

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

DECISION AND ORDER

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

- C. “Surgery Partners” means Surgery Center Holdings, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships, subsidiaries, divisions, groups, and affiliates controlled by Surgery Partners, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition is completed, Surgery Partners includes Symbion.

- D. “Symbion” means Symbion Holdings Co

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.

- 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.
- V. “Orange City Employees” means all Persons who are full-time employees, part-time employees, contract employees, or independent contractors of Respondents whose duties, at any time during the six (6) months preceding the date Respondents execute the Agreement Containing Consent Order in this matter or at any time after the date Respondents execute the Agreement Containing Consent Order in this matter, related or relate to the ASC Business of the Orange City Surgery Center.
- W. “Orange City Surgery Center” means Orange City Surgery Center, LLC, a Florida limited liability company, and includes the Ambulatory Surgery Center located at 975 Town Center Dr., Orange City, FL 32763.
- X. “Outpatient Surgical Services” means a broad cluster of procedures that do not require an overnight stay at a healthcare facility, including, but not limited to, arthroscopic knee surgery, cataract removal, colonoscopy, and anesthetic injections for pain management.
- Y. “Payor” means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other person, including, but not limited to: health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; health maintenance organizations; government health benefits programs; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.
- Z. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, or other business or legal entity.
- AA. “Proposed Acquirer” means any proposed acquirer of the Symbion Membership Interest (or the SP Membership Interest, if required to be divested) that is submitted to the Commission for its approval under this Order; Proposed Acquirer of the Symbion Membership Interest may include Dr. Mark W. Hollmann.

BB. “SP Membership Interest” means all of H.I.G.’s rights in and title to H.I.G.’s

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 is to ensure the continuation 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 viable enterprise engaged in the provision of Outpatient Surgical Services independent of Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that, pending divestiture of the Symbion Membership Interest (or the SP Membership Interest, if required to be divested), Respondents shall:

- A. With respect to the Symbion Membership Interest, the Blue Springs Surgery Center, and the ASC Business of the Blue Springs Surgery Center:
1. Ensure that the ASC Business of the Blue Springs Surgery Center is managed separate, apart, and independent of Respondents' other businesses and assets as required by this Decision and Order and the Hold Separate Order and shall vest the Blue Springs Surgery Center with all rights, powers, and authority necessary to conduct its business;
 2. Take no actions that interfere with existing relationships with third parties, including Payors, providers, suppliers, and others having business relations with the Blue Springs Surgery Center;
 3. Not exercise direction or control over, or influence directly or indirectly, the ASC Business of the Blue Springs Surgery Center or any of its operations, except to the extent that Respondents must exercise direction and control over the business as is necessary to assure compliance with the Hold Separate Order, the Consent Agreement, the Decision and Order, and all applicable laws;
 4. Take all actions necessary to maintain the marketability of the Symbion Membership Interest and the economic viability and competitiveness of the Blue Springs Surgery Center, and the ASC Business of the Blue Springs Surgery Center, to minimize any risk of loss of competitive potential for the Blue Springs Surgery Center or the ASC Business of the Blue Springs Surgery Center, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Blue Springs Surgery Center or the ASC Business of the Blue Springs Surgery Center, except for ordinary wear and tear; and

5. Not sell, transfer, encumber, or otherwise impair the Symbion Membership Interest (except as required by the Decision and Order), take no action that lessens the marketability of the Symbion Membership Interest or the full economic viability or competitiveness of the Blue Springs Surgery Center, or the ASC Business of the Blue Springs Surgery Center.

B. With respect to the SP Membership Interest, the Orange City Surgery Center, and the Orange City Surgery Center, Respondents shall:

1. Maintain the management of the Orange City Surgery Center, in the regular and ordinary course of business and in accordance with past practice and as may be necessary to preserve the marketability of the SP Membership Interest and the viability and competitiveness of the Orange City Surgery Center and the ASC Business of the Orange City Surgery Center, to minimize any risk of loss of competitive potential of the Orange City Surgery Center and the ASC Business of the Orange City Surgery Center, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Orange City Surgery Center or the ASC Business of the Orange City Surgery Center, except for ordinary wear and tear;
2. Use their best efforts, in a manner consistent with past practices, to preserve the existing relationships with third parties, including Payors, providers, suppliers, and others having business relations with the Orange City Surgery Center;
3. Take all actions necessary to maintain the economic viability, marketability, and competitiveness of the SP Membership Interest, the Orange City Surgery Center, and the ASC Business of the Orange City Surgery Center, and prevent the destruction, remnimize any risk of

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to a Transition Services Agreement, subject to the prior approval of the Commission.

- B. Respondents shall provide Transition Services to the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) necessary and sufficient to assure the operation of the ASC Business of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) in substantially the same manner that such business was operated prior to the Acquisition and to provide Outpatient Surgical Services in at least the same manner as were provided prior to the Acquisition.
- C. Respondents shall provide the Transition Services required by this Paragraph at least at the same level and quality as such services are or have been provided by or to Respondents with respect to the other ASC Businesses that they manage or have managed, including the services Symbion provided to the ASC Business of the Blue Springs Surgery Center and Surgery Partners provided to the ASC Business of the Orange City Surgery Center.
- D. Subject to the prior approval of the Commission, the term of the Transition Services Agreement shall be six (6) months with an option by the Commission-approved Acquirer to extend the term for up to another six (6) months.
- E. All services provided by Respondents to the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) pursuant to the Transition Services Agreement shall be at no more than Respondents' Direct Cost.
- F. Prior to or during the term of the Transition Services Agreement, Respondents shall provide an opportunity for 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:
 - 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 or to enable 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 to make offers of employment to any one or more of the ASC Employees.

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- 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 217eirge City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company.

V.

IT IS FURTHER ORDERED that the Divestiture Agreement approved by the Commission:

- A. Shall not 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 agreement; and
- B. Shall be incorporated by reference into this Order and made a part hereof. 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, 217eder Term shall determine Respondents' obligations under this Order.

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 217eirge City Surgery Center, if the SP Membership Interest is required to be divested), and shall not disclose, provide, discuss, exchirge, 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 employed at, or with responsibilities relating to, the Blue Springs Surgery Center or the Orange City Surgery Center, or who had or have access to or possession, custody, or control of any Confidential Business Information relating to the Blue Springs Surgery Center or the Orange City Surgery Center; such notification shall include a plain language explanation of the requirements of this Order and a description of the consequences of failing to comply with the requirements.

- F. Respondents 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 Respondents' compliance with the Order and the Divestiture Agreement.
- G. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
- H. Respondents 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 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 Monitor.
- I. Respondents shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in the agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Order, the Divestiture Agreement, or the Transition Services Agreement. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order and the Divestiture Agreement.
- J. Respondents may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- K. 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 related to Commission materials and information received in connection with the performance of the Monitor's duties.
- L. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VII.

- M. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- N. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee or Monitor pursuant to the relevant provisions of this Order or the Hold Separate Monitor pursuant to the Hold Separate Order.

VIII.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested the Symbion Membership Interest as required by Paragraph II. of this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to divest, at the Divestiture Trustee’s option, either the Symbion Membership Interest or the SP Membership Interest in a manner that satisfies the requirements of this Order, including Paragraph II. 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, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VIII. 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 Respondents to comply with this Order.
- B. 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:
 - 1. 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, 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 Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee. The Commission shall require the Divestiture Trustee to sign a customary confidentiality agreement.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.
3. Within ten (10) days after appointment of the Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture or transfer required by the Order.
4. The Divestiture Trustee shall have twelve (12) months from 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 twelve (12) month 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 may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the divestiture period only two (2) times.
5. 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 assigned, granted, licensed, divested, delivered, or 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

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