

Complaint

119 F.T.C.

IN THE MATTER OF

MEDICAL STAFF OF GOOD SAMARITAN
REGIONAL MEDICAL CENTERCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3554. Complaint, Feb. 1, 1995--Decision, Feb. 1, 1995*

This consent order prohibits, among other things, the members of the medical staff from agreeing, or attempting to enter into an agreement, to prevent or restrict the services offered by Good Samaritan, the clinic, or any other health care provider by refusing to deal with others offering health care services, or by withholding patient referrals.

Appearances

For the Commission: *Mark J. Horoschak, Garry H. Gibbs, Steven J. Osnowitz and Gary H. Schorr.*

For the respondent: *Robert J. Milligan, Gallagher & Kennedy, Phoenix, AZ.*

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 Good Samaritan Regional 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 as follows:

THE SAMARITAN ORGANIZATION AND RESPONDENT MEDICAL STAFF

PARAGRAPH 1. Samaritan Health Systems ("SHS"), formerly operated as two separate corporations (Samaritan Foundation and its subsidiary Samaritan Health Services), is a nonprofit corporation organized and existing under the laws of the State of Arizona. SHS operates nine full service medical and surgical hospitals in the United States, including four hospitals in Maricopa County, Arizona. Good

Samaritan Regional Medical Center ("Good Samaritan" or "the Hospital"), one of the hospitals operated by SHS, is a 571-bed tertiary, teaching hospital. Good Samaritan is the largest hospital in Arizona. The principal physical facilities of Good Samaritan are located at 1111 E. McDowell Road, Phoenix, Arizona.

PAR. 2. Respondent Medical Staff of Good Samaritan Regional Medical Center ("respondent Medical Staff" or "Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Arizona, with its mailing address at 1111 E. McDowell Road, Phoenix, Arizona. The Medical Staff is composed of over 500 physicians and other practitioners who have privileges to attend patients at Good Samaritan.

PAR. 3. The overwhelming majority of physicians in Maricopa 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. Except to the extent that competition has been restrained as herein alleged, most, if not all, of the Medical Staff's members have been and are now in competition among themselves and with other health care practitioners in Maricopa County.

PAR. 4. The Medical Staff 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.

PAR. 5. The acts and practices of the 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.

THE FORMATION OF THE SAMARITAN PHYSICIANS CENTER

PAR. 6. In early 1986, SHS began investigating the concept of developing a physician-hospital clinic joint venture. The idea for the joint venture was prompted by the anticipated opening of the Mayo Clinic in nearby Scottsdale, which was expected to offer significant competition for SHS hospitals in Maricopa County. While SHS was

still studying the idea, several members of Good Samaritan's medical staff independently approached the Hospital with the idea of opening a hospital-affiliated physician group practice. After a feasibility study showed that the group practice could be expected to significantly increase patient admissions to Good Samaritan, the Hospital and the physicians who approached the Hospital concerning the group practice agreed to implement their plans.

PAR. 7. In March 1987, Good Samaritan announced its plans to open the Samaritan Physicians Center ("SPC" or "the Clinic"), a multispecialty clinic in the Phoenix area. As originally planned, the Clinic was to have 39 physicians within five years and was to be a patient-oriented practice, benefitting patients by providing one-stop shopping for various medical specialties, extended hours, preventive care, house calls, and a single set of records and billing for each patient. Representatives of Good Samaritan and the SPC physicians believed that the Clinic had the potential for holding down medical costs.

THE CONSPIRACY TO RESTRICT COMPETITION

PAR. 8. Respondent Medical Staff, acting as a combination of its members and in conspiracy with at least some of its members and others, joined in a common plan to coerce, intimidate, and threaten to boycott Good Samaritan in order to induce termination of the Hospital's involvement with SPC. At various times during, and in furtherance of, the combination and conspiracy, respondent Medical Staff:

A. Agreed to boycott and threatened to boycott Good Samaritan by representing to Good Samaritan that doctors would jointly withhold patient admissions from Good Samaritan if Good Samaritan continued its relationship with SPC; and

B. Solicited physicians on the Medical Staff to threaten to withhold patient admissions from Good Samaritan if Good Samaritan continued its relationship with SPC.

CONDUCT FURTHERING THE CONSPIRACY

PAR. 9. Beginning in March 1987, Good Samaritan administrators and the SPC physicians presented their plans for the

new multispecialty clinic to various medical departments at the Hospital. Physicians at the March 10, 1987, Obstetrical/Gynecology Department meeting passed a motion "to inform [the] administration that this department condemns the development of a multispecialty care clinic on the [Good Samaritan] campus to capture patients." Physicians at this meeting commented that direct action by physicians would be beneficial in making known to the administration their feelings about the SPC, and there was general discussion regarding a physician boycott of the hospital.

PAR. 10. In December 1987, the Executive Committee of Samaritan Health Services approved Good Samaritan's request to broaden the size and scope of practice at the proposed SPC. The revised plan provided for SPC to eventually be located at two different sites having a total of 84 to 100 physicians.

PAR. 11. SPC began operations in a limited capacity in February 1988 with approximately four physicians. By July 1988, SPC had nineteen physicians on staff, and was continuing to expand.

PAR. 12. Physicians at a Medicine Department meeting on July 21, 1988, passed a motion to create a subcommittee "to discuss the economic impacts [of SPC] on [physicians'] offices in the vicinity of [Good Samaritan]." According to one physician who attended the meeting, "everyone [at the meeting] was wondering how this [the Clinic] would affect them economically."

PAR. 13. At a special meeting of the Medical Staff to discuss SPC on November 14, 1988, physicians complained that they had not approved the Clinic and that the venture would compete with members of the Medical Staff, and threatened to withhold patient admissions to Good Samaritan if the Hospital continued its relationship with SPC. Physicians asked "why should [they] continue to support a hospital that is putting up a clinic to compete with them?" Physicians stated that they had choices as to where to admit their patients and if the Hospital continued to give support to the Clinic they would take their patients elsewhere. Physician opposition to the Clinic at this meeting resulted in the Medical Staff passing a motion to advise the Boards of Samaritan Foundation and its subsidiaries that "these plans [to open a clinic] were instituted without the approval of any Medical Staff member or committee." After learning about the motion, Samaritan administrators, fearing a Medical Staff boycott of Good Samaritan, immediately put further

development of the SPC project on hold and froze physician staffing levels and Samaritan's financial support for further planned development.

PAR. 14. At the July 24, 1989, meeting of the Good Samaritan Medical Staff Executive Committee, members of the Medical Staff continued to express anger and hostility over the Clinic. Physicians stated that there is a continuing schism between the Medical Staff and the Hospital over the Clinic. Physicians stated that members of the Medical Staff wanted to know if Good Samaritan had reduced its financial commitment to the Clinic, so that they could make a decision on whether to continue their practices at Good Samaritan. A Medical Staff Advisory Committee, made up of physicians and hospital administrators, was created to provide the Hospital with physician input regarding the Clinic and other physician sensitive issues.

PAR. 15. On August 24, 1989, the Medical Staff Advisory Committee met to discuss the Clinic. Hospital representatives at this meeting agreed to downsize the Clinic by reducing the number of physicians at the Clinic from 100 to 50 and by reducing the Hospital's financial commitment to the project. Physicians at the meeting stated that there was still great unrest in the Medical Staff, and that this unrest would become apparent at the September 13th Quarterly Medical Staff Meeting.

PAR. 16. At the September 13, 1989, Quarterly Medical Staff Meeting, due to concerns about SPC, an Ad Hoc Committee was formed to conduct a vote of no-confidence in the Corporate Administration and the Governing Board of Samaritan Foundation. The results of the vote were findings of no-confidence in the Corporate Administration and the Governing Board of the Samaritan Foundation. Because of the two no-confidence votes by the Medical Staff, the President/Chief Executive Officer of the Samaritan Foundation resigned.

PAR. 17. As a result of the combination, conspiracy, acts and practices herein described, Good Samaritan halted further development of SPC from November 1988 through July 1, 1991, and then severed its relationship with SPC.

EFFECTS

PAR. 18. The purpose, effects, tendency, or capacity of respondent Medical Staff's conduct described in paragraphs eight through sixteen are and have been to restrain trade unreasonably and hinder competition in the provision of health care services in Maricopa County in the following ways, among others:

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

B. Depriving consumers of the full array of services that Good Samaritan sought to offer consumers in Maricopa County;

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

D. Limiting competition among physicians in Maricopa County to the extent that physicians agreed not to compete with each other, but rather act only on collectively determined terms, in deciding whether to admit patients to Good Samaritan, to refer patients to SPC physicians, or otherwise to deal with Good Samaritan; and

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

VIOLATION

PAR. 19. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Competition 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 Starek dissenting.

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 the Federal Trade Commission Act; and

The respondent, its attorney, 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 Good Samaritan Regional Medical Center is an unincorporated association, organized and existing under and by virtue of the laws of the State of Arizona, with its principal office and place of business located at 1111 E. McDowell Road, Phoenix, Arizona.

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.

MEDICAL STAFF OF GOOD SAMARITAN
REGIONAL MEDICAL CENTER

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Decision and Order

ORDER

I.

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

A. "*Medical Staff*" means the Medical Staff of Good Samaritan Regional Medical Center, its successors, assigns, officers, directors, committees, agents, employees, and representatives.

B. "*Good Samaritan*" means Samaritan Health Systems, formerly operated as two separate corporations (Samaritan Foundation and its subsidiary Samaritan Health Services), doing business as Good Samaritan Regional Medical Center, a non-profit corporation with its principal offices located at 1111 E. McDowell Road, Phoenix, Arizona, its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

C. "*SPC*" means Samaritan Physicians Center, Inc., an Arizona Corporation, its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

D. "*Integrated joint venture*" means a joint arrangement to provide health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share a substantial risk of loss from their participation in the venture.

II.

It is ordered, That respondent Medical Staff, directly or indirectly, or through any device, shall cease and desist from entering into, maintaining, or continuing, or attempting to enter into, maintain, or continue, any agreement or understanding, either 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 Good

Samaritan, SPC or any other provider of health care services, including any agreement to:

A. Refuse to deal, threaten to refuse to deal, or attempt to induce others to refuse to deal or threaten to refuse to deal; and

B. Withhold patient referrals, threaten to withhold patient referrals, or attempt to induce others to withhold patient referrals or threaten to withhold patient referrals.

III.

A. *It is further ordered*, That this order shall not be construed to prohibit the Medical Staff or its members from offering to participate or participating with other physicians, pursuant to the Medical Staff's bylaws, in *bona fide* utilization review, quality assurance, or credentialing activities in connection with the provision of physician services.

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 as said Medical Staff member.

C. *It is further ordered*, That this order shall not be construed to prohibit respondent Medical Staff from forming, facilitating the formation of, or participating in, an "integrated joint venture" that limits the number of participating physicians, as long as the physicians participating in the joint venture remain free to deal with other persons or entities other than through the joint venture.

IV.

It is further ordered, That the Medical Staff shall:

A. Within thirty (30) days after the date this order becomes final, mail a copy of this order and the accompanying complaint to each member of the Medical Staff as of the date this order becomes final, and for a period of three (3) years after the date this order becomes final, distribute to each new member of the Medical Staff a copy of

this order and the accompanying complaint within thirty (30) days after he or she is officially admitted to the Medical Staff.

B. For a period of three (3) years after the date this order becomes final, 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 of the date this order becomes final, 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 and is complying with this order.

D. Notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change in the association which may affect compliance obligations arising out of this order.

Commissioner Starek dissenting.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I do not agree with the Commission's decision to issue the final order in this matter because I continue to find the evidence insufficient to support reason to believe that the respondent violated the law.

As I noted in my earlier dissenting statement, the centerpiece of this case is a resolution adopted by the medical staff of Good Samaritan Regional Medical Center concerning plans under consideration by the Medical Center to develop a multispecialty medical clinic that would compete with staff members' private practices. That resolution -- approved on November 14, 1988, following certain medical staff members' complaints about plans for the clinic -- declared that those plans "were instituted without the approval of any [m]edical [s]taff member or committee." In the wake of the resolution, the Medical Center decided to "freeze" the development and planned expansion of the clinic, and eventually the Medical Center severed its financial and other ties to the clinic.

Neither the language of the medical staff resolution nor the other information unearthed in this investigation has established the validity of the core allegation here -- that in order to end the Medical Center's involvement with the clinic, medical staff members combined to threaten a boycott of the Medical Center (which they would effect by referring patients to other area hospitals). Although individual physicians on the medical staff made clear the Medical Center's administration their displeasure with the Medical Center's role in support of the clinic, the November 14, 1988 resolution and the other evidence in this case are insufficient to show an agreement to threaten a boycott.

Nothing that has come to the Commission's attention during the public comment period disturbs my view that this case rests almost exclusively -- and precariously -- on the purported boycott victims' characterization of the medical staff's collective state of mind. Because of the ambiguities and weaknesses that have plagued the evidence in the present case, I respectfully dissent from the Commission's decision to issue the final order.

IN THE MATTER OF

OERLIKON-BUHRLE HOLDING AG

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-3555. Complaint, Feb. 1, 1995--Decision, Feb. 1, 1995

This consent order permits, among other things, a Switzerland-based corporation to acquire Leybold AG, a German firm, but requires the respondent to divest both the Leybold compact disc metallizer business and the Balzers-Pfeiffer turbomolecular pump business, within 12 months, to Commission approved entities. If the divestitures are not completed within 12 months, the Commission is permitted to appoint trustees to complete them. In addition, the respondent is required, for ten years, to obtain Commission approval before acquiring any interest in any entity engaged in either of the two markets at issue.

Appearances

For the Commission: *Ann B. Malester, Michael R. Moiseyev and Mary Lou Steptoe.*

For the respondent: *Tim Fieghery, Kaye, Scholer, Fierman, Hays & Handler, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Oerlikon-Buhrle Holding AG ("Oerlikon-Buhrle"), a Swiss corporation subject to the jurisdiction of the Commission, has proposed to acquire all of the voting stock of Leybold AG ("Leybold"), a wholly-owned subsidiary of Degussa Aktiengesellschaft, ("Degussa"), a German corporation subject to the jurisdiction of the Commission, 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 it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows: