

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
J. Thomas Rosch
Edith Ramirez
Julie Brill
Maureen K. Ohlhausen

_____)	
In the Matter of)	
)	
)	
Alan B. Miller,)	
a natural person;)	
)	Docket No. C-
and)	
)	
Universal Health Services, Inc.,)	
a corporation.)	
)	
_____)	

DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of voting securities of Ascend Health Corporation (“Ascend”) by Universal Health Services, Inc. (“UHS”), an entity controlled by Alan B. Miller (UHS and Alan B. Miller hereinafter referred to as Respondents), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Decree (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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, 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 closed the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Alan B. Miller is a natural person with his offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.
2. Respondent Universal Health Services, Inc. is a corporation organized, existing, and doing business under and by virtue of laws of the State of Delaware, with its corporate head offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "Acquisition" means the proposed acquisition described in and contemplated by the Agreement and Plan of Merger by and among UHS and Ascend dated as of June 3, 2012.
- B. "Acute Inpatient Psychiatric Services" means the provision of inpatient psychiatric services for the diagnosis, treatment, and care of patients deemed, due to an acute psychiatric condition, to be a threat to themselves or others or unable to perform basic life functions.
- C. "Alan B. Miller" means Alan B. Miller, a natural person and all partnerships, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Alan B. Miller, and the respective partners, directors, officers, employees, agents, attorneys, representatives, successors, and assigns of each.
- D. "Ascend" means Ascend Health Corporation, a corporation organized,

existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 32 E. 57th Street, 17th Floor, New York, NY 10022.

- E. "Business Records" means all information, documents, and records, including all electronic records wherever stored, including without limitation, client and customer lists, patient and payor information, referral sources, research and development reports, production reports, service and warranty records, equipment logs, operating guides, manuals, financial and accounting documents, creative materials, advertising materials, promotional materials, studies, reports, correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists, salaries and benefits information, and, subject to legal requirements, copies of all personnel files.
- F. "Closing Date" means the date on which Respondents (or a Divestiture Trustee, if the New Mexico Psychiatric Hospital Assets are required to be divested) consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Peak Behavioral Health Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) to the Commission-approved Acquirer.
- G. "Commission" means the Federal Trade Commission.
- H. "Commission-approved Acquirer" means the Person approved by the Commission to acquire the Peak Behavioral Health Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) pursuant to this Order.
- I. "Confidential Business Information" means information not in the public domain that is primarily related to and primarily used in connection with the Psychiatric Hospital Business, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents, and includes, but is not limited to, pricing information, marketing methods, market intelligence, competitor information, commercial information, management system information, business processes and practices, payor and provider communications, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices.
- J. "Direct Cost" means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent that such costs are directly incurred to provide Transitional Services. "Direct Cost" a Commission-approved Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

- K. "Divestiture Agreement" means the agreement(s) between Respondents and the Commission-approved Acquirer (or between a Divestiture Trustee and the Commission-approved Acquirer, if the New Mexico Psychiatric Hospital Assets are required to be divested), and all amendments, exhibits, attachments, agreements, and schedules thereto related to divestiture of the Peak Behavioral Hospital Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) that have been approved by the Commission to accomplish the requirements of this Order.
- L. "Hold Separate Order" means the Order Hold Separate and Maintain Assets issued by the Commission in this matter.
- M. "Intellectual Property" means, without limitation:
1. all patents, patent applications, and inventions and discoveries that may be patentable;
 2. all know-how, trade secrets, software, technical information, data, registrations, applications for governmental approvals, inventions, processes, best practices (including clinical pathways), formulae, protocols, standards, methods, techniques, designs, quality control practices and information, research and test procedures and information, and safety, environmental and health practices and information;
 3. all confidential or proprietary information, commercial information, management systems, business processes and practices, customer lists, customer information, customer records and files, customer communications, procurement practices and information, supplier qualification and approval practices and information, training materials, sales and marketing practices

made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;

8. all inventories, stores, and supplies;
9. all accounts receivable;
10. all rights under warranties and guarantees, express or implied;
11. all books, records, and files (electronic and hard copy); and
12. all Business Records;

provided, however, that the Psychiatric Hospital Assets shall not include Respondents' rights, title, and interests in property and assets, tangible or intangible, that are not primarily related to or primarily used in connection with the Psychiatric Hospital Business conducted at the specified Psychiatric Hospital Facility;

provided, however, at the option of the Commission-approved Acquirer, that the Psychiatric Hospital Assets need not include any property or assets that the Commission-approved Acquirer determines does not need or want, if the Commission approves the Divestiture Agreement without such property or assets; and

provided, however, that Respondents may retain a copy of all books, records, files, and Business Records to the extent necessary to comply with applicable law, regulations, and other legal requirements.

- T. "Psychiatric Hospital" means a health care facility, licensed or certified as a psychiatric hospital (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides Acute Inpatient Psychiatric Services.
- U. "Psychiatric Hospital Business" means the operation of a Psychiatric Hospital Facility and includes but is not limited to the provision of Acute Inpatient Psychiatric Services, whether provided or performed at the facility or in a different location within the Relevant Area, and also includes all other services, businesses, and operations primarily related to the specified Psychiatric Hospital Facility.
- V. "Psychiatric Hospital Facility" means Psychiatric Hospital or a Psychiatric Unit.
- W. "Psychiatric Unit" means a department, unit, or other organizational subdivision of a hospital, licensed or certified as a provider of inpatient psychiatric care (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides Acute Inpatient Psychiatric Services.

X. "Relevant Area" means the El Paso Metr

II.

IT IS FURTHER ORDERED that:

- A. No later than six (6) months after the Order is issued, Respondents shall divest the Peak Behavioral Health Assets ~~solely~~ and in good faith and at no minimum price, as an on-going business, only to a single acquirer that receives the prior approval of the Commission, and only in a manner (including an executed Divestiture Agreement) that receives the prior

III.

IT IS FURTHER ORDERED that:

A.

notification and with copies of all other certifications, notifications, and reminders sent to Respondents' personnel.

C. Respondents shall:

1.

- B. Within a reasonable time after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make offers of employment to any one or more of the Relevant Employees;
- C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by the Prospective Acquirer;
- D. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from the Prospective Acquirer, *provided, however*

that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if the Commission-approved Acquirer has notified Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Commission-approved Acquirer.

V.

IT IS FURTHER ORDERED

Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI.A. 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 Section 5 of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
1. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.
 2. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - a. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.
 - b. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraph II. of this Order, or believes that such obligations can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court, provided, however, that the Commission

may extend the period only two (2) times.

- c. Subject to any demonstrated or generally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and files 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. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph VI. for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
- d. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' 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

VII.

IT IS FURTHER ORDERED that:

- A. No Divestiture Agreement shall limit or contradict, or be construed to limit 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 any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreements.
- B. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof.
- C. Respondents shall comply with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a failure to comply with this Order. If any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order.

VIII.

IT IS FURTHER ORDERED that:

- A. For a period of ten (10) years from the date this Order is issued, Respondents shall not, without providing advance written notification to the Commission in the manner described in this Paragraph, directly or indirectly:
 - 1. Acquire any stock, share capital, equity or other interest in any Person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in or engaged in providing Acute Inpatient Psychiatric Services in the Relevant Area; or
 - 2. Enter into any agreement or other arrangement to manage or otherwise control a Third Party Psychiatric Facility which, during the twelve (12) months immediately preceding such agreement or arrangement, was engaged or is engaged in providing Acute Inpatient Psychiatric Services in the Relevant Area.

Nothing herein shall be construed to require advance written notification if Respondents seek to open a new Psychiatric Hospital Facility or expand existing Acute Inpatient Psychiatric Services at one of Respondents' Psychiatric Hospital Facilities in the Relevant Area.

B. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), 16 C.F.R. § 803 App., 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 of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or

of all parties contacted. Respondents shall include in their compliance reports copies of all written communication to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

- B. One (1) year after this Order is issued, annually for the next nine (9) years on the anniversary of that date, and other times as the Commission may require, Respondents shall file written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

X.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of such Respondent;
- B. Any proposed acquisition, merger, consolidation of such Respondent; and
- C. Any other change in such Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to legally recognized privilege, and upon written request and upon five (5) days notice to the applicable Respondent made to their principal United States office, registered office of their United States subsidiaries, or headquarters elsewhere, such Respondent shall, without restraint or interference, permit duly authorized representative of the Commission:

- A. Access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of such Respondent; and

Confidential Appendix

Exceptions To Relevant Employees Definition

[Redacted From the Public Record Version, But Incorporated By Reference]