

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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In the Matter of)	
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)	
Alan B. Miller,)	
a natural person;)	
)	Docket No. C-4372
and)	
)	
Universal Health Services, Inc.,)	
a corporation.)	
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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 Orders (“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

- 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

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 amendmen

- P. “Peak Behavioral Health Assets” means the Psychiatric Hospital Assets associated with and the Psychiatric Hospital Business conducted at the Psychiatric Hospital Facility, doing business as Peak Behavioral Health Services, LLC, located at 5055 McNutt Road, Santa Teresa, New Mexico 88088.
- Q. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.
- R. “Prospective Acquirer” means a Person that Respondents (or the Divestiture Trustee, if the New Mexico Psychiatric Hospital Assets are required to be divested) intend to submit to the Commission for its prior approval pursuant to Paragraph II.A. (or Paragraph VI. if applicable) of this Order.
- S. “Psychiatric Hospital Assets” means all of Respondents’ rights, title, and interest in all property and assets, tangible or intangible, of whatever nature and wherever located, relating to or used in connection with the Psychiatric Hospital Business, including, without limitation, the following:
1. all real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee) to the extent transferable, including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
 2. all Tangible Personal Property, including, without limitation, any Tangible Personal Property removed from and not replaced at the specific Psychiatric Hospital Facility, if such property was used by or in connection with the Psychiatric Hospital Business conducted at such facility on or after the date Respondents execute the Consent Agreement;
 3. all rights under any and all contracts and agreements (e.g., leases, service agreements such as dietary and housekeeping services, supply agreements, procurement contracts) to the extent assignable, including but not limited to contracts and agreements with physicians, other health care providers, unions, third-party payors, HMOs, customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners, and consignees;
 4. all rights and title in and to use the name of each of the hospitals on a permanent and exclusive basis (even as to Respondents);
 5. all Intellectual Property;
 6. all intangible rights and property other than Intellectual Property, including, going concern value, goodwill, internet, telephone, telecopy and telephone numbers, domain names, listings, and web sites;

7. all approvals, consents, licenses, certificates, registrations, permits, waivers, or other authorizations issued, granted, given, or otherwise 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 interest to or 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 it 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 a 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 Metropolitan Statistical Area, as defined by the US Office of Management and Budget, and the Las Cruces Metropolitan Statistical Area, as defined by the US Office of Management and Budget.
- Y. “Relevant Employees” means any and all full-time employees, part-time employees, contract employees, or independent contractors whose duties, at any time during the ninety (90) days preceding the Acquisition Date or at any time after the Acquisition Date, related or relate primarily to the Peak Behavioral Health Business (or the New Mexico Psychiatric Hospital Assets, if required to be divested); *provided, however*, that the persons listed in the Confidential Appendix shall not be considered Relevant Employees.
- Z. “Respondents” means Alan B. Miller and UHS, collectively or

representatives, successors, and assigns of each; after the Acquisition, UHS includes Ascend.

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, absolutely 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 approval of the Commission.
- B. Respondents shall cooperate with the Commission-approved Acquirer to ensure that the Peak Behavioral Health Assets are transferred to the Commission-approved Acquirer as a financially and competitively viable Psychiatric Hospital Facility, operating as an ongoing business providing Acute Inpatient Psychiatric Services, including but not limited to providing assistance necessary to transfer to the Commission-approved Acquirer all governmental approvals needed to operate the Peak Behavioral Health Assets.
- C. Prior to the Closing Date, Respondents shall:
 - 1. secure all consents and waivers from all Third Parties that are necessary for Respondents to divest the Peak Behavioral Health Assets and/or to grant any license(s) to the Commission-approved Acquirer to permit the Commission-approved Acquirer to operate the Peak Behavioral Health Assets; *provided, however*, that Respondents may satisfy this requirement by certifying that such Commission-approved Acquirer has executed all such agreements directly with each of the relevant Third Parties; and
 - 2. take all actions necessary to ensure that the Peak Behavioral Health Assets meet federal, state, local, and municipal requirements necessary to allow the transfer of the Peak Behavioral Health Assets to the Commission-approved Acquirer.
- D. The purpose of the divestiture is to ensure the continuation of the Peak Behavioral Health Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) as an ongoing, viable Psychiatric Hospital Facility and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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(l) 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 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. 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 is 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 at other times as the Commission may require, Respondents shall file verified 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, or 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 any legally recognized privilege, and upon written request and upon five (5) days notice to the applicable Respondent made to their principal United States offices, registered office of their United States subsidiaries, or headquarters addresses, such Respondent shall, without restraint or interference, permit any 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

- B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Order.

XII.

IT IS FURTHER ORDERED

Confidential Appendix

Exceptions To Relevant Employees Definition

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