

IN THE MATTER OF

DOMINICAN SANTA CRUZ HOSPITAL, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket C-3521. Complaint, Aug. 18, 1994--Decision, Aug. 18, 1994

This consent order prohibits, among other things, the California non-profit corporations from acquiring, for ten years, without prior Commission approval, all or any significant part of a general acute care hospital in Santa Cruz County, CA. The consent order also prohibits, for ten years, the respondents from selling or transferring any hospital in the county to a non-respondent prior to the acquirer agreeing to be bound by the Commission's order.

Appearances

For the Commission: *Jeffrey A. Klurfeld, David M. Newman and John P. Wiegand.*

For the respondents: *Toby Singer and Philip Proger, Jones, Day, Reavis & Pogue, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Catholic Healthcare West and Dominican Santa Cruz Hospital have acquired AMI-Community Hospital in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C.18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to the provisions of Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) "*General acute care hospital*," herein referred to as "*hospital*," means a health facility, other than a federally owned facility, having a duly organized governing body with overall

administrative and professional responsibility, and an organized medical staff, that provides or is licensed to provide 24-hour inpatient care, as well as outpatient services, and having as a function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities; “hospital” does not include any skilled nursing facility, mental health or psychiatric facility, rehabilitation facility, chemical dependency facility or other chronic care facility.

(b) To “*operate a hospital*” means to own, lease, manage, or otherwise control or direct the operations of a hospital, directly or indirectly.

II. THE RESPONDENTS

2. Respondent Catholic Healthcare West (“CHW”) is a non-profit religious corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business and mailing address at 1700 Montgomery Street, Suite 300, San Francisco, California. CHW is a person subject to the jurisdiction of the Commission pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21.

3. CHW is primarily engaged in the establishment, management, and maintenance of acute care hospitals in the western United States. It and its affiliated corporations own and operate hospitals in California, Nevada, and Arizona.

4. Respondent Dominican Santa Cruz Hospital (“Dominican”) is a non-profit religious corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, principal place of business and mailing address at 1555 Soquel Drive, Santa Cruz, California. Dominican operates a hospital facility also called Dominican Santa Cruz Hospital (“DSCH”). Dominican is a person subject to the jurisdiction of the Commission pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21.

5. CHW is the sole corporate member of Dominican. Through this affiliation, CHW controls Dominican.

6. At all times relevant herein, respondents have been and are now engaging in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. CHW does

business in a number of states. CHW and Dominican, through their hospitals, among other things, have:

- (a) Purchased substantial amounts of supplies, equipment and medicines from sources outside of the State of California;
- (b) Received substantial revenues from private and governmental insurers located outside of the State of California; and
- (c) Treated some patients who travel from or reside outside of the State of California.

7. Until the acquisition described in Section III below, respondents owned or operated one general acute care hospital, DSCH, in Santa Cruz County, California.

III. THE ACQUISITION

8. AMI-Community is a wholly-owned subsidiary of American Medical International ("AMI"), a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its executive offices in Beverly Hills, California. The sole shareholder of AMI-Community is AMI. Until the acquisition described below, AMI-Community owned and operated a general acute care hospital in Santa Cruz County, California, the AMI-Community Hospital of Santa Cruz (hereinafter "Community Hospital"). At the time of the acquisition, AMI owned and operated over 49 acute care hospitals in 14 states, including Community Hospital.

9. At all times relevant herein, AMI and AMI-Community have been engaging in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. AMI does business in a number of states. AMI and AMI-Community, through their hospitals, among other things, have:

- (a) Purchased substantial amounts of supplies, equipment and medicines from sources outside of the State of California;
- (b) Received substantial revenues from private and governmental insurers located outside of the State of California; and
- (c) Treated some patients who travel from or reside outside of the State of California.

10. On or about March 8, 1990, Dominican entered into an agreement with AMI for Dominican to purchase substantially all of the assets of AMI-Community, including Community Hospital and associated real property, inventories, tangible personal property, and all transferable licenses. In consideration thereof, the agreement provided that Dominican would pay AMI approximately \$11.25 million.

11. On or about March 8, 1990, Dominican and CHW, through its control of, and affiliation with, Dominican, acquired Community Hospital pursuant to the agreement described in paragraph ten, above.

IV. TRADE AND COMMERCE

12. For purposes of this complaint, the relevant line of commerce is general acute care hospital services.

13. For purposes of this complaint, the relevant sections of the country are Santa Cruz County, California, and/or portions of Santa Cruz County.

14. Prior to the acquisition described above, the relevant markets were highly concentrated, with no more than three firms doing business in the markets. The only hospital in Santa Cruz County, other than DSCH and Community Hospital, was Watsonville Community Hospital in Watsonville, California. In 1989, DSCH had a market share, measured by patient-days, of 62% or more, and, measured by available beds, of 50% or more; Community Hospital had a market share, measured by patient-days, of 14% or more, and measured by available beds, of 23% or more.

15. Entry into the relevant markets is difficult, due to the following factors, among others:

- (a) Substantial lead times required to establish a new hospital, including but not limited to lead times for obtaining regulatory clearance for construction of hospital facilities; and
- (b) Sunk costs that are large relative to the total cost for *de novo* entry.

V. THE EFFECTS OF THE ACQUISITION

16. The acquisition of Community Hospital by CHW and Dominican increased the market share of CHW and Dominican, the

largest provider of acute care hospital services in the Santa Cruz County area, from approximately 62% to approximately 76%, measured by patient-days, and from approximately 50% to approximately 73% measured by available beds, and increased the two-firm concentration ratio from approximately 86%, measured by patient-days, and 77%, measured by available beds, to approximately 100%. As a result of the acquisition, the Herfindahl-Hirschmann Index increased by over 1700 points, from approximately 4620 points to approximately 6350 points, measured by patient-days, and increased by over 2300 points, from approximately 3770 points to approximately 6090, measured by available beds.

17. Through their acquisition of Community Hospital, CHW and Dominican acquired a direct and actual competitor in the relevant markets.

18. The effect of the acquisition of Community Hospital by CHW and Dominican may be substantially to lessen competition or tend to create a monopoly in the relevant markets in the following ways, among others:

- (a) Actual and potential competition in the relevant markets has been substantially reduced;
- (b) CHW and Dominican have obtained a dominant position in the relevant markets;
- (c) The likelihood of collusion in the relevant markets has been substantially increased; and
- (d) Patients, physicians, and purchasers of health care coverage may be denied the benefits of free and open competition based on price, quality, and service.

VI. VIOLATION CHARGED

19. The acquisition of Community Hospital and other assets from AMI-Community by CHW and Dominican violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Azcuenaga and Commissioner Yao dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation into the acquisition of substantially all of the assets of AMI-Community Hospital of Santa Cruz by Dominican Santa Cruz Hospital ("Dominican") and Catholic Healthcare West ("CHW") (hereinafter collectively known as "respondents"), and the respondents having been furnished with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Clayton Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said 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, 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 had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

1. Respondent Dominican is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, principal place of business and mailing address at 1555 Soquel Avenue, Santa Cruz, California.

Respondent CHW is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, principal place of business and mailing address at 1700 Montgomery Street, San Francisco, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order, the following definitions shall apply:

A. “*Dominican*” means Dominican Santa Cruz Hospital (a California corporation), its directors, trustees, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors and assigns.

B. “*CHW*” means Catholic Healthcare West (a California corporation), its directors, trustees, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors and assigns.

C. “*General acute care hospital,*” herein referred to as “*hospital,*” means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides or is licensed to provide 24-hour inpatient care, as well as outpatient services, and having as a function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities; “*hospital*” does not include any skilled nursing facility, mental health or psychiatric facility, rehabilitation facility, chemical dependency facility or other chronic care facility.

D. To “*acquire a hospital*” means to directly or indirectly acquire the whole or any part of the stock, share capital, equity or other interest in or any assets of any hospital, or enter into any arrangement to obtain direct or indirect ownership, management or control of any hospital or any part thereof, including but not limited to the lease of or management contract for a hospital, or the acquisition of the right to designate directly or indirectly the directors or trustees of a hospital. To “*acquire a hospital*” excludes entering into any arrangement to construct a new hospital if a construction permit for such hospital has not been issued by the California Office

of Statewide Health Planning and Development at the time such an arrangement is entered into.

E. “*Affiliate*” means any entity whose management and policies are controlled or directed in any way, directly or indirectly, by the entity of which it is an affiliate.

II.

It is ordered, That, for a period of ten (10) years from the date this order becomes final, neither Dominican nor CHW shall, without the prior approval of the Federal Trade Commission, acquire any hospital in Santa Cruz County, California; and

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, neither Dominican nor CHW shall permit all or any substantial part of any hospital owned or operated by either Dominican or CHW in Santa Cruz County, California, to be acquired by any other person unless the acquiring person files with the Federal Trade Commission, a written agreement to be bound by the provisions of this order, which agreement shall be a condition precedent to the acquisition;

Provided, however, that no acquisition shall be subject to this paragraph II of this order if the fair market value of (or, in the case of a purchase acquisition, the consideration to be paid for) the hospital or part thereof to be acquired does not exceed two million dollars (\$2,000,000).

III.

It is further ordered, That respondents, Dominican and CHW, upon written request of the staff of the Federal Trade Commission, made to Dominican or CHW, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission:

A. Reasonable access during Dominican’s or CHW’s office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in Dominican’s or CHW’s possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to Dominican's and CHW's reasonable convenience, to interview officers or employees of Dominican or CHW, who may have counsel present, regarding such matters; and

It is further ordered, That annually beginning on the first anniversary of the date this order becomes final and continuing for nine (9) years thereafter, Dominican shall submit a verified report demonstrating the manner in which it has complied and is complying with this order.

IV.

It is further ordered, That Dominican and CHW shall notify the Commission at least thirty (30) days prior to any proposed change, such as dissolution, assignment, sale resulting in the emergence of a successor corporation or association, or the creation or dissolution of subsidiaries or affiliates, which may affect compliance obligations arising out of this order.

STATEMENT OF CHAIRMAN JANET D. STEIGER IN SUPPORT OF FINAL ISSUANCE OF CONSENT ORDER

Respondent Dominican Santa Cruz Hospital acquired the assets of its principal competitor, AMI-Community Hospital, in March, 1990, in what I have reason to believe was a violation of Section 7 of the Clayton Act. The Commission has voted to resolve this matter by issuing a consent order that requires Dominican and its parent, Catholic Healthcare West, to seek prior approval of any further hospital acquisitions in the Santa Cruz County, California, market.

The facts of this case provide sufficient reason to believe that this acquisition violates Section 7 of the Clayton Act. Ordinarily, such facts would lead the Commission to seek a preliminary injunction in federal district court. However, the acquisition was not reportable under the Hart-Scott-Rodino Act, and was consummated before Commission staff was able to open an investigation to explore the competitive effects of the acquisition consequently, the Commission never had the opportunity to consider seeking a preliminary injunction under Section 13(b) of the FTC Act to prevent the acquisition from being consummated.

Under these circumstances, the Commission is left with less effective or more costly remedial options.¹ Divestiture of the acquired hospital is not an appealing remedy. The acquired hospital has been converted to a skilled nursing/rehabilitative care facility -- it no longer operates as a hospital -- and the costs of conversion back to a hospital would, even under the best of circumstances, be substantial, with no guarantee of success. In addition, subsequent to the acquisition, Sutter Health, a major Northern California hospital chain, announced plans to construct an acute care hospital in Santa Cruz, which would restore a third hospital competitor in the market.² The very real prospect that Sutter will enter this market, before a divestiture decree could be obtained through litigation and a willing buyer found, is an additional factor weighing against pursuit of a divestiture order.³ Thus, although divestiture may be an appropriate remedy in many cases where the Commission is unable to obtain a pre-consummation injunction, the facts of this case suggest that the Commission's resources would not be well spent on pursuing divestiture here.

Respondents have agreed to accept an order that requires them to seek prior approval of hospital acquisitions in the Santa Cruz County market. The order includes within the definition of "hospital" any facility for which the State of California's Office of Statewide Healthcare Planning and Development has issued a building permit, even if the hospital has not been completed. Thus, it will prevent respondents from acquiring Sutter's interest in its proposed site once Sutter has obtained permission from the State of California to begin construction.

As a practical matter, this very unusual case presents the Commission with three choices: to close a case in which there is

¹ These, of course, are the circumstances that Congress sought to obviate through the Hart-Scott-Rodino Act.

² Sutter's planned 30-bed hospital, while smaller than AMI-Community, is expected to be a state-of-the-art facility that may pose a competitive check on a unilateral exercise of market power by Dominican or on the possibility of coordination between Dominican and Watsonville Community Hospital, which currently is Dominican's only competitor in the relevant market.

³ While Sutter's plans are not so far advanced that its entry is inevitable, several factors suggest that Sutter is likely to enter. First, it has committed substantial funds by acquiring a site for its proposed hospital. Second, Sutter has obtained all necessary land use and zoning approvals from the City and County of Santa Cruz. Third, Sutter's experience as a hospital company in Northern California enhances the likelihood that it will be able to enter the market successfully.

reason to believe that the law has been violated; to issue an administrative complaint under Part III of the Commission's Rules; or to issue the negotiated consent order. The first choice, ignoring an apparent violation of law, clearly is unacceptable. The second choice, issuing a complaint, does not appear to be in the public interest under the specific circumstances of this case. Because divestiture is problematic here, it is entirely possible that the Commission would obtain nothing more than the relief contained in this consent order after expending scarce enforcement resources in protracted litigation. The third choice, issuing the consent order, makes the clear statement that the Commission will not ignore what it has reason to believe are violations of law, and imposes a reasonable remedy given the specific circumstances presented.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have reason to believe that Dominican Santa Cruz Hospital's acquisition of AMI-Community Hospital was anticompetitive, and I would have supported an action under Section 7 of the Clayton Act to enjoin the transaction before it was consummated in March 1990. In light of the competitive situation in this market, I share Commissioner Yao's concern that the consent order does not provide an adequate remedy, and on that ground I dissent.

DISSENTING STATEMENT OF COMMISSIONER DENNIS A. YAO

I agree with the majority that Dominican Santa Cruz Hospital's acquisition of AMI-Community Hospital is likely to be anti-competitive. I do not believe that this anticompetitive problem can be solved with the relief the Commission is today giving final approval to, and I have reason to believe that issuance of an administrative complaint would be appropriate in this matter. Because I believe that something more than a requirement that Dominican obtain prior approval of future acquisitions is needed here, I dissent from the Commission's decision.

This merger, consummated in March 1990, combines two major acute care hospitals in Santa Cruz County, California, and leaves Dominican as the dominant hospital, with more than 70% of a clearly defined geographic market (bounded by mountains and ocean). Only one competitor remains in the market, Watsonville Hospital, located

in a more rural area approximately 14 miles south of Santa Cruz. There is considerable evidence that suggests that this merger may be anticompetitive. Dominican has argued for efficiencies from converting Community into a skilled nursing/rehabilitative care facility. However, neither hospital's physical plant was so small as to raise concerns that either was operating pre-merger below minimum efficient scale and, in my view, the asserted efficiencies are clearly insufficient to offset the likely anticompetitive effects.

Other activities detailed in comments received since the Commission's acceptance of the proposed consent raise concerns of possible collusion. Santa Cruz Medical Clinic's comment presents evidence which it suggests shows that Dominican and Watsonville may have colluded with respect to the provision of home health services through a joint venture-like relationship.

An argument supporting possible restoration of competition in Santa Cruz County is based on the publicly announced plans of Sutter Health Systems to open a 30-bed hospital specializing in baby deliveries and non-acute surgeries by 1995. However, the limited scope of procedures that Sutter plans to perform at the center may make its presence in the market, should it ever actually enter,¹ insufficient to defeat a collusive price increase by Dominican and Watsonville in acute care services.

Admittedly complicating the possibility of obtaining greater relief here is that Dominican, shortly after the merger, converted Community into a skilled nursing/rehabilitative care facility. That conversion is now largely complete and presents the Commission with a problem. At the time the proposed consent was accepted for public comment, I had suggested that a stronger consent order, short of a full divestiture order, could be crafted that might reduce the prospects that the merger will be anticompetitive. For example, I suggested that prior approval or prior notification requirements could be placed on potentially anticompetitive joint ventures.² Also, restrictions could be placed on conduct by Dominican that might make entry of Sutter more difficult (*e.g.*, if Dominican sought to bar doctors at its hospitals from attending patients at Sutter), without

¹ Although Sutter has apparently finally obtained all local permits, Sutter has not cleared all necessary regulatory hurdles in order to commence construction.

² In *University Health, Inc.*, Docket No. 9246 (Sept. 9, 1992) (final consent order), the Commission required that the respondent give the Commission prior notification of certain joint ventures.

impinging on activity that would be protected under the Noerr-Pennington immunity doctrine. Unfortunately, a majority of the Commission is not prepared at this time to seek to obtain stronger relief.

In sum, because I believe that something more than a prior approval requirement for future acquisitions is needed here, I respectfully dissent.

IN THE MATTER OF

AMERICAN INSTITUTE OF HABIT CONTROL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3522. Complaint, Aug. 23, 1994--Decision, Aug. 23, 1994

- This consent order prohibits, among other things, a Florida-based company and its
- president from making any representation about the relative or absolute
performance or efficacy of any smoking cessation or weight loss program,
unless they possess and rely upon competent and reliable scientific evidence
to substantiate the representation, and from representing that the Surgeon
General's 1989 report states that the hypnosis method used by the respondents
is one of the most effective ways to stop smoking.

Appearances

For the Commission: *Matthew Daynard.*

For the respondents: *David A. Clanton, Baker & McKenzie,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Institute of Habit Control, Inc., a corporation, and Steven Present, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent American Institute of Habit Control, Inc., is a Florida corporation, with its principal office or place of business at 9655 South Dixie Highway, Miami, Florida.

Respondent Steven Present is the sole officer, director and shareholder of the corporate respondent. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.