

Complaint

118 F.T.C.

IN THE MATTER OF

COLUMBIA/HCA HEALTHCARE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3544. Complaint, Dec. 6, 1994--Decision, Dec. 6, 1994*

This consent order permits, among other things, the hospital company to complete its acquisition of Medical Care America, but requires it to divest the Alaska Surgery Center within twelve months to a Commission-approved entity. If the transaction is not completed in the designated time frame, the respondent is required to permit the Commission to appoint a trustee. In addition, the consent order requires the respondent, for ten years, to obtain Commission approval before acquiring an interest worth more than \$1 million in any outpatient surgical services facility in Anchorage, Alaska, and before selling such an interest to any entity that operates an outpatient surgical services facility in Anchorage, Alaska.

Appearances

For the Commission: *Mark J. Horoschak and Philip Eisenstat.*

For the respondent: *Ky P. Ewing, Jr., Vinson & Elkins,*
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Columbia/HCA Healthcare Corporation ("Columbia/HCA"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement whereby Columbia/HCA will acquire Medical Care America, Inc. ("Medical Care America"); that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate 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 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 Section 11(b) of the

Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

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

a. “*Outpatient surgery facility*” means a health facility which has as a function the provision of outpatient surgery services. Outpatient surgery facilities include general acute care hospitals that offer outpatient surgery services, as well as ambulatory surgery centers that are not part of a general acute care hospital. The term “outpatient surgery facility” shall not include a physician’s, other healthcare professional’s, or group practice’s office or offices that provide outpatient surgery services for use solely by that physician, healthcare professional, or group practice, so long as such facility is not licensed as an ambulatory surgical facility by the State of Alaska.

b. “*Outpatient surgery services*” means facilities, personnel, and tools and equipment used by doctors in performing surgical procedures on patients who are not confined for more than 23 hours in an acute care hospital or other facility for recovery following the surgery. Outpatient surgery services include operating rooms, recovery rooms, surgical tools and devices, nurses, anesthesia equipment and personnel.

c. “*Acute care 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 24-hour inpatient care, as well as outpatient services, and having as a primary 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.

THE PARTIES TO THE PROPOSED ACQUISITION

PAR. 2. Columbia/HCA is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 201 West Main Street, Louisville, Ken-

tucky. Columbia/HCA and/or its subsidiaries own and operate the Alaska Regional Hospital in Anchorage, Alaska.

PAR. 3. Medical Care America is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 13455 Noel Road, Dallas, Texas. Medical Care America, through a limited partnership, owns Alaska Surgery Center, in Anchorage, Alaska.

JURISDICTION

PAR. 4. Columbia/HCA and Medical Care America are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of Columbia/HCA and Medical Care America are, and at all times relevant herein, have been, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE PROPOSED ACQUISITION

PAR. 5. On or about May 24, 1994, Columbia/HCA and Medical Care America entered into an agreement whereby Columbia/HCA will acquire all the stock of Medical Care America. The total value of the Medical Care America stock to be acquired by Columbia/HCA is approximately \$692 million.

NATURE OF TRADE AND COMMERCE

PAR. 6. For the purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale of outpatient surgery services and/or any narrower group of services contained therein.

PAR. 7. For the purposes of this complaint, the relevant section of the country is the municipality of Anchorage in Alaska.

MARKET STRUCTURE

PAR. 8. The relevant market -- *i.e.*, the relevant line of commerce in the relevant section of the country -- is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or by four-firm concentration ratios.

ENTRY CONDITIONS

PAR. 9. Entry into the relevant market is difficult. In particular, potential new entrants must obtain a certificate of need from the State of Alaska in order to establish a new outpatient surgery facility in the relevant section of the country. It is unlikely that a certificate of need can be obtained for a new outpatient surgery facility in Anchorage within two years.

COMPETITION

PAR. 10. In the relevant market, Columbia/HCA and Medical Care America are actual and potential competitors.

EFFECT

PAR. 11. The effect of the aforesaid acquisition may be substantially to lessen competition in the relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between Columbia/HCA's and Medical Care America's outpatient surgery facilities in the relevant market;

(b) It would significantly increase the already high level of concentration in the relevant market;

(c) It would eliminate Medical Care America's outpatient surgery facility from the relevant market as a substantial, independent competitive force;

(d) It may increase the possibility of collusion or interdependent coordination by the remaining firms in the relevant market; and

(e) It may deny patients, physicians, third-party payers, and other consumers of outpatient surgery services in the relevant market the benefits of free and open competition based on price, quality, and service.

VIOLATIONS CHARGED

PAR. 12. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 13. The acquisition described in paragraph five, if consummated, would violate 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation into the proposed acquisition of Medical Care America, Inc. by Columbia/HCA Healthcare Corporation ("Columbia/HCA"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation 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

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all 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 respondent 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 respondent has violated the said Acts, 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, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Columbia/HCA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 201 West Main Street, Louisville, Kentucky.

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

ORDER

I.

It is ordered, That as used in this order, the following definitions shall apply:

A. “*Respondent*” or “*Columbia/HCA*” means Columbia/HCA Healthcare Corporation, its partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates controlled by respondent, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

B. The “*Acquisition*” means the acquisition by Columbia/HCA of Medical Care America, Inc., including the Alaska Surgery Center.

C. “*Outpatient surgery facility*” means a health facility which has as a function the provision of outpatient surgery services. Outpatient surgery facilities include general acute care hospitals that offer outpatient surgery services, as well as ambulatory surgery centers that are not part of a general acute care hospital. The term “outpatient surgery facility” shall not include a physician's, other healthcare professional's, or group practice's office or offices that provide outpatient surgery services for use solely by that physician, healthcare professional, or group practice, so long as such facility is not licensed as an ambulatory surgical facility by the State of Alaska.

D. “*Outpatient surgery services*” means facilities, personnel, and tools and equipment used by doctors in performing surgical procedures on patients who are not confined for more than 23 hours in an acute care hospital or other facility for recovery following the surgery. Outpatient surgery services include operating rooms, recovery rooms, surgical tools and devices, nurses, anesthesia equipment and personnel.

E. To “*operate an outpatient surgery facility*” means to own, lease, manage, or otherwise control or direct the operations of an outpatient surgery facility, directly or indirectly.

F. “*Affiliate*” means any entity whose management and policies are controlled in any way, directly or indirectly, by the person with which it is affiliated.

G. “*Person*” means any natural person, partnership, corporation, company, association, trust, joint venture, or other business or legal entity, including any governmental agency.

H. “*Commission*” means the Federal Trade Commission.

I. “*Schedule A Assets*” means assets acquired by the respondent and listed on the attached Schedule A.

J. “*Viability and competitiveness*” means that the Schedule A Assets are capable of functioning independently and competitively.

K. “*Assets and Businesses*” include, but are not limited to, all assets, properties, businesses, rights, privileges, contractual interests, licenses, and goodwill of whatever nature, tangible and intangible, including, without limitation, the following:

1. All real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), together with all buildings, improvements and fixtures located thereon, all construction in progress thereat, all appurtenances thereto, and all licenses and permits related thereto (collectively, the “Real Property”);

2. All 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 (collectively, the “contracts”);

3. All machinery, equipment, fixtures, vehicles, furniture, inventories, and supplies (other than such inventories and supplies as are used in the ordinary course of business during the time that Columbia/HCA owns the assets) (collectively, the “Personal Property”);

4. All research materials, technical information, management information systems, software, software licenses, inventions, trade secrets, technology, know how, specifications, designs, drawings, processes, and quality control data (collectively, the “Intangible Personal Property”);

5. All books, records and files, excluding, however, the corporate minute books and tax records of Columbia/HCA and its Affiliates; and

6. All prepaid expenses.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Schedule A Assets, and shall also divest such additional assets and businesses ancillary to the Schedule A Assets and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Schedule A Assets.

B. Respondent shall divest the Schedule A Assets only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Assets is to ensure the continuation of the Schedule A Assets as an ongoing, viable outpatient surgery facility and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Respondent shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this order or until such other time as the Agreement to Hold Separate provides.

D. Pending divestiture of the Schedule A Assets, respondent shall take such actions as are necessary to maintain the viability and competitiveness and the marketability of the Schedule A Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Schedule A Assets, except for ordinary wear and tear.

E. A condition of approval by the Commission of the divestiture shall be a written agreement by the acquirer of the Schedule A Assets that it will not sell for a period of ten (10) years from the date of divestiture, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission, the Schedule A Assets to any person who operates, or will operate immediately following the sale, any other outpatient surgery facility in the Municipality of Anchorage, Alaska.

III.

It is further ordered, That:

A. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Schedule A Assets, in accordance with this order, within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Schedule A Assets. In the event that the Commission or the Attorney General brings an action for any failure to comply with this order or in any way relating to the Acquisition, pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, the respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, the respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of the respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A Assets.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers

necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that 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 trustee, by the court; provided however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Schedule A Assets, or to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The 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 the respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of the respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commis-

sion and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule A Assets.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other 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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative, or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Schedule A Assets.

12. The trustee shall report in writing to the respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

B. Acquire any assets used, or previously used, in the Municipality of Anchorage, Alaska (and still suitable for use) for operating an outpatient surgery facility from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any outpatient surgery facility, or any part thereof, in the Municipality of Anchorage, Alaska, including but not limited to, a lease of or management contract for any such outpatient surgery facility;

D. Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of any outpatient surgery facility in the Municipality of Anchorage, Alaska;

E. Permit any outpatient surgery facility it operates in the Municipality of Anchorage, Alaska to be acquired by any person that operates, or will operate immediately following such acquisition, any other outpatient surgery facility in the Municipality of Anchorage, Alaska.

Provided, however, that such prior approval shall not be required for:

1. The establishment of a new outpatient surgery service or facility (other than as a replacement for an outpatient surgery service or facility, not operated by respondent, in the Municipality of Anchorage, Alaska, pursuant to an agreement or understanding between respondent and the person operating the replaced service or facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the outpatient surgery facility or part thereof to be acquired does not exceed one million dollars (\$1,000,000); or

3. The acquisition of products or services in the ordinary course of business.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without

providing advance written notification to the Commission, consummate any joint venture or other arrangement with any other outpatient surgery facility in the Municipality of Anchorage, Alaska, for the joint establishment or operation of any new outpatient surgery facility, or part thereof, in the Municipality of Anchorage, Alaska. Such advance notification shall be filed immediately upon respondent's issuance of a letter of intent for, or execution of an agreement to enter into, such a transaction, whichever is earlier.

Said notification required by this paragraph V of this order 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), 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 need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent is not required to observe any waiting period for said notification required by this paragraph V.

Respondent shall comply with reasonable requests by the Commission staff for additional information concerning any transaction subject to this paragraph V of this order, within fifteen (15) days of service of such requests.

Provided, however, that no transaction shall be subject to this paragraph V of this order if:

1. The fair market value of the assets to be contributed to the joint venture or other arrangement by outpatient surgery facilities not operated by respondent does not exceed one million dollars (\$1,000,000);

2. The service, facility, or part thereof to be established or operated in a transaction subject to this order is to engage in no activities other than the provision of the following services: laundry; data processing; purchasing; materials management; billing and collection; dietary; industrial engineering; maintenance; printing; security; records management; laboratory testing; personnel education, testing, or training; or health care financing (such as through a health maintenance organization or preferred provider organization); or

3. Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or prior

approval by the Commission is required, and has been requested, pursuant to paragraph IV of this order.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not permit all or any substantial part of any outpatient surgery facility it operates in the Municipality of Anchorage, Alaska to be acquired by any other person (except pursuant to the divestiture required by paragraph II of this order) unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order, which agreement respondent shall require as a condition precedent to the acquisition.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondent has fully complied with paragraph II of this order, the respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph II of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph II of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall also include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and it is complying with paragraphs IV, V, and VI of this order.

VIII.

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, the respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

Commissioner Varney not participating.

SCHEDULE A

The assets to be divested ("Schedule A Assets") shall consist of, without limitation, all Assets and Businesses relating to the Alaska Surgery Center, which were acquired by Columbia/HCA pursuant to the Acquisition (including all improvements, additions and enhancements made to such assets prior to divestiture).

* * *

It is further provided, That to the extent that any of the contracts, warranties with respect to Personal Property, licenses or other interests in the Intangible Personal Property, or other Schedule A Assets:

(A) Also applies to facilities or operations other than those included in the Schedule A Assets, then during the period (the "Con-

tract Period”) beginning on the closing date of the Acquisition and ending on the earlier of (1) the expiration of the term of the given contract or other right and (2) the second anniversary of Columbia/HCA’s divestiture of the Schedule A Assets, Columbia/HCA, at the request of the owner or acquirer of the Schedule A Assets, shall use its reasonable best efforts to cause the services, property, or other benefits provided or made available under such a contract or other Schedule A Asset to continue to be available to the owner or acquirer of the Schedule A Assets on terms and conditions substantially similar to those presently in effect; or

(B) Requires the consent of a third party in order to transfer or assign such Contract or other Schedule A Asset, then Columbia/HCA, at the request of the owner or acquirer of the Schedule A Assets, shall use its reasonable best efforts to obtain such consent and, if such consent cannot be obtained, to cooperate in any reasonable arrangement with the owner or acquirer of the Schedule A Assets designed to provide to such owner or acquirer the benefits of the given contract or other Schedule A Asset during the Contract Period on terms and conditions substantially similar to those presently in effect.

Commissioner Varney not participating.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Columbia/HCA Healthcare Corporation ("respondent" or "Columbia/HCA"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, on or about May 23, 1994, Columbia agreed to acquire all of the stock of Medical Care America, Inc. ("Medical Care America"), and thereby acquire Alaska Surgery Center, an outpatient surgical facility in Anchorage, Alaska, and other Medical Care America assets, including 95 other outpatient surgical facilities (the "Acquisition"); and

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), which would require the divestiture of certain assets listed in Schedule A of the Consent Order ("Schedule A Assets"), including the Alaska Surgery Center in Anchorage, Alaska, the Commission must place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Schedule A Assets during the period prior to the final acceptance and issuance of the Consent Order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Schedule A Assets as described in paragraph II of the Consent Order and the Commission's right to have Alaska Surgery Center continue as a viable independent outpatient surgical facility; and

Whereas, the purpose of this Agreement and the Consent Order is to:

- (i) Preserve Alaska Surgical Center as a viable independent outpatient surgical facility pending its divestiture, and
- (ii) Remedy any anticompetitive effects of the Acquisition;

Whereas, respondent's entering into this Agreement shall in no way be construed as an admission by respondent that the Acquisition is illegal; and

Whereas, respondent understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the anti-trust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from respondent with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Schedule A Assets pursuant to the Consent Order, as follows:

1. Respondent agrees to execute the Agreement Containing Consent Order and be bound by the attached Consent Order.

2. Respondent agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a or 2.b, it will comply with the provisions of paragraph 3 of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the divestiture required by the Consent Order has been completed.

3. Respondent will hold the Schedule A Assets as they are presently constituted separate and apart on the following terms and conditions:

a. The Schedule A Assets, as they are presently constituted, shall be held separate and apart and shall be operated independently of respondent (meaning here and hereinafter, Columbia/HCA excluding the Schedule A Assets), except to the extent that respondent must exercise direction and control over the Schedule A Assets to assure compliance with this Agreement or the Consent Order, and except as otherwise provided in this Agreement.

b. Prior to, or simultaneously with its acquisition of the stock of Medical Care America, respondent shall organize a distinct and separate legal entity, either a corporation, limited liability company, or general or limited partnership ("New Company") and adopt constituent documents for the New Company that are not inconsistent with other provisions of this Agreement or the Consent Order. Respondent shall transfer all ownership and control of all Schedule A Assets to the New Company.

c. The board of directors of the New Company, or, in the event respondent organizes an entity other than a corporation, the governing body of the entity ("New Company Board") shall have five members. Respondent may elect the members of the New Company Board; provided, however, that the New Company Board shall include no more than two members who are a director, officer, employee, or agent of respondent ("the respondent's New Company Board member(s)"). The New Company Board shall include a chairman who is independent of respondent and is competent to assure the continued viability and competitiveness of the Schedule A Assets. Meetings of the New Company Board during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

d. Respondent shall not exercise direction or control over, or influence directly or indirectly, the Schedule A Assets, the independent Chairman of the Board of the New Company, the New Company Board, or the New Company or any of its operations or businesses; provided, however, that respondent may exercise only such direction and control over the New Company as is necessary to assure compliance with this Agreement or the Consent Order.

e. Respondent shall maintain the viability and competitiveness and the marketability of the Schedule A Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their viability and competitiveness or their marketability.

f. Except for the respondent's New Company Board members, respondent shall not permit any director, officer, employee, or agent of respondent to also be a director, officer, or employee of the New Company.

g. The New Company shall be staffed with sufficient employees to maintain the viability and competitiveness of the Schedule A Assets, which employees shall be selected from Alaska Surgery Center's existing employee base and may also be hired from sources other than Alaska Surgery Center.

h. With the exception of the respondent's New Company Board Members, respondent shall not change the composition of the New Company Board unless the independent chairman consents. The independent chairman shall have power to remove members of the New Company Board for cause. Respondent shall not change the composition of the management of the New Company except that the New Company Board shall have the power to remove management employees for cause.

i. If the independent chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c. of this Agreement.

j. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations, defending or prosecuting litigation, or negotiating agreements to divest assets, or complying with this Agreement or the Consent Order, respondent shall not receive or have access to, or use or continue to use, any material confidential information not in the public domain about the New Company or the activities of the New Company Board. Nor shall the New Company or the New Company Board receive or have access to, or use or continue to use, any material confidential information not in the public domain about respondent and relating to respondent's outpatient surgical facilities in Anchorage, Alaska. Respondent may receive on a regular basis aggregate financial information relating to the New Company necessary and essential to allow respondent to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to respondent from sources other than the New Company, and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

k. Except as permitted by this Agreement, the respondent's New Company Board members shall not in their capacity as New Company Board members, receive material confidential information and shall not disclose any such information

received under this Agreement to respondent, or use it to obtain any advantage for respondent. The respondent's New Company Board members shall enter a confidentiality agreement prohibiting disclosure of material confidential information. The respondent's New Company Board members shall participate in matters that come before the New Company Board only for the limited purposes of considering a capital investment or other transaction exceeding \$250,000, approving any proposed budget and operating plans, and carrying out respondent's responsibilities under this Agreement and the Consent Order. Except as permitted by this Agreement, the respondent's New Company Board members shall not participate in any matter, or attempt to influence the votes of the other members of the New Company Board with respect to matters, that would involve a conflict of interest if respondent and the New Company were separate and independent entities.

l. If necessary to assure compliance with the terms of this Agreement, the Consent Agreement, or the Consent Order, respondent may, but is not required to, assign an individual to the New Company for the purpose of overseeing such compliance ("on-site person"). The onsite person shall have access to all officers and employees of the New Company and such records of the New Company as he deems necessary and reasonable to assure compliance. Such individual shall enter into a confidentiality agreement prohibiting disclosure of material confidential information.

m. Any material transaction of the New Company that is out of the ordinary course of business must be approved by a majority vote of the New Company Board; provided that the New Company shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

n. Respondent shall provide the New Company with sufficient working capital to operate at its current rate of operation, and to carry out any capital improvement plans for the New Company which have already been approved.

o. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) twelve months after the date the Consent Order becomes final, or (ii) the date contemplated by subparagraph 2.b (the "Initial Divestiture Period"), respondent shall make available for use by the New Company funds sufficient to perform all necessary routine maintenance to, and replacements of, the Schedule A Assets ("normal repair and replacement"). After termination of the Initial Divestiture Period and until the earlier of the date contemplated by either subparagraph 2.a or 2.b, respondent shall make available for use by the New Company each year an amount not less than that required for normal repair and replacement. Provided, however, that in any event, respondent shall provide the New Company with such funds as are necessary to maintain the viability and competitiveness and marketability of the Schedule A Assets.

4. Should the Federal Trade Commission seek in any proceeding to compel respondent to divest any of the Schedule A Assets, as provided in the Consent Order, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Order or this Agreement, or in any way relating to the Acquisition, as defined in the draft complaint, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this Agreement.

5. To the extent that this Agreement requires respondent to take, or prohibits respondent from taking, certain actions that otherwise may be required or prohibited by contract, respondent shall abide by the terms of this Agreement or the Consent Order and shall not assert as a defense such contract requirements in a civil penalty action brought by the Commission to enforce the terms of this Agreement or Consent Order.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to respondent made to its principal office, respondent shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of respondent and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession, or under the control of respondent relating to compliance with this Agreement;

b. Upon five (5) days' notice to respondent, and without restraint or interference from respondent, to interview officers or employees of respondent, who may have counsel present, regarding any such matters.

7. This Agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

CHEMOPHARM LABORATORY, INC.

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

Docket C-3545. Complaint, Dec. 6, 1994--Decision, Dec. 6, 1994

This consent order prohibits, among other things, a Utah corporation that markets the ice melting product, Superior Sno-N-Ice, from making any environmental benefit claim about any product unless it possesses and relies on competent and reliable scientific evidence to substantiate the claims. In addition, the respondent is prohibited from misrepresenting the existence or contents of any test or study.

Appearances

For the Commission: *C. Steven Baker, Mary Tortorice and John Hallerud.*

For the respondent: *Jack Schoenhals, Salt Lake City, UT.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Chemopharm Laboratory, Inc., d/b/a CP Industries, a corporation ("respondent"), has 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 Chemopharm Laboratory, Inc. is a Utah corporation with its principal office or place of business at 503 North 400 West, Salt Lake City, Utah.

PAR. 2. Respondent has offered for sale, sold, advertised, labeled and distributed de-icing products, including Superior Sno-N-Ice Melter, to the public.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Superior Sno-N-Ice Melter, including but not necessarily limited to the