

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

J. Thomas Rosch

**In the Matter of
CARILION CLINIC,
a corporation.**

Docket No. 9338

DECISION AND O

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and

3. all rights, title, and interests of Respondent Carilion in any tangible property (except for consumable or disposable inventory) that has been on the premises of the CAI at any time since the Acquisition including, but not limited to, all equipment, imaging equipment, furnishings, fixtures, improvements, and appurtenances;
4. any interest (other than leases) held by Respondent Carilion in the real property of CAI;
5. books, records, files, correspondence, manuals, computer printouts, databases, and other documents Relating To the Operation Of CAI located on the premises of CAI or in the possession of Respondent Carilion employees responsible for CAI (or copies thereof where Respondent Carilion has a legal obligation to maintain the original document), including, but not limited to:
 - a. documents containing information Relating To patients (to the extent transferable under applicable law), including, but not limited to, medical records,
 - b. financial records,
 - c. personnel files,
 - d. Physician lists and other records of CAI's dealings with Physicians,
 - e. maintenance records,
 - f. promotional and advertising materials,
 - g. documents Relating To policies and procedures,
 - h. documents Relating To quality control,
 - i. documents Relating To Payors,
 - j. documents Relating To suppliers, and
 - k. copies of contracts with Payors and suppliers, unless such contracts cannot, according to their terms, be disclosed to third parties even with the permission of Respondent Carilion to make such disclosure;
6. CAI's Medicare and Medicaid provider numbers, to the extent transferable;
7. all permits and licenses, to the extent transferable including, but not limited to, Medicare certification to operate as an imaging center;
8. intangible property relating exclusively to the Operation Of CAI;

9. assets that are used in, or necessary for, the Operation Of CAI; and
 10. the Certificates of Public Need associated with CAI.
- H. “CAI Divestiture Agreement” means any agreement pursuant to which Respondent Carilion divests the CAI Business pursuant to this Order and with the prior approval of the Commission.
- I. “CAI Effective Date” means the date on which Respondent Carilion divests the CAI Business to the CAI Acquirer.
- J. “COPN” means a Certificate of Public Need which is the regulatory approval required by the Commonwealth of Virginia, pursuant to 12 VAC §§ 5-220-10 *et seq.*, before any clinical health facility can create, add to, relocate or expand clinical health services or facilities, and for any capital expenditure exceeding \$15 million.
- K. “Confidential Business Information” means competitively sensitive

4. any interest (other than leases) held by Carilion in the real property of CSE;
5. books, records, files, correspondence, manuals, computer printouts, databases, and other documents Relating

V. "Operation Of CSE" means all activities Relating To the business of CSE, including, but not limited to:

1. attracting patients to CSE for outpatient surgical services, providing outpatient surgical services to patients at CSE

- AA. “Referring CAI Physician” means any Physician or Physician assistant or other Person who, since January 1, 2008, referred a patient to CAI, including, but not limited to CAI Affiliated Radiologists.
- BB. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- CC. “Roanoke Area” means the areas around Roanoke, Virginia, and Salem, Virginia, covered by the following zip codes: 24001, 24002, 24003, 24004, 24005, 24006, 24007, 24008, 24009, 24010, 24011, 24012, 24013, 24014, 24015, 24016, 24017, 24018, 24019, 24020, 24022, 24023, 24024, 24025, 24026, 24027, 24028, 24029, 24030, 24031, 24032, 24033, 24034, 24035, 24036, 24037, 24038, 24040, 24042, 24043, 24044, 24045, 24048, 24050, 24059, 24065, 24070, 24077, 24083, 24153, 24155, 24156, 24157, 24175, 24179.

II.

IT IS FURTHER ORDERED that:

- A. Respondent Carilion shall divest, within three (3) months after the date on which Respondent Carilion signs the Consent Agreement, the CAI Business absolutely and in good faith, at no minimum price, only to a CAI Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The CAI Divestiture Agreement between Respondent Carilion and the CAI Acquirer shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of the CAI Acquirer or to reduce any obligations of Respondent Carilion under such agreements, and such agreement, if approved by the Commission as the CAI Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof. Any failure by Respondent Carilion to comply with any term of the CAI Divestiture Agreement shall constitute a failure to comply with this Order.
- B. Respondent Carilion shall divest, within three (3) months after the date on which Respondent Carilion signs the Consent Agreement, the CSE Business absolutely and in good faith, at no minimum price, only to a CSE Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

6. In negotiating agreements to divest assets pursuant to this Order and engaging in related due diligence;

7. In complying with this Order;

8. To the extent necessary to allow Resp^{ag} (005) LTD (0000) Th (Orda) 52808.010905188000.0010 6

any individual patient's case, or engaging in quality improvement and peer review activities.

- B. For a period of six (6) months after the date on which Respondent Carilion signs the Consent Agreement, Respondent Carilion shall not directly or indirectly, solicit or attempt to solicit a Referring CAI Physician or a Physician practice that includes a Referring CAI Physician to be employed by, or exclusively under contract with, Respondent Carilion. *PROVIDED, HOWEVER*, this Paragraph III.B does not prohibit Respondent Carilion and its employees from discussing any individual patient's case, or engaging in quality improvement and peer review activities. *PROVIDED, FURTHER, HOWEVER*, this Paragraph III.B. does not prohibit Respondent Carilion from placing general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the particular Referring CAI Physician or a Physician practice that includes a Referring CAI Physician; *PROVIDED FURTHER, HOWEVER*, Respondent Carilion may hire such Referring CAI Physician or a Physician practice that includes a Referring CAI Physician who seek out Respondent Carilion for employment as long as such Persons were not solicited by Respondent Carilion in violation of this Paragraph. *PROVIDED, FURTHER, HOWEVER*, this Paragraph III.B. does not prohibit Respondent Carilion from continuing discussions with the Confidential Referring CAI Physicians that began before the date Respondent signed the Consent Agreement in which Respondent Carilion is attempting to hire a Referring CAI Physician or a Physician practice that includes a Referring CAI Physician.
- C. Within ten (10) days after the date the Consent Agreement is accepted for public comment, Respondent Carilion shall:
1. notify any Referring CAI Physician or a Physician practice that includes a Referring CAI Physician with whom it is discussing the possible acquisition of the practice or the possible hiring of Referring CAI Physicians that they are under no continuing obligation to continue such discussions with Respondent Carilion; and
 2. provide such Referring CAI Physician and such Physician practice that includes a Referring CAI Physician with a copy of this Order together with the Analysis to Aid Public Comment that accompanies the Consent Agreement.
- D. At any time after Respondent Carilion has signed the Consent Agreement and up to ninety (90) days after the CAI Effective Date, Respondent Carilion shall facilitate the hiring of any Designated CAI Carilion Employee by the CAI Acquirer by:
1. Allowing the CAI Acquirer an opportunity to interview each Designated CAI Carilion Employee before they are hired pursuant to this paragraph;
 2. Allowing the CAI Acquirer to inspect the personnel files and other documentation relating to the Designated CAI Carilion Employee, to the extent permissible under applicable laws, before they are hired pursuant to this paragraph;

3. Not offering any incentive to the Designated CAI Carilion Employee to decline employment with the CAI Acquirer; and
 4. Not interfering with any negotiations by the CAI Acquirer to employ any Designated CAI Carilion Employee.
- E. At any time after Respondent Carilion has signed the Consent Agreement and up to ninety (90) days after the CSE Effective Date, Respondent Carilion shall facilitate the hiring of any Designated CSE Carilion Employee by the CSE Acquirer by:
1. Allowing the CSE Acquirer an opportunity to interview each Designated Carilion CSE Employee before they are hired pursuant to this paragraph;
 2. Allowing the CSE Acquirer to inspect the personnel files and other documentation relating to the Designated CSE Carilion Employee, to the extent permissible under applicable laws, before they are hired pursuant to this paragraph;
 3. Not offering any incentive to the Designated CSE Carilion Employee to decline employment with the CSE Acquirer; and
 4. Not interfering with any negotiations by the CSE Acquirer to employ any Designated CSE Carilion Employee.
- F. Respondent Carilion shall:
1. Allow the Image Guided Therapeutics P.C. to terminate its contract with Respondent Carilion with no penalty or delay.
 2. Remove any contractual impediments that may deter any Designated CAI Carilion Employee and Designated Carilion CSE Employee from accepting employment with the CAI Acquirer and CSE Acquirer, respectively, working for such acquirer, and assigning any confidentiality agreements or restrictions, except as to information related solely to products or businesses not transferred to such CAI Acquirer or CSE Acquirer, respectively.

IV.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent Carilion signs the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that Respondent Carilion expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.

- B. The Commission shall select the Monitor, subject to the consent of Respondent Carilion, which consent shall not be unreasonably withheld. If Respondent Carilion has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Carilion of the

responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

5. Respondent Carilion shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.
 6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent Carilion of its obligations under the Orders.
 7. Respondent Carilion may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *PROVIDED, HOWEVER*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondent Carilion, which consent shall not be unreasonably withheld. If Respondent Carilion has not opposed, in writing, including the reasons for opposing

- H. A Monitor appointed pursuant to the Asset Maintenance Order may be the same person appointed as the Monitor pursuant to this Decision and Order, and the Divestiture Trustee pursuant to the relevant provisions of this Decision and Order.

V.

IT IS FURTHER ORDERED that:

- A. If Respondent Carilion has not fully complied with the obligations as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the CAI Business and the CSE Business in a manner that satisfies the requirements of this Order.

In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent Carilion shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraph II. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph V shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Carilion to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Carilion, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Carilion has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Carilion of the identity of any proposed Divestiture Trustee, Respondent Carilion shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent e,cue ea ptuste g

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the CAI Business and the CSE Business as described in Paragraph II of this Order, absolutely and in good faith, at no minimum price, to one or more acquirers that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period or periods may be extended by the Commission; *PROVIDED, HOWEVER*, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Carilion shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Carilion shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Carilion shall extend the time for divestiture under this Paragraph V in an amount equal to the delay, as determined by the Commission.
4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Carilion's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order;

PROVIDED, HOWEVER, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for assets to be divested pursuant to Paragraph II, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent Carilion from among those approved by the Commission;

PROVIDED FURTHER, HOWEVER, that Respondent Carilion shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Carilion, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Carilion, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the

account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent Carilion, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a c

VI.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final:

- A. Respondent Carilion shall not, without the prior approval of the Commission, acquire, directly or indirectly, any assets divested pursuant to this Order; and
- B. Respondent Carilion shall not, without providing advance written notification to the Commission in the manner described in this Paragraph VI.B., directly or indirectly, acquire all or any part of:
 - 1. an advanced outpatient imaging services center with a COPN that provides, among other things, MRI and CT scanning services, in the Roanoke Area.
 - 2. an ambulatory outpatient surgical center with a COPN in the Roanoke Area.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to ~~Part 803 of the United States Code~~ of Federal Regulations as amended (herein referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States ~~Department~~ set forth in the

VII.

IT IS FURTHER OR

CONFIDENTIAL EXHIBIT A

Confidential CAI Referring Physician

[Redacted From Public Record Version But Incorporated by Reference]