

IN THE MATTER OF

UROLOGICAL STONE SURGEONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3791. Complaint, April 6, 1998--Decision, April 6, 1998*

This consent order prohibits, among other things, the three Illinois-based firms and two doctors from agreeing or attempting to agree to fix prices, discounts, or other terms of sale or contract for lithotripsy professional services (treatment for kidney stones); requires the respondents to terminate third-party payer contracts that include the challenged fees at contract renewal time; and also requires them to notify the Commission at least 45 days before forming or participating in an integrated joint venture to provide lithotripsy professional services.

Appearances

For the Commission: *Nicholas Franczyk, Karen Dodge, John Hallerud, David Narrow, C. Steven Baker, David Pender, Robert Leibenluft, Mark Whitener and William Baer.*

For the respondents: *Richard Raskin, Sidley & Austin, Chicago, IL.*

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 Urological Stone Surgeons, Inc. ("USS"), Stone Centers of America, L.L.C. ("SCA"), Urological Services, Ltd. ("USL"), and Donald M. Norris, M.D., and Marc A. Rubenstein, M.D., individually, and as officers, directors, and shareholders of USS, as owners and officers of USL, and as shareholders of SCA, hereinafter sometimes referred to as respondents, have violated and are violating Section 5 of the Federal Trade Commission Act, 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 in that respect as follows:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

A. "*Extracorporeal shock wave lithotripsy*" or "*lithotripsy*" means the treatment of kidney stones without surgery by projecting, against the patient's body, high-energy shock waves that pulverize the kidney stones into particles which are then eliminated through the urinary tract. "*Lithotripter*" means a machine used to generate such shock waves.

B. "*Urologist*" means a physician licensed to practice medicine who entirely or substantially limits his or her practice to the specialized practice of urology, which includes the diagnosis and treatment of diseases or medical conditions of or affecting the urogenital system.

C. "*Urologist professional services*" means any services provided by a urologist relating to the diagnosis and treatment of diseases or medical conditions of or affecting the urogenital system.

D. "*Lithotripsy professional services*" means any urologist professional services associated with the provision of extracorporeal shock wave lithotripsy.

E. "*Lithotripsy machine services*" means the provision of extracorporeal shock wave lithotripsy, including, but not limited to, the supplying of the lithotripter, operation of the lithotripter, and providing accompanying services to the patients, but excluding lithotripsy professional services and anesthesia services associated with extracorporeal shock wave lithotripsy.

F. "*USS*" means Urological Stone Surgeons, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by USS, their successors and assigns, and their directors, officers, employees, agents, and representatives.

G. "*USL*" means Urological Services, Ltd., its predecessors, subsidiaries, divisions, groups and affiliates controlled by USL, their successors and assigns, and their directors, officers, employees, agents, and representatives.

H. "*SCA*" means Stone Centers of America, L.L.C., its predecessors, subsidiaries, divisions, groups and affiliates controlled by SCA, their successors and assigns, and their directors, officers, employees, agents, and representatives.

I. "*Respondent urologists*" means Donald M. Norris, M.D., and Marc A. Rubenstein, M.D.

J. "*Person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, trust, or other entity.

K. "*Third-party payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Third-party payer includes,

but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; and employer or other person providing or administering any self-insured health benefits program.

L. "*Contracted services*" means provision of lithotripsy to patients pursuant to a written contractual agreement with a purchaser or third-party payer of lithotripsy services, in which the amount and terms of reimbursement for such services are specified in the contractual agreement.

M. "*Global fee or bill for lithotripsy*" means a method of billing or charging for lithotripsy whereby the charges for its component services, including lithotripsy machine services, lithotripsy professional services, and anesthesia services, are billed and/or paid as a single, combined charge, whether or not the component services are separately itemized in the bill.

RESPONDENTS

PAR. 2.A. Respondent USS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1875 West Dempster Street, Park Ridge, Illinois. There are approximately 35 shareholders of USS, including respondent urologists, all of whom are urologists licensed to practice medicine in the State of Illinois and engaged in the business of providing urologist professional services, including lithotripsy professional services, to patients. USS's shareholders comprise approximately 15 percent of the urologists in the Chicago metropolitan area.

B. Respondent SCA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1875 West Dempster Street, Park Ridge, Illinois. SCA is jointly owned by USS, the respondent urologists, and approximately 66 additional urologists, all of whom are licensed to practice medicine in the State of Illinois and are engaged in the business of providing urologist professional services, including lithotripsy professional services, to patients. SCA's shareholders comprise approximately 45 percent of the urologists in the Chicago metropolitan area.

C. Respondent USL is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1875 West Dempster Street, Park Ridge, Illinois. USL is owned by respondents Donald M. Norris, M.D., and Marc A. Rubenstein, M.D.

D. Respondents Donald M. Norris, M.D., and Marc A. Rubenstein, M.D., are urologists, licensed to practice medicine in the State of Illinois, and engaged in the business of providing urologist professional services, including lithotripsy professional services, to patients. Their business address is 1875 West Dempster Street, Suite 365, Park Ridge, Illinois. The respondent urologists are officers, directors, and shareholders of USS; owners and officers of USL; and shareholders in SCA.

JURISDICTION

PAR. 3. The acts and practices of the respondents, including those alleged herein, are in or affect commerce within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

RESPONDENTS' BUSINESS ACTIVITIES

PAR. 4. USS, SCA, USL, the respondent urologists, and other unnamed urologists, are engaged in the provision of lithotripsy under the name Parkside Kidney Stone Center ("Parkside"). Parkside operates two lithotripsy facilities. Since February 1986, Parkside has operated a lithotripsy facility in Park Ridge, Illinois; USS provides lithotripsy machine services at Parkside's Park Ridge facility. Since February 1995, Parkside has operated a second lithotripsy facility in LaGrange, Illinois; SCA provides lithotripsy machine services at Parkside's LaGrange facility. The respondent urologists, and other unnamed urologists, have jointly invested in the purchase and operation of the two lithotripsy machines that Parkside operates. USL provides billing and collection services for all lithotripsy provided at Parkside's two facilities, including lithotripsy professional services. The respondent urologists and approximately 140 other unnamed urologists, including the other urologists who are shareholders in USS or SCA, each provide lithotripsy professional services to their own patients at Parkside's facilities.

PAR. 5. Except to the extent that competition has been restrained as alleged herein, the urologists who provide lithotripsy professional services at Parkside, including the respondent urologists and the other shareholders of USS and SCA, have been in competition with other urologists who provide lithotripsy professional services at Parkside.

PAR. 6. Of all lithotripsy procedures performed at the six to eight providers of lithotripsy machine services operating in the Chicago metropolitan area during the past several years, approximately two-thirds of the procedures are, and for several years have been, performed at Parkside. Currently, this amounts to more than 2500

lithotripsy procedures per year performed at the Parkside facilities. Approximately 65 percent of the urologists in the Chicago metropolitan area use Parkside to provide lithotripsy to some or all of their patients needing lithotripsy. Of those urologists using Parkside to provide lithotripsy, approximately 80 percent use Parkside exclusively.

RESPONDENTS' ACTS AND PRACTICES

PAR. 7. The respondent urologists and other unnamed urologists who are their competitors and who provide lithotripsy professional services at Parkside, including the shareholders of USS and SCA, agreed to fix the prices they would charge for such services.

PAR. 8. In furtherance of the agreement described in paragraph seven:

A. On or about March 18, 1985, USS informed its prospective investors, all of whom were urologists, that lithotripsy patients will pay or would be charged a set price, estimated at \$2,000, for lithotripsy professional services, and that USS or its agents would bill and collect for such services performed at Parkside.

B. On or about April 15, 1985, USS entered into an agreement with a third party to perform the day-to-day management and operation of Parkside. The agreement provided, in part, that USS will "use its best efforts to set forth suggested fee structure for [lithotripsy professional services at Parkside, that the] fee will be suggested to be \$2,000," and that such prices would be subject to annual increases to reflect the changes in the costs of medical services in the metropolitan Chicago area.

C. The respondent urologists and other unnamed urologists, including the shareholders of USS and SCA, agreed to use respondent USL as their common billing agent. Each urologist providing lithotripsy professional services at Parkside was required to sign an agreement with USL which: (1) states that it is "being signed between [USL] and all physicians providing . . . services [at Parkside];" (2) prohibits the physician from independently billing patients for any services billed by USL; and (3) requires the urologist to "accept as payment in full for such services the sum paid . . . by USL."

D. On or about the day Parkside opened its first Chicago area lithotripsy facility for business in Park Ridge, Illinois, respondent USL produced and disseminated to the urologists fee schedules that included, among other things, a \$2,000 charge for lithotripsy professional services.

E. On or about April 1, 1987, and each year thereafter until 1993, Parkside's charges, including the charges for lithotripsy professional services, were increased in accordance with the April 15, 1985, agreement described above, and revised fee schedules were distributed to the urologists who provided lithotripsy professional services at Parkside.

F. In February, 1995, Parkside opened a second Chicago area lithotripsy facility, located in LaGrange, Illinois. Lithotripsy services provided at this facility were and continue to be billed for and reimbursed in the same manner and at the same prices as those provided at Parkside's Park Ridge facility. Investors in SCA are prohibited from having an ownership interest, either directly or indirectly, in any other entity that owns or operates a lithotripter within a 30-mile radius of LaGrange, Illinois, and may not compete, directly or indirectly, with SCA within such 30-mile radius.

G. Until about April 1, 1995, respondent USL always or almost always billed the amounts listed in the fee schedules for lithotripsy professional services provided at Parkside, including lithotripsy professional services performed in connection with contracted services.

H. On or about April 1, 1995, respondent USL revised the billing policy for lithotripsy services provided at Parkside by requiring each urologist providing lithotripsy professional services at Parkside to determine that charge independently. Since that date, USL has billed each individual urologist's charge for lithotripsy professional services. The individually determined charges for lithotripsy professional services by urologists using the Parkside facilities have varied greatly in amount since Parkside revised its billing policy.

I. Although USL has billed the individual urologist's charge for lithotripsy professional services since about April 1, 1995, urologists providing lithotripsy professional services at Parkside pursuant to contracted services agreements that provide for a global fee or bill for lithotripsy continue to receive a uniform amount of reimbursement from each such contracted purchaser or third-party payer. Urologists providing lithotripsy professional services at Parkside pursuant to contracted services agreements that provide for reimbursement based on percentage discounts off the urologists' fees or charges have a uniform percentage discount applied to their fees or charges for urologist professional services by each such contracted purchaser or third-party payer. Such uniform payment and discount provisions for lithotripsy professional services are negotiated jointly by, for, or on behalf of respondents, and for or on behalf of other urologists using

Parkside, with each purchaser or third-party payer that has an agreement with Parkside for contracted services.

PAR. 9. By engaging in the acts and practices alleged herein, USS, SCA, USL, the respondent urologists, and other unnamed urologists have combined or conspired to fix, and have fixed, the prices for lithotripsy professional services performed at Parkside.

PAR. 10. The individual respondents and the other unnamed urologists who invested in Parkside financially integrated for the purposes of purchasing and operating Parkside's lithotripsy machines. However, it was not reasonably necessary to achieving the benefits of this legitimate joint venture activity for respondents to fix or set the fees for urologist professional services, as described in paragraphs seven through nine of this complaint. Furthermore, the respondent urologists and other unnamed urologists who provide lithotripsy professional services at Parkside have not substantially integrated their professional practices so as to justify respondents' acts or practices in fixing or setting fees for urologist professional services, as described in paragraphs seven through nine of this complaint.

EFFECTS OF RESPONDENTS' ACTS AND PRACTICES

PAR. 11. The acts and practices of the respondents, as alleged herein, have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. By restraining competition among urologists in the provision of lithotripsy professional services; and

B. By fixing or increasing the prices that are paid to urologists who provide lithotripsy professional services.

VIOLATIONS OF THE FTC ACT

PAR. 12. The acts and practices of the respondents alleged herein constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation or the effects thereof, as herein alleged, are continuing and will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have 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 no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent USS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 1875 West Dempster Street, Park Ridge, Illinois.

2. Respondent SCA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business at 1875 West Dempster Street, Park Ridge, Illinois.

3. Respondent USL is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business at 1875 West Dempster Street, Park Ridge, Illinois.

4. Respondents Donald M. Norris, M.D., and Marc A. Rubenstein, M.D., are officers, directors, and shareholders of respondent USS, co-owners and officers of respondent USL, and shareholders of respondent SCA. Respondents Donald M. Norris, M.D., and Marc A. Rubenstein, M.D., are urologists engaged in the business of providing medical services to patients for a fee. Their

principal office and place of business is 1875 West Dempster Street, Suite 365, Park Ridge, Illinois.

5. The acts and practices of the respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. The Federal Trade Commission has jurisdiction of the subject matter in this proceeding and of the respondents, 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. "*Extracorporeal shock wave lithotripsy*" or "*lithotripsy*" means the treatment of kidney stones without surgery by projecting, against the patient's body, high-energy shock waves that pulverize the kidney stones into particles which are then eliminated through the urinary tract. "*Lithotripter*" means a machine used to generate such shock waves.

B. "*Urologist*" means a physician licensed to practice medicine who entirely or substantially limits his or her practice to the specialized practice of urology, which includes the diagnosis and treatment of diseases or medical conditions of or affecting the urogenital system.

C. "*Lithotripsy professional services*" means any urologist professional services associated with the provision of extracorporeal shock wave lithotripsy.

D. "*Lithotripsy machine services*" means the provision of extracorporeal shock wave lithotripsy, including, but not limited to, the supplying of the lithotripter, operation of the lithotripter, and providing accompanying services to the patients, but excluding lithotripsy professional services and anesthesia services associated with extracorporeal shock wave lithotripsy.

E. "*USS*" means Urological Stone Surgeons, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by USS, their successors and assigns, and their directors, officers, employees, agents, and representatives.

F. "*USL*" means Urological Services, Ltd., its predecessors, subsidiaries, divisions, groups and affiliates controlled by USL, their successors and assigns, and their directors, officers, employees, agents, and representatives.

G. "*SCA*" means Stone Centers of America, L.L.C., its predecessors, subsidiaries, divisions, groups and affiliates controlled

by SCA, their successors and assigns, and their directors, officers, employees, agents, and representatives.

H. "*Respondent urologists*" means Donald M. Norris, M.D., and Marc A. Rubenstein, M.D.

I. "*Person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, trust, or other entity.

J. "*Third-party payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Third-party payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; and employer or other person providing or administering self-insured health benefits programs.

K. "*Global fee or bill for lithotripsy*" means a method of billing or charging for lithotripsy whereby the charges for its component services, including lithotripsy machine services, lithotripsy professional services, and anesthesia services, are billed and/or paid as a single, combined charge, whether or not the component services are separately itemized in the bill.

L. "*Integrated joint venture*" means a joint venture where the participants either: (a) share substantial financial risk that provides incentives for the participants to cooperate in controlling costs and improving quality by managing the provision of services by network participants; (b) implement an active and ongoing program to evaluate and modify practice patterns by the network's participants and create a high degree of interdependence and cooperation among the participants to control costs and ensure quality, so that the joint venture involves sufficient integration with the potential to achieve significant efficiencies; or (c) otherwise sufficiently integrate so that the joint venture has the potential to achieve significant efficiencies.

II.

A. *It is further ordered*, That each respondent, directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, forthwith cease and desist from agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination with any other respondent or any other urologist: (1) to fix, establish, stabilize, set, tamper with, or negotiate the prices, discounts, or any other aspect or term relating to prices charged or billed to, or to be charged or billed to, or paid or reimbursed by, or to be paid or reimbursed by, any patient, purchaser, or third-party payer for

lithotripsy professional services (including prices established through the use of any global fee or bill for lithotripsy); and (2) concerning any other term of sale or contract for lithotripsy professional services to or with any patient, purchaser, or third-party payer.

B. *It is further ordered*, That respondents USS, SCA, and USL shall terminate any agreement or contract with any third-party payer for the provision of lithotripsy professional services that does not comply with paragraph II.A of this order at the earlier of: (1) the termination or renewal date (including any automatic renewal date) of such agreement or contract; or (2) receipt of a written request from a third-party payer to terminate such agreement or contract.

Provided that nothing in this order shall be construed to prohibit any respondent from performing pursuant to any existing agreement or contract with any third-party payer for the provision of lithotripsy professional services until the earlier of: (1) the termination or renewal date (including any automatic renewal date) of such agreement or contract; or (2) receipt of a written request from a third-party payer to terminate such agreement or contract.

Provided further that nothing in this order shall be construed to prohibit either respondent urologist from entering into an agreement or combination with any other physician with whom the respondent urologist practices in partnership or in a professional corporation, or who is employed by the same person as the respondent urologist, to deal with any patient, purchaser, or third-party payer on collectively determined terms.

Provided further that nothing in this order shall be construed to prohibit respondents USS, SCA, USL or respondent urologists from forming, facilitating the formation of, or participating in an integrated joint venture and dealing through such integrated joint venture with any patient, purchaser, or third-party payer on collectively determined terms regarding the provision of, or contracts or arrangements for the provision of, lithotripsy professional services, or of urology services including lithotripsy professional services.

III.

It is further ordered, That respondents USS, SCA, and USL shall:

A. Within thirty (30) days from the date this order becomes final, distribute a copy of the complaint and order in this matter to each of their current shareholders, officers, and directors, and to each other agent, representative, or employee of USS, SCA, or USL whose activities are affected by this order, or who have responsibilities with respect to the subject matter of this order;

B. For a period of four (4) years from the date this order becomes final, and within thirty (30) days of the date the person assumes such position, distribute a copy of the complaint and order in this matter to each new shareholder, officer, and director of USS, SCA, or USL, and to each other agent, representative, or employee of USS, SCA, or USL whose activities are affected by this order, or who have responsibilities with respect to the subject matter of this order;

C. For a period of four (4) years from the date this order becomes final, distribute a copy of the complaint and order in this matter to each urologist who provides lithotripsy professional services in connection with USS, SCA, or USL within thirty (30) days from the date such urologist commences providing lithotripsy professional services in connection with USS, SCA, or USL; and

D. Within thirty (30) days from the date this order becomes final, distribute a copy of the complaint and order in this matter, together with the NOTICE in the Attachment to this order, to each third-party payer with whom respondent USS, SCA, or USL has an agreement or contract for the provision of lithotripsy professional services that does not comply with paragraph II.A of this order.

IV.

It is further ordered, That each respondent shall file a verified written report with the Commission within sixty (60) days after the date this order becomes final, annually thereafter for four (4) years on the anniversary of the date the order becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which the respondent has complied and is complying with paragraphs II and III of this order.

V.

It is further ordered, That:

A. Respondents USS, SCA, and USL shall notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution

of subsidiaries or any other change in the corporation that may affect compliance obligations arising under this order; and

B. For ten years after the date this order becomes final, respondents USS, SCA, USL, and respondent urologists shall notify the Commission in writing at least forty-five (45) days prior to forming or participating in an integrated joint venture and dealing through such integrated joint venture with any patient, purchaser or third-party payer on collectively determined terms regarding the provision of, or contracts or arrangements for the provision of, lithotripsy professional services or of urology services including lithotripsy professional services.

VI.

It is further ordered, That each respondent shall, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, permit duly authorized Commission representatives:

A. Access during respondent's office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in respondent's possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to respondent's reasonable convenience, to interview respondent, and officers, directors, employees, agents, or other representatives of respondent, who may have counsel present, regarding such matters.

VII.

It is further ordered, That this order shall terminate on April 6, 2018.

Commissioner Thompson and Commissioner Swindle not participating. Commissioner Azcuenaga concurring in part and dissenting in part.

ATTACHMENT TO ORDER

NOTICE

Urological Stone Surgeons, Inc. ("USS"), Stone Centers of America, L.L.C. ("SCA"), and Urological Services, Ltd. ("USL"), doing business as Parkside Kidney Stone Center ("Parkside"), are prohibited by an order issued by the Federal Trade Commission from entering into any arrangement, including any agreement or contract with purchasers or third-party payers of lithotripsy services, whereby competing urologists agree among themselves concerning any aspect

of the prices, discounts, or other terms of sale or reimbursement of their professional services related to the provision of lithotripsy.

Purchasers and third-party payers who have entered into such contracts with Parkside have not engaged in any improper or unlawful conduct by signing such contracts, and are not covered by the order issued by the Federal Trade Commission. However, this order may affect such contracts with Parkside. If you currently have an agreement or contract with Parkside for the provision of lithotripsy services that includes any provisions establishing uniform prices, discounts, or other terms of sale or reimbursement for the professional services of urologists related to the provision of lithotripsy, the order permits you, at your discretion, to immediately terminate the agreement or contract by notifying the contracting party (USS, SCA, or USL) in writing. If you choose not to terminate the agreement or contract by this procedure, Parkside is required by the order to terminate the agreement or contract upon its stated termination or renewal date (including any date set therein for automatic renewal). However, the order does not prohibit Parkside from negotiating new agreements or contracts with you, so long as they do not involve the joint setting of any aspect of the prices, discounts, or other terms of sale or reimbursement of urologists' professional services related to the provision of lithotripsy.

Thus, the order does not prohibit Parkside from negotiating or entering into new contracts with you for the provision of lithotripsy machine services and anesthesia services related to lithotripsy, where you independently arrange with urologists for provision of their professional services for lithotripsy. In addition, Parkside is not prohibited from conveying information, offers, and responses between purchasers or payers and individual urologists providing their professional services related to the provision of lithotripsy, so long as these activities do not involve any explicit or implicit agreements among urologists regarding the prices, discounts, or other terms of sale or reimbursement of their professional services. This may be done, for example, by using a "messenger model" arrangement as discussed in the August 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and the U.S. Department of Justice.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

I agree that an order requiring the respondents to cease and desist from fixing the price of professional lithotripsy services is warranted, but the requirement that the respondents, for ten years, give the Commission 45 days notice before "forming or participating in an integrated joint venture" that sets prices for lithotripsy services is unjustified and unnecessary.¹ The prior notice requirement departs from the Commission's policy adopting a presumption against prior approval and prior notice provisions in merger and joint venture orders.² An exception to the policy may be appropriate, if there is a credible risk that prior notice is necessary to prevent repetition of the unlawful conduct. Given the express prohibition in the order of the allegedly unlawful conduct, the potential liability for civil penalties for a violation, and the periodic reports of compliance that may be required under the order, no such necessity appears. I dissent from the prior notice requirement.

¹ The prior notice requirement is inconsistent with the weight of Commission precedent. Similar cases in the health care field typically have not imposed any notice requirements or have required notice within 30 days after certain joint venture activity. *See, e.g.,* Physician Group, Inc., Docket C-3610 (Aug. 11, 1995); Trauma Associates of North Broward, Inc., Docket C-3541 (Nov. 1, 1994); *Southbank IPA, Inc.*, 114 FTC 783 (1991); *Preferred Physicians, Inc.*, 110 FTC 157 (1988); *Medical Staff of Doctors' Hospital of Prince George's County*, 110 FTC 476 (1988). But *see* Montana Associated Physicians, Inc., Docket C-3704 (Jan. 13, 1997) (20-year prior approval); College of Physicians-Surgeons of Puerto Rico, File No. 971-0011 (filed D. Puerto Rico Oct. 2, 1997), Commissioner Azcuenaga concurring in part and dissenting from perpetual prior approval requirement.

² Prior Approval Policy Statement (June 1955), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,241.

Complaint

125 F.T.C.

IN THE MATTER OF

FOOTE, CONE & BELDING ADVERTISING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE CONSUMER LEASING ACT, REGULATION M AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3792. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order prohibits, among other things, the Illinois-based advertising agency of Mazda Motor of America from misrepresenting in any motor vehicle lease advertisement the total amount due at lease signing or delivery, the amount down, and/or the down payment, capitalized cost, reduction, or other amounts that reduce the capitalized cost of the vehicle (or that no such amount is required).

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky and David Medine.*

For the respondent: *Elroy H. Wolff, Sidley & Austin, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Foote, Cone & Belding Advertising, Inc., a corporation ("respondent" or "FCB"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Foote, Cone & Belding Advertising, Inc. is a Delaware corporation with its principal office or place of business at 101 East Erie Street, Chicago, Illinois.

2. Respondent, at all times relevant to this complaint, was an advertising agency of Mazda Motor of America, Inc. ("Mazda"). Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.