

**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 (00000) Th (Orda) 52808.010905188000.0016

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

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 identity of any proposed Monitor, Respondent Carilion shall be deemed to have consented to the selection of the proposed Monitor.
- C. Not later than ten (10) days after appointment of the Monitor, Respondent Carilion shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Carilion's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.
- D. Respondent Carilion shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor Respondent Carilion's compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission including, but not limited to:
 - a. Assuring that Respondent Carilion expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders; and
 - b. Monitoring any agreements between Respondent Carilion and either the CAI Acquirer or the CSE Acquirer.
 - 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 - 3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Carilion's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent Carilion's compliance with its obligations under the Orders. Respondent Carilion shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Carilion's compliance with the Orders.
 - 4. The Monitor shall serve, without bond or other security, at the expense of Respondent Carilion on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent

Carilion, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and 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, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Carilion of the identity of any proposed Monitor, Respondent Carilion shall be deemed to have consented to the selection of the proposed Monitor.
 2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent Carilion shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Carilion's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the CAI Business and the CSE Business as described in Paragraph II of this Order.
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 Commissio

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 commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent Carilion shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation 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, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
9. The Divestiture Trustee shall report in writing to Respondent Carilion and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
10. Respondent Carilion may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement;

percent of the outstanding securities or other equity interest in an entity described in this Paragraph VI.B, or (2) Respondent Carilion acquires any additional ownership interest in the Roanoke Ambulatory Surgery Center, a center Respondent Carilion operates as a joint venture with Physicians.

VII.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent Carilion has fully complied with Paragraphs II and III of this Order, Respondent Carilion shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent Carilion shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor or Divestiture Trustee, if any Divestiture Trustee has been appointed pursuant to this Order. Respondent Carilion shall include in its report, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondent Carilion shall include in its report copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

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VIII.

CONFIDENTIAL EXHIBIT A

Confidential CAI Referring Physician

[Redacted From Public Record Version But Incorporated by Reference]