

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright
Terrell McSweeney

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In the Matter of)	
)	
H.I.G. Bayside Debt & LBO Fund II, L.P.,)	
 a partnership,)	
)	Docket No. C-4494
and)	
)	
Crestview Partners, L.P.,)	
 a partnership.)	
_____)	

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Surgery Center Holdings, Inc., a subsidiary of H.I.G. Bayside Debt & LBO Fund II, L.P. (“H.I.G.”), of Symbion Holdings Corporation, a subsidiary of Crestview Partners, L.P. (“Crestview”), 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 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 considered the matter and having determined that it has 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 an 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 H.I.G. Bayside Debt & LBO Fund II, L.P., is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 1450 Brickell Avenue, 31st Floor, Miami, Florida 33131. Surgery Center Holdings, Inc., is a subsidiary of Respondent H.I.G. Bayside Debt & LBO Fund II, L.P.
2. Respondent Crestview Partners, L.P., is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 667 Madison Avenue, 10th Floor, New York, New York 10065. Symbion Holdings Corporation is a subsidiary of Crestview Partners, L.P.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the 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. “H.I.G.” means H.I.G. Bayside Debt & LBO Fund II, L.P., its directors, officers, partners, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships, subsidiaries (including Surgery Center Holdings, Inc.), divisions, groups, and affiliates controlled by H.I.G., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition is completed, H.I.G. includes Symbion.
- B. “Crestview” means Crestview Partners, L.P., its directors, officers, partners, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships, subsidiaries (including Symbion Holdings Corporation), divisions, groups, and affiliates controlled by Crestview, and the respective

- L. “Closing Date” means the date on which Respondents (or a Divestiture Trustee, if one is appointed by the Commission) consummate a transaction to divest the Symbion Membership Interest (or the SP Membership Interest, if required to be divested) to the Commission-approved Acquirer.
- M. “Commission-approved Acquirer” means the entity approved by the Commission to acquire the Symbion Membership Interest (or the SP Membership Interest, if required to be divested) pursuant to this Order.
- N. “Confidential Business Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, patient lists and information, physician referral lists, price lists, Payor contract terms, other contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- O. “Direct Cost” means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide Transition Services. “Direct Cost” to a Commission-approved Acquirer for its use of any of Respondents’ employee’s labor shall not exceed the then-current average wage rate for such employee, including benefits.
- P. “Divestiture Agreement” means any agreement between one or both the Respondents and a Proposed Acquirer (or a Divestiture Trustee appointed pursuant to Paragraph VIII. of this Order and a Proposed Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to divestiture of the Symbion Membership Interest (or the SP Membership Interest, if required to be divested), that have been submitted to the Commission for its approval to accomplish the requirements of this Order, including, but not limited to, the Transition Services Agreement.
- Q. “Divestiture Trustee(s)” means any person or entity appointed by the Commission pursuant to Paragraph VIII. of this Order to act as a trustee in this matter.

behalf), and a Management Company pursuant to which such Management Company shall provide administrative and management services to the Ambulatory Surgical Center.

T. “Management Company” means the Person or entity managing the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), other than Symbion or H.I.G.

U. “Operating Agreement” means an agreement providing for the operation of the limited liability company that owns and operates the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) and establishing the relative rights and responsibilities of the members of the company.

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rights of first refusal, from all private and governmental entities that are necessary for the divestiture of the Symbion Membership Interest (or the SP Membership Interest, if required to be divested) and for the continued operation of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) as an ongoing ASC Business in substantially the same manner as the business was operated prior to the Acquisition, including execution of the applicable Operating Agreement.

- C. The purpose of the divestiture

IV.

IT IS FURTHER ORDERED that:

- A. Respondents shall, at the option of the Commission-approved Acquirer, provide Transition Services to the

1. To meet personally, and outside of the presence or hearing of any employee or agent of any Respondents, with any one or more of the ASC Employees; and
2. To make offers of employment

Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company to terminate his or her employment with the Commission-approved Acquirer, its agent, an agent of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company; provided, however, that Respondents may:

- a. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at ASC Employees; or
- b. hire ASC Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph G.4.; provided further, however, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any ASC 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, its agent, an agent of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company.

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VI.

IT IS FURTHER ORDERED that:

- A. After the Closing Date, Respondents shall not use, solicit, or access, directly or indirectly, any Confidential Business Information of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), and shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish such Confidential Business Information, directly or indirectly, to or with any Person other than:
 - 1. As necessary to comply with the requirements of this Order or the Hold Separate Order;
 - 2. Pursuant to a Divestiture Agreement; or
 - 3. To comply with applicable law, regulations, and other legal requirements.
- B. No later than five (5) days after the Acquisition is completed, Respondents shall provide written notification of the restrictions, prohibitions, and requirements of this Paragraph VI. to all of Respondents' employees, agents, and representatives

- E. Respondents shall, no later than thirty (30) days after the Acquisition is completed:
1. Obtain, as a condition of continued employment, from each of Respondents' employees, agents, and representatives who had or have access to or possession, custody, or control of any Confidential Business Information of the Blue Springs Surgery Center and the Orange City Surgery Center an executed confidentiality agreement that complies with the restrictions, prohibitions, and requirements of this Order and the Hold Separate Order; and
 2. No later than thirty (30) days after the Closing Date, institute procedures and requirements and take such actions as are necessary to ensure that Respondents' personnel comply with the restrictions, prohibitions, and requirements of this Paragraph VI., including all actions that Respondents would take to protect their own trade secrets and confidential information.

VII.

IT IS FURTHER ORDERED that:

- A. At any time after the Respondents sign the Agreement Containing Consent Order in this matter, the Commission may appoint a Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Divestiture Agreement, including the Transition Services Agreement and the Order to Hold Separate and Maintain Assets.
- B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have 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 Respondents of the identity of any proposed monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.
- C. No later than ten (10) days after appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights, powers, and authorities necessary to permit the monitor to perform his/her duties and responsibilities, pursuant to this Order in a manner consistent with the purposes of this Order.

- D. If a Monitor is appointed, Respondents 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 Respondents' compliance with the Respondents' obligations under the Order, 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 Order and in consultation with the Commission.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
- E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order and the Divestiture Agreement.
- F. Respondents

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otherwise conveyed 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 under this Order. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VIII. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

6. The Divestiture Trustee shall use his or her best 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 a Commission-approved Acquirer as required by this Order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person, and if the Commission determines to approve more than one such acquiring person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such person within five (5) days of receiving notification of the Commission's approval.
7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, 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 Respondents, 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 and, in the case of a court-appointed Divestiture Trustee, by the court, 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 Respondents, 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 assets that are required to be divested by this Order.
8. Respondents 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 dut

privileged internal memoranda, and all non-privileged reports and recommendations concerning completing the obligations; and

- B. One (1) year from the date this Order is issued, annually for the next nine (9) years on the anniversary of the date this Order is issued, 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 Respondents;
- B. Any proposed acquisition, merger, or consolidation of Respondents; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

XI.

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

- A. Access, during business 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 relating 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. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

