward General:

- (i) to refuse to affiliate with the Clinic, and
- (ii) to prevent CCF physicians from becoming members of the respondent Medical Staff;

B. Refused to deal with Cleveland Clinic except on collectively determined terms;

C. Induced NBHD, through pretextual justifications, to deny hospital privileges to CCF physicians; and

D. Refused to process applications for privileges by CCF physicians.

CONDUCT FURTHERING THE CONSPIRACY

PAR. 11. On September 20, 1985, acting in furtherance of the conspiracy, the respondent Medical Staff's members formally resolved: (a) to demand that NBHD "immediately cease all negotiations with the Cleveland Clinic"; and (b) that the Medical Staff had "no

confidence" in Broward General's administration or the NBHD Board because of their negotiations with the Clinic. The respondent Medical Staff's resolutions, as well as other subsequent similar statements, were intended as, and were understood by Hospital officials to be, threats that the respondent Medical Staff's members would withhold patient admissions from Broward General if NBHD entered an affiliation with the Clinic.

PAR. 12. In late 1985, due at least in part to respondent Medical Staff's conspiracy, NBHD officials informed the Clinic that further discussions of an affiliation with NBHD would be futile, and the Cleveland Clinic thereafter terminated negotiations.

PAR. 13. From 1986 through 1987, the Cleveland Clinic unsuccessfully sought an affiliation with Holy Cross Hospital. The Clinic faced the prospect that its physicians would not be permitted to admit and treat their patients at any suitable hospital in the spring of 1988 when CCF's clinic was scheduled to open. In the fall of 1987, CCF decided to apply for a certificate of need ("CON") to build its own tertiary care hospital in Northern Broward County, anticipating that if the CON were approved the hospital would not become operational for three to five years. To ensure that its physicians would have immediate access to some hospital, CCF contracted as a last resort with North Beach Hospital ("North Beach"), a small hospital with limited facilities. Although CCF financed major renovations, North Beach could not support all of the services CCF sought to offer, including cardiac surgery services. Consequently, in early 1988, CCF still needed access to a Northern Broward County hospital at which its physicians could perform cardiac surgery and other specialty and subspecialty services that could not be performed at North Beach.

PAR. 14. During late 1987 and early 1988, the Chairman of the NBHD Board encouraged CCF to explore a long term affiliation with NBHD, under which initially CCF would establish its cardiac surgery program at Broward General, and eventually all CCF physicians would join the respondent Medical Staff. CCF revived discussions about an affiliation with NBHD, and five members of CCF's cardiac surgery team applied for staff privileges at Broward General.

PAR. 15. During 1988, continuing the conspiracy to restrict competition from CCF, respondent, among other things, obstructed CCF's attempts to obtain authority to build its own hospital, CCF's proposal to affiliate with Broward General, and CCF physicians' attempts to obtain hospital privileges at Broward General.

PAR. 16. In October 1988, due at least in part to respondent's and Dr. Seropian's conspiracy, the NBHD Board adopted the respondent Medical Staff's pretextual justifications to deny hospital privileges to all five CCF applicants. Thereafter, the NBHD Chief Executive Officer informed the NBHD Board that he believed that the Medical Staff's opposition to the Clinic in 1985 had been motivated by a fear of "doctor competition," and that Medical Staff physicians had recently made an "open threat" to leave the Hospital if the Board granted hospital privileges to the five CCF physicians. In addition, the Board's decision to deny privileges caused a public outcry, including expressions of concern from state legislators that the NBHD Board's decision would deny consumers the benefits of CCF's experienced cardiac surgery team. The NBHD Board thereupon rescinded its vote to deny privileges and urged the administration to negotiate a contract with CCF, under which CCF would establish a cardiac care unit at Broward General, bringing the five physicians from CCF's cardiac surgery team onto the respondent Medical Staff and permitting other CCF specialists and subspecialists to obtain privileges and consult on CCF cardiac patients admitted to Broward General.

PAR. 17. Since December 1988, respondent and Dr. Seropian have continued the conspiracy to prevent competition from CCF. For example:

A. Dr. Seropian threatened that unless NBHD backed respondent Medical Staff and refused to deal with CCF, he would urge all Medical Staff committee chairmen to resign their positions.

B. After the NBHD Board granted provisional hospital privileges to the five CCF physicians and approved an exclusive contract for cardiac surgery services with CCF, the respondent Medical Staff refused to evaluate the hospital privilege applications of 35 CCF physicians. The Medical Staff refused to evaluate the CCF physicians' privilege applications, unless, among other things, CCF and NBHD agreed to reduce CCF's rights under the contract.

PAR. 18. On April 26, 1989, the NBHD Board made a formal finding that the respondent Medical Staff had refused to evaluate applications for hospital privileges submitted by 35 CCF physicians, and that there was evidence of "a clear, consistent and intentional pattern of a boycott by the medical staff of the credentialing process . . . they are empowered and obliged to apply." As a consequence of the credentialing boycott and pressure by the Medical Staff on its members not to serve on any alternative credentialing panel, NBHD

contracted with a panel of outside physicians to review the credentials of the 35 CCF physicians. This panel found that all 35 CCF physicians were qualified to receive hospital privileges at Broward General.

PAR. 19. In August 1989, Joint Commission on Accreditation of Healthcare Organizations' surveyors concluded that because the respondent Medical Staff had failed both to process the applications from the 35 CCF physicians within a reasonable amount of time, and to monitor actively the quality of care provided by Medical Staff members, the Hospital's accreditation was at risk. As a result, respondent Medical Staff and Dr. Seropian agreed to evaluate future applications for hospital privileges from CCF physicians, but their continued opposition to the Hospital's relationship with CCF still jeopardizes the Hospital's accreditation.

EFFECTS

PAR. 20. The purpose, effects, tendency, or capacity of the respondent Medical Staff's conduct described in paragraphs 10 through 19 are and have been to restrain trade unreasonably and hinder competition in the provision of health care services in the Northern Broward County area in the following ways, among others:

A. Depriving consumers of the price and quality benefits of competition between CCF's integrated multispecialty group practice and independent fee-for-service practitioners;

B. Depriving consumers of the full array of services that CCF sought to offer consumers in Northern Broward County, on some occasions forcing consumers to travel outside the Northern Broward County area to receive specialty and subspecialty medical diagnosis and treatment;

C. Hindering CCF's ability to offer health care services to consumers by raising its costs, reducing its efficiency, and delaying or preventing CCF from offering specialty and subspecialty services;

D. Limiting competition among physicians in Northern Broward County to the extent that physicians have agreed not to compete with each other, but rather act only on collectively determined terms, in deciding whether to admit patients to Broward General, to refer patients to CCF physicians, or otherwise to deal with NBHD, Broward General, the Clinic, or CCF; and

E. Raising impediments to entry into the physician services market by innovative or nontraditional providers of health care services.

VIOLATION

PAR. 21. 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 or recur in the absence of the relief herein requested.

Commissioner Yao not participating.

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 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 Section 5 of the Federal Trade Commission Act; and

The respondent, its duly authorized officer, 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 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 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. The Medical Staff of Broward General Medical Center ("the Medical Staff") is an unincorporated association, organized and existing, under the laws of the State of Florida, with its office and principal place of business located at 1600 S. Andrews Avenue, Ft. Lauderdale, FL.

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. “*Medical Staff*” means the Medical Staff of Broward General Medical Center, its successors, assigns, officers, directors, committees, agents, employees, and representatives.

B. “*NBHD*” means the North Broward Hospital District, a tax supported entity with its principal offices located at 1625 Southeast Third Avenue, Fort Lauderdale, FL, the hospitals that are owned by the North Broward Hospital District, and its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

C. “*Broward General*” means the Broward General Medical Center, one of the hospitals of the North Broward Hospital District, located at 1600 South Andrews Avenue, Fort Lauderdale, FL, its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

D. “*CCF*” means Cleveland Clinic Florida, a nonprofit corporation organized under Florida law, located at 3000 West Cypress Creek Road, Ft. Lauderdale, FL, its parent foundation (Cleveland Clinic Foundation, which is located at 9500 Euclid Avenue, Cleveland, OH), any entity located in Florida that is owned, controlled or under the management of Cleveland Clinic Florida or Cleveland Clinic Foundation, and the officers, directors, committees, agents, employees, and representatives of Cleveland Clinic Florida or Cleveland Clinic Foundation.

E. “*Corrective action*” means action taken pursuant to and in conformance with the Medical Staff’s bylaws against any person with hospital privileges at Broward General whose activities or professional conduct is reasonably believed to be detrimental to patient safety or the delivery of quality patient care.

II.

It is further ordered, That the Medical Staff directly or indirectly, or through any device, in connection with activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from entering into, attempting to enter into, organizing, continuing, or acting in furtherance of any agreement or combination, express or implied, between or among its members or with other physicians, providers of health care services, medical societies, hospitals, or medical staffs, for the purpose or with the effect of preventing or restricting the offering or delivery of health care services by the NBHD, Broward General, CCF, any CCF physician, or any other provider of health care services, including any agreement to:

A. Refuse to deal or threaten to refuse to deal with the NBHD, Broward General, CCF, any CCF physician, or any other provider of health care services, including, but not limited to, any agreement or combination to refuse or threaten to refuse to:

1. Participate in any Medical Staff or NBHD Committee, admit any patient to any NBHD hospital, fulfill any Medical Staff obligation imposed or recognized under any provision of the Florida statutes, the Code of the NBHD, the By-Laws or Rules and Regulations of the Medical Staff, or fulfill any other function customarily performed by the Medical Staff;

2. Refer patients to, accept patient referrals from, provide back-up for, or consult in the treatment of any patient with, any CCF physician; or

3. Associate with NBHD or CCF as an employee or independent contractor, or otherwise deal with NBHD, CCF or any CCF physician.

B. Deny, impede, or refuse to consider any application for hospital privileges or for changes in hospital privileges by any person solely because of his or her affiliation with CCF.

C. Deny or recommend to deny, limit, or otherwise restrict hospital privileges for any CCF physician without a reasonable basis for concluding that the denial, limitation, or restriction serves the interests of the hospital in providing for the efficient and competent delivery of health care services.

D. Discriminate, or threaten to discriminate, against any CCF physician with hospital privileges at Broward General with respect to the rights accorded to a member of the Medical Staff.

E. Encourage, advise, pressure, induce, or attempt to induce any person to engage in any action prohibited by this order.

III.

A. *It is further ordered*, That this order shall not be construed to prohibit the respondent Medical Staff or its members from engaging, pursuant to the Medical Staff's bylaws, in credentialing, corrective action, utilization review, quality assurance, or peer review at Broward General, where such conduct neither constitutes nor is part of any agreement, combination or conspiracy the purpose, effect, or likely effect of which is to impede competition unreasonably.

B. *It is further ordered*, That this order shall not be construed to prohibit any individual member of the Medical Staff from entering into an agreement or combination with any other physician or health care practitioner with whom the individual Medical Staff member practices in partnership or in a professional corporation, or who is employed by the same person.

IV.

It is further ordered, That the Medical Staff shall:

A. Within thirty (30) days after the date this order becomes final:

1. Mail a copy of this order, the accompanying complaint, and the attached Announcement to: (a) each Commissioner on the NBHD Board of Commissioners; (b) the Chief Executive Officers of Cleveland Clinic Florida and Cleveland Clinic Foundation; and (c) each member of the Medical Staff as of the date this order becomes final; and

2. Retract in writing the Medical Staff's September 20, 1985, resolution opposing any affiliation between CCF and the NBHD.

B. For a period of three (3) years after the date this order becomes final:

1. Report to the Federal Trade Commission any adverse recommendation by the Medical Staff concerning any application for hospital privileges, or change in existing hospital privileges, of any CCF physician or other CCF health care practitioner, within thirty (30) days after final action upon the Medical Staff's recommendation;

2. Distribute to each new member of the Medical Staff a copy of this order, the accompanying complaint, and the attached Announcement

within 30 days after he or she is officially admitted to the Medical Staff; and

3. Maintain records adequate to describe in detail any action taken in connection with the activities covered by this order and, upon reasonable notice, make such records available to the Federal Trade Commission staff for inspection and copying.

C. Within sixty (60) days after the date this order becomes final, annually for three (3) years on the anniversary date of the initial report, and at such other times as the Federal Trade Commission may by written notice require, file with the Federal Trade Commission a report setting forth in detail the manner and form in which it has complied with and intends to continue complying with this order.

D. Notify the Federal Trade 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 Yao not participating.

APPENDIX A

ANNOUNCEMENT

As you may be aware, on September 10, 1991 the Federal Trade Commission issued a complaint and a final consent order against the Broward General Medical Staff.

The order generally prohibits the Medical Staff from collectively refusing to deal with the North Broward Hospital District, Broward General ("Broward General"), Cleveland Clinic Florida ("CCF"), or CCF physicians. The order also prohibits the Medical Staff from refusing to evaluate applications for hospital privileges of any person because of his or her affiliation with CCF, or recommending the denial of hospital privileges for any CCF physician without a reasonable basis for concluding that the denial is reasonably related to the efficient operation and competent delivery of health care services at Broward General.

In addition, the order prohibits the Medical Staff from discriminating or threatening to discriminate against any CCF physician with privileges at Broward General, regarding the rights accorded to a member of the Medical Staff. Finally, the Medical Staff is also prohibited from encouraging any person or organization to take actions that the order prohibits the Medical Staff from taking.

Under the order, the Medical Staff retracted its September 20, 1985, resolution, which the complaint alleges was a threat to boycott Broward General to discourage the Hospital from affiliating with CCF.

The agreement between the Federal Trade Commission and the Broward General Medical Staff is for settlement purposes only and does not constitute an admission by the Medical Staff that the law has been violated as alleged in the complaint. The order does not prohibit the members of the Medical Staff from lawfully carrying on their medical practices and from providing patient care at Broward General and does not otherwise prohibit the Medical Staff, its officers and committees from engaging in lawful peer review and quality assurance at Broward General.

For more specific information, you should refer to the FTC complaint and order. The civil penalty for violation of the order is \$10,000 per day for each order violation. A copy of the order is enclosed.

(Vice Chief of Staff)
Broward General Medical Staff

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Complaint

IN THE MATTER OF
MEDICAL STAFF OF HOLY CROSS HOSPITAL

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

Docket C-3345. Complaint, Sept. 10, 1991—Decision, Sept. 10, 1991

This consent order prohibits, among other things, the medical staff of a Florida hospital from entering, or attempting to enter, into any agreement which would prevent or restrict the offering or delivery of health care services by Holy Cross Hospital, Cleveland Clinic Florida (CCF), any CCF physician, or any other provider of health care services.

Appearances

For the Commission: *Paul J. Nolan and Mark J. Horoschak.*

For the respondent: *Bruno L. DiGiulian & Associates, P. A.,* Fort Lauderdale, FL.

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 Medical Staff of Holy Cross Hospital has violated and is violating 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 this complaint stating its charges in that respect as follows:

RESPONDENT

PARAGRAPH 1. Respondent Medical Staff of Holy Cross Hospital ("the Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Florida, with its mailing address at 4725 N. Federal Highway, Ft. Lauderdale, FL. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Holy Cross Hospital ("Holy Cross" or "the Hospital"). Appointment to the Medical Staff is a prerequisite for physicians who seek to admit, diagnose, or treat patients at Holy Cross Hospital.