

IN THE MATTER OF

CHARTER MEDICAL 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-3558. Complaint, Feb. 14, 1995--Decision, Feb. 14, 1995

This consent order requires, among other things, Charter Medical Corporation (Charter), a Georgia-based chain of psychiatric hospitals, to modify its agreement to purchase certain National Medical Enterprises (NME) facilities by rescinding Charter's acquisitions of NME psychiatric facilities in four specified localities. In addition, the consent order requires Charter, for ten years, to secure Commission approval before acquiring or divesting psychiatric facilities in those localities.

Appearances

For the Commission: *Robert W. Doyle, Jr., Ronald B. Rowe and John C. Weber.*

For the respondent: *Robert C. Jones, Jones, Day, Reavis & Pogue, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Charter Medical Corporation ("Charter"), a corporation subject to the jurisdiction of the Commission, proposes to acquire some of the assets of National Medical Enterprises, Inc. ("NME"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

a. "*Psychiatric hospital*" means a hospital licensed or certified as a psychiatric hospital (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state, or county psychiatric hospital that primarily provides long-term, *i.e.*, thirty days or more, treatment of chronic mental illness or short term court ordered detention or involuntary treatment, that provides 24-hour in-patient psychiatric services for psychiatric diagnosis, treatment, and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

b. "*Psychiatric unit*" means a department, unit, or other organizational subdivision of a general acute care hospital licensed or certified as a provider of in-patient psychiatric care (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state or county psychiatric unit that primarily provides long-term, *i.e.*, thirty days or more, treatment of chronic mental illness or short term court ordered detention or involuntary treatment, that provides 24-hour in-patient psychiatric services for psychiatric diagnosis, treatment and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

II. CHARTER

2. Respondent Charter is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 577 Mulberry Street, Macon, Georgia.

3. For purposes of this proceeding, Charter is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. NME

4. NME is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its offices and principal place of business at 2700 Colorado Avenue, Santa Monica, California.

5. NME is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

6. On or about March 29, 1994, Charter and NME signed an Asset Sales Agreement; under the terms of that agreement, as subsequently amended, Charter would acquire 17 psychiatric hospitals, chemical dependency facilities and residential treatment centers from NME for approximately \$53 million ("the Acquisition").

V. THE RELEVANT MARKETS

7. Relevant lines of commerce in which to analyze the effects of the Acquisition include the provision of all in-patient services by psychiatric hospitals and psychiatric units of general acute care hospitals, as well as narrower lines of commerce, such as in-patient psychiatric services for children and adolescents.

8. For purposes of this complaint, the relevant geographic areas in which to analyze the effects of the Acquisition are:

a. The "Orlando area," consisting of the Florida counties of Orange, Osceola and Seminole;

b. The "Atlanta area," consisting of the Georgia counties of Fulton, Paulding, Fayette, Clayton, Henry, Rockdale, De Kalb, Gwinnett, Cobb, Cherokee, Forsyth, and Douglas;

c. The "Memphis area," consisting of the Tennessee counties of Shelby, Tipton, and Fayette, the Arkansas county of Crittenden, and the Mississippi county of De Soto, and;

d. The "Richmond area," consisting of the Virginia city of Richmond and the Virginia counties of Henrico, Hanover, Goochland, Powhatan, Chesterfield, Charles City, and New Kent.

9. The relevant markets set forth in paragraphs seven through eight are concentrated, whether measured by Herfindahl-Hirschmann Indices or two-firm and four-firm concentration ratios.

10. Entry into the relevant markets is difficult due to certificate-of-need regulation of entry by the States of Florida, Georgia, Tennessee, and Virginia, substantial lead times required to establish a new hospital, and other factors.

11. Charter is an actual competitor of NME in the relevant markets. Charter is the largest chain of psychiatric hospitals in the United States.

VI. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- a. Eliminating actual competition between Charter and NME;
- b. Increasing the likelihood that Charter will unilaterally exercise market power in the relevant markets;
- c. Eliminating the NME hospitals as substantial independent competitive forces in the relevant markets;
- d. Enhancing the likelihood of collusion or coordinated interaction between or among the firms in the relevant markets; and
- e. Denying patients, physicians, third-party payors, and other consumers of hospital services in the relevant market the benefits of free and open competition based on price, quality, and service.

VII. VIOLATIONS CHARGED

13. The Asset Sales Agreement described in paragraph six constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The Acquisition described in paragraph six, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of certain assets and businesses of National Medical Enterprises, Inc. ("NME"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

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 a 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 described 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 Charter 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 577 Mulberry Street, Macon, Georgia.

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 "*Charter*" means Charter Medical 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. "*NME*" means National Medical Enterprises, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada with its office and principal place of business at 2700 Colorado Avenue, Santa Monica, California.

C. "*Commission*" means the Federal Trade Commission.

D. "*Hospital*" means a health care facility, licensed as a hospital, other than a federally-owned facility (such as a military or Veterans Administration hospital), having a duly organized governing body with overall administrative and professional responsibility, and an organized professional staff that provides 24-hour inpatient care, and that may also provide outpatient services.

E. "*General acute care hospital*" means a health care facility licensed as a hospital, 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.

F. "*Psychiatric hospital*" means a hospital licensed or certified as a psychiatric hospital (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state or county psychiatric hospital that primarily provides long-term, *i.e.*, 30 days or more, treatment of chronic mental illness or short term court ordered detentions and involuntary treatment, that provides 24-hour inpatient services for psychiatric diagnosis,

treatment, and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

G. "*Psychiatric unit*" means a department, unit, or other organizational subdivision of a general acute care hospital licensed or certified as a provider of inpatient psychiatric care (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state or county psychiatric unit that primarily provides long-term, *i.e.*, 30 days or more, treatment of chronic mental illness or short term court ordered detentions and involuntary treatment, that provides 24-hour inpatient services for psychiatric diagnosis, treatment and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

H. "*Psychiatric facility*" means either a psychiatric hospital, a general acute care hospital with a psychiatric unit, or a psychiatric unit.

I. "*Psychiatric service*" means the provision of inpatient services for psychiatric diagnosis, treatment and care of persons suffering from mental illness, emotional disturbance, or alcohol or drug abuse at a psychiatric facility.

J. To "*operate*" a psychiatric facility means to own, lease, manage, or otherwise control or direct the operations of a psychiatric facility, directly or indirectly.

K. To "*acquire*" a psychiatric facility means to directly or indirectly, through subsidiaries, partnerships, or otherwise:

(1) Acquire the whole or any part of assets used or previously used within the last two years (and still suitable for use) for operating a psychiatric facility from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating a psychiatric facility;

(2) Acquire the whole or any part of the stock, share capital, equity, or other interest in any person engaged in, or within the two years preceding such acquisition engaged in, operating a psychiatric facility;

(3) Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of a psychiatric facility; or

(4) Enter into any other arrangement to obtain direct or indirect ownership, management or control of a psychiatric facility or any part

thereof, including but not limited to, a lease of or management contract for a psychiatric facility.

L. "*Residential treatment center*" means a treatment center that provides long-term (length of stay of 30 days or more) care in a non-psychiatric facility setting to patients that require long term care for psychiatric diagnosis and treatment for mental illness, emotional disturbance, or alcohol or drug abuse.

M. "*Outpatient facility*" means a facility that is not licensed as a psychiatric facility and has a primary function of providing outpatient treatment for psychiatric diagnosis, treatment and care of persons suffering from mental illness, emotional disturbance, or alcohol or drug abuse, for patients that do not require inpatient psychiatric services.

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

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

P. "*Relevant area(s)*" means:

(1) The "Orlando area," consisting of the Florida counties of Orange, Osceola and Seminole;

(2) The "Atlanta area," consisting of the Georgia counties of Fulton, Paulding, Fayette, Clayton, Henry, Rockdale, De Kalb, Gwinnett, Cobb, Cherokee, Forsyth and Douglas;

(3) The "Memphis area," consisting of the Tennessee counties of Shelby, Tipton and Fayette, the Arkansas county of Crittenden, and the Mississippi county of De Soto;

(4) The "Richmond area," consisting of the Virginia city of Richmond and the Virginia counties of Henrico, Hanover, Goochland, Powhatan, Chesterfield, Charles City, and New Kent.

Q. "*Relevant facilities*" means the following NME psychiatric hospitals, including, without limitation, all related assets and businesses, successors and assigns and all improvements, additions and enhancements made to such assets: MidSouth Hospital, Memphis, Tennessee; Psychiatric Institute of Richmond, Richmond, Virginia; Brawner North Medical Health System, Smyrna, Georgia;

Crescent Pines Hospital, Stockbridge, Georgia; Laurel Oaks Hospital and Residential Treatment Center, Orlando, Florida.

II.

It is further ordered, That respondent forthwith modify its Asset Sale Agreement with NME, dated March 29, 1994, to rescind respondent's agreement to acquire the relevant facilities.

III.

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:

A. Acquire any psychiatric facility in any of the relevant areas, including the relevant facilities;

B. Permit any psychiatric facility it operates in the relevant areas to be acquired by any person that operates, or will operate immediately following such acquisition, any other psychiatric facility in the relevant areas, including the relevant facilities.

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

1. The acquisition of a facility that is (a) solely licensed as a residential treatment center and not licensed as a psychiatric facility, or (b) solely operated as an outpatient facility and not licensed as a psychiatric facility;

2. Any acquisition that does not involve psychiatric services; or

3. Any acquisition otherwise subject to this paragraph III of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the psychiatric facility or part thereof to be acquired, including assumption by respondent of any liabilities, does not exceed five hundred thousand dollars (\$500,000).

IV.

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 psychiatric facility in the relevant areas, for the joint establishment or operation of any new psychiatric facility, psychiatric service or part thereof, in the relevant areas, including the relevant facilities. 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 IV 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 IV.

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

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

1. The fair market value of the assets to be contributed to the joint venture or other arrangement by the psychiatric facility not operated by respondent does not exceed five hundred thousand dollars (\$500,000);
2. The transaction does not involve psychiatric services; 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 III of this order.

V.

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 psychiatric facility it operates in the relevant areas to be acquired by any other person 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.

VI.

It is further ordered, That, within sixty (60) days after the date this order becomes final, and annually thereafter for a period of ten (10) 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 the requirements of this order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, 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 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.

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.

Set Aside Order

119 F.T.C.

IN THE MATTER OF

THE H.D. LEE CO., INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 2(d) OF THE CLAYTON ACT*Docket C-411. Consent Order, May 1, 1963* -- Set Aside Order, Feb. 14, 1995*

The Federal Trade Commission has set aside a 1965 consent order with The H.D. Lee Co., Inc., (62 FTC 1248), pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On October 26, 1994, The Lee Apparel Company, Inc., formerly The H.D. Lee Co., Inc. ("Lee") filed its Petition To Reopen and Set Aside Consent Order ("Petition") in this matter. Lee requests that the Commission set aside the 1965 consent order in this matter pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued July 22, 1994, published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Lee affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on December 15, 1994. No comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's order in Docket No. C-411 became final on August 9, 1965, and has been in effect for more than twenty-nine years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to

* The consent order was made effective on August 9, 1965.

¹ See Sunset Policy Statement, 59 Fed. Reg. at 45, 289.