

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-3627. Complaint, Nov. 24, 1995--Decision, Nov. 24, 1995*

This consent order, among other things, permits a Tennessee-based corporation to acquire John Randolph Medical Center in Hopewell, VA., and requires the respondent to divest, within 12 months, Poplar Springs Hospital, in Petersburg, VA., to a Commission-approved entity. In addition, the consent order requires the respondent, for 10 years, to notify the Commission before combining its psychiatric facility with any other psychiatric hospital facility in the Tri-Cities area of south central Virginia.

Appearances

For the Commission: *Oscar M. Voss* and *Mark J. Horoschak*.

For the respondent: *Ky Ewing, Vinson & Elkins*, Washington, D.C. and *Ray Hartwell, Hutton & Williams*, 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 John Randolph Medical Center in Hopewell, Virginia, and certain related assets, from the Hopewell Hospital Authority ("HHA"); that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and 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) "*Psychiatric hospital*" means a health care facility, licensed or certified as a psychiatric hospital (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides 24-hour inpatient services for the 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 or other non-psychiatric hospital, licensed or certified as a provider of inpatient psychiatric care (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides 24-hour inpatient services for the 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.

(c) "*Psychiatric hospital services*" mean the provision by psychiatric hospitals or psychiatric units of inpatient services for the psychiatric diagnosis, treatment, and care of persons suffering from acute mental illness or emotional disturbance, or alcohol or drug abuse. "Psychiatric hospital services" do not include the long-term psychiatric treatment provided by residential treatment facilities, other long-term treatment of chronic mental illness, or such treatment and other services provided by federally-owned facilities and state mental hospitals.

THE PARTIES

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 One Park Plaza, Nashville, Tennessee. Columbia/HCA owns and operates, *inter alia*, over 300 hospitals throughout the United States. One of those hospitals is Poplar

Springs Hospital ("Poplar Springs"), a 100-bed psychiatric hospital in Petersburg, Virginia. In 1994, Columbia/HCA had total sales of over \$13.7 billion.

PAR. 3. HHA is a non-profit hospital authority organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal place of business at 441 West Randolph Road, Hopewell, Virginia. HHA owns and operates John Randolph Medical Center ("John Randolph"), a 150-bed general acute care hospital including a 34-bed psychiatric unit, in Hopewell, Virginia, which is about ten miles northeast of Petersburg. In 1994, John Randolph had total sales of over \$40 million.

JURISDICTION

PAR. 4. Columbia/HCA and HHA 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 HHA 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 October 31, 1994, Columbia/HCA and HHA entered into an agreement whereby Columbia/HCA will acquire John Randolph Medical Center, and certain related assets, from HHA. The total value of the assets Columbia/HCA is to acquire from HHA is about \$45 million.

NATURE OF TRADE AND COMMERCE

PAR. 6. For purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale of psychiatric hospital services and/or any narrower group of services contained therein. Psychiatric hospital services represent a line of commerce distinct and separate from outpatient psychiatric care, as well as from the long-term treatment of chronic mental illness (which is the province of facilities such as residential treatment facilities and state mental hospitals). Psychiatric

hospital services are provided to patients with a compelling clinical need for inpatient, acute psychiatric treatment, whose mental health care needs generally cannot reasonably be met by other, much less expensive forms of psychiatric health care.

PAR. 7. For purposes of this complaint, the relevant section of the country is the "Tri-Cities" area of south central Virginia, encompassing: the independent cities of Colonial Heights, Hopewell, and Petersburg; Dinwiddie and Prince George counties; and southwestern Charles City and southeastern Chesterfield counties.

MARKET STRUCTURE

PAR. 8. Columbia/HCA's acquisition of John Randolph would combine the largest psychiatric hospital facility in the Tri-Cities area with one of the only two other competing providers of psychiatric hospital services in the area. The only other provider of psychiatric hospital services in the Tri-Cities area is Southside Regional Medical Center, a general acute care hospital in Petersburg, Virginia with a 31-bed psychiatric unit.

PAR. 9. The market for psychiatric hospital services in the Tri-Cities area is highly concentrated, whether measured by four-firm concentration ratios or by the Herfindahl-Hirschmann Index ("HHI"). The proposed merger would significantly increase concentration in this market. It would increase Columbia/HCA's market share in the Tri-Cities area from over 50% to over 70%. The HHI would increase more than 2400 points, to a post-acquisition level of over 6400.

ENTRY CONDITIONS

PAR. 10. Entry of new psychiatric hospitals or psychiatric units in the Tri-Cities area would not be likely to deter or counteract anticompetitive effects of the acquisition in the relevant market. In Virginia, certificate of need approval from a state regulatory agency is required for the establishment of new psychiatric hospitals and psychiatric units. Obtaining such approval would be difficult in the Tri-Cities area, because the existing supply of psychiatric hospital beds in the Tri-Cities area substantially exceeds that which is needed (according to state standards) to meet the mental health needs of that area's residents.

COMPETITION

PAR. 11. In the relevant market, Columbia/HCA and HHA are direct, actual, and potential competitors.

EFFECTS

PAR. 12. The acquisition described in paragraph five, if consummated, may substantially lessen competition in the relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between Columbia/HCA and HHA as providers of psychiatric hospital services;

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

(c) It would eliminate the psychiatric unit at HHA's John Randolph Medical Center as a substantial, independent, and competitive provider of psychiatric hospital services;

(d) It may permit Columbia/HCA to unilaterally raise prices for psychiatric hospital services in the Tri-Cities area;

(e) It may result in less favorable prices and other terms for health plans that contract with providers of psychiatric hospital services in the Tri-Cities area;

(f) It may increase the possibility of collusion or interdependent coordination by the remaining providers of psychiatric hospital services in the Tri-Cities area; and

(g) It may deny patients, physicians, third-party payers, and other consumers of psychiatric hospital services the benefits of free and open competition based on price, quality, and service.

VIOLATIONS CHARGED

PAR. 13. 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. 14. 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 of the proposed acquisition of John Randolph Medical Center in Hopewell, Virginia, and certain related assets, by Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent") from the Hopewell Hospital Authority, 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 Delaware, with its principal place of business at One Park Plaza, Nashville, Tennessee.

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

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

C. The "*Acquisition*" means the transaction contemplated by the October 31, 1994, agreement between Columbia/HCA and the Hopewell Hospital Authority, whereby Columbia/HCA will acquire John Randolph Medical Center in Hopewell, Virginia, and certain related assets.

D. "*Psychiatric hospital*" means a health care facility licensed or certified as a psychiatric hospital (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides 24-hour inpatient services for the 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.

E. "*Psychiatric unit*" means a department, unit, or other organizational subdivision of a general acute care or other non-psychiatric hospital, licensed or certified as a provider of inpatient psychiatric care (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides 24-hour inpatient services for the 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.

F. "*Psychiatric hospital facility*" means a psychiatric hospital, a non-psychiatric hospital with a psychiatric unit, or a psychiatric unit.

G. "*Psychiatric hospital services*" mean the provision by psychiatric hospitals or psychiatric units of inpatient services for the psychiatric diagnosis, treatment, and care of persons suffering from acute mental illnesses or emotional disturbance, or alcohol or drug

abuse. "Psychiatric hospital services" do not include the long-term psychiatric treatment provided by residential treatment facilities, other long-term treatment of chronic mental illnesses, or such treatment and other services provided by federally-owned facilities and state mental hospitals.

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

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

1. Acquire the whole or any part of the assets of a psychiatric hospital facility;
2. Acquire the whole or any part of the stock, share capital, equity, or other interest in any person operating a psychiatric hospital facility;
3. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of a psychiatric hospital facility; or
4. Enter into any other arrangement to obtain direct or indirect ownership, management, or control of a psychiatric hospital facility or any part thereof, including, but not limited to, a lease of or management contract for a psychiatric hospital facility.

J. "*Relevant area*" means the area in Virginia encompassing the independent cities of Colonial Heights, Hopewell, and Petersburg; Dinwiddie and Prince George counties; and those portions of Charles City and Chesterfield counties within a fifteen (15) mile radius of the present site of Poplar Springs Hospital in Petersburg, Virginia.

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

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

M. "*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, all Assets and Businesses, including all improvements, additions, and enhancements made prior to divestiture, of Poplar Springs Hospital in Petersburg, Virginia (the "paragraph II Assets").

B. Respondent shall also divest such additional Assets and Businesses ancillary to the paragraph II Assets and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the paragraph II Assets.

C. Respondent shall divest the paragraph II Assets only to an acquirer or acquirers that receive 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 paragraph II Assets is to ensure the continuation of the paragraph II Assets as an ongoing, viable psychiatric hospital and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

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

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

F. A condition of approval by the Commission of the divestiture shall be a written agreement by the acquirer(s) of the paragraph II 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 prior notification to the Commission in the manner prescribed by paragraph IV of this order, any paragraph II Asset to any person who operates, or will operate immediately following the sale, any other psychiatric hospital facility in the relevant area.

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 paragraph II 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 undivested paragraph II Assets.

B. 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(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), 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 paragraph III.A, 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.

C. 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 paragraph II 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.C.3 to accomplish the divestiture(s), 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 undivested paragraph II 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(s). 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. Subject to Columbia/HCA's absolute and unconditional obligation to divest at no minimum price the paragraph II Assets (and subject to the terms described in paragraph II.A), and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint, 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(s) shall be made in the manner and to the acquirer as set out in paragraph II; 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 Commission 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 undivested paragraph II 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(s) required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the paragraph II 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 providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person operating a psychiatric hospital facility in the relevant area;

B. Acquire any assets of a psychiatric hospital facility in the relevant area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any psychiatric

hospital facility, or any part thereof, in the relevant area, including but not limited to, a lease of or management contract for any such facility;

D. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any psychiatric hospital facility in the relevant area;

E. Permit any psychiatric hospital facility it operates in the relevant area to be acquired by any person that operates, or will operate immediately following such acquisition, any other psychiatric hospital facility in the relevant area.

Said notification 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 (hereinafter referred to as "the Notification"), 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 shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information and documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

Provided, however, that prior notification pursuant to this paragraph IV, or pursuant to paragraph II.F. of this order, shall not be required for:

1. The establishment by respondent of a new psychiatric hospital facility in the relevant area: (a) that is a replacement for an existing psychiatric hospital facility, if that facility is operated by respondent and is not required to be divested pursuant to paragraph II of this

order; or (b) that is not a replacement for any psychiatric hospital facility in the relevant area;

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 psychiatric hospital facility or part thereof to be acquired does not exceed one million dollars (\$1,000,000);

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

4. Any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

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 hospital facility it operates in the relevant area to be acquired by any other person (except pursuant to the divestiture required by paragraph II), 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:

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, 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 this order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondent shall

include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestitures.

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 this order.

VII.

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, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

VIII.

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, who may have counsel present regarding such matters.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), 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 One Park Plaza, Nashville, Tennessee; 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.*

PREMISES

Whereas, on October 31, 1994, Columbia/HCA and the Hopewell Hospital Authority entered into an agreement whereby Columbia/HCA will acquire John Randolph Medical Center in Hopewell, Virginia, and certain related assets, from the Authority (the "Acquisition"); and

Whereas, Columbia/HCA, with its principal place of business at One Park Plaza, Nashville, Tennessee, owns and operates, among other things, psychiatric hospitals; 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 Agreement Containing Consent Order ("consent order"), which would require the divestiture of certain assets specified in paragraph II of the consent order ("paragraph II Assets"), 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 paragraph II 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 divestitures of the paragraph II Assets, and the Commission's right to have the paragraph II Assets continue as a viable psychiatric hospital independent of Columbia/HCA; and

Whereas, the purposes of this Agreement and the consent order are to:

- (i) Preserve the paragraph II Assets as a viable, competitive, and ongoing psychiatric hospital, independent of Columbia/HCA, pending the divestitures of the paragraph II Assets as required under the terms of the consent order;
- (ii) Prevent interim harm to competition from the operation of the paragraph II Assets pending divestiture as required under the terms of the consent order; and
- (iii) 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 antitrust 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, at the time it accepts the consent order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and 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 of the paragraph II Assets is not accomplished, to appoint a trustee to seek divestiture of said assets pursuant to the consent order or to seek civil penalties or a court appointed trustee or other equitable relief, 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 three 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 of the paragraph II Assets, as required by the consent order, is completed.

3. To ensure the complete independence and viability of the paragraph II Assets, and to assure that no competitive information is exchanged between Columbia/HCA and the managers of the paragraph II Assets, respondent shall hold the paragraph II Assets, as they are presently constituted, separate and apart on the following terms and conditions:

a. The paragraph II Assets, as they are presently constituted, shall be held separate and apart and shall be managed and operated independently of respondent (meaning here and hereinafter, Columbia/HCA excluding the paragraph II Assets), except to the extent that respondent must exercise direction and control over such 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 the Acquisition, 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; provided, however, that Columbia/HCA may designate as the "New Company" under this agreement, the "New Company" created pursuant to the Agreement to Hold Separate regarding the Florida, Texas, and Louisiana Assets between Columbia/HCA and the Commission in connection with FTC File No. 951-0022. Respondent, shall transfer all ownership and control of all paragraph II 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 Board"), shall have three members. Respondent shall elect the members of the New Board. The New Board shall consist of the following three persons: Winfield C. Dunn; Samuel H. Howard; and David C. Colby. The Chairman of the New Board shall be Winfield C. Dunn (provided he agrees), or a comparable, knowledgeable person, who shall remain independent of

Columbia/HCA and competent to assure the continued viability and competitiveness of the paragraph II Assets. The New Board shall include no more than one member who is a director, officer, employee, or agent of respondent, who shall be David C. Colby, provided he agrees, or a comparable knowledgeable person ("the respondent's New Board member"). The New Board shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the New Board during the term of this Agreement shall be audiographically transcribed and the tapes 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 paragraph II Assets, the independent Chairman of the Board of the New Company, the New 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, or with all applicable laws.

e. Respondent shall maintain the viability, competitiveness, and marketability of the paragraph II Assets; shall not sell, transfer, or encumber said Assets (other than in the normal course of business); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair their viability, competitiveness, or marketability of said Assets.

f. Except for the respondent's New Board member, 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 paragraph II Assets, which employees shall be selected from the existing employee base of each facility or entity and may also be hired from sources other than these facilities and entities.

h. With the exception of the respondent's New Board member, respondent shall not change the composition of the New Board unless the independent Chairman consents. The independent Chairman shall have power to remove members of the New Board for cause. Respondent shall not change the composition of the management of the New Company except that the New 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, obtaining legal advice, 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 hospital to be operated by the New Board. Nor shall the New Company or the New 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 hospitals. 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 an entity from sources other than the entity to which the information pertains, 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 Board member shall not, in his or her capacity as a New Board member, 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 Board member shall enter a confidentiality agreement prohibiting disclosure of Material Confidential Information. The respondent's New Board member shall participate in matters that come before the New 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 Board member shall not participate

in any matter, or attempt to influence the votes of the other members of the New Board with respect to matters, that would involve a conflict of interest if respondent and the New Company were separate and independent entities.

l. 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 Board; provided that the New Company shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

m. If necessary, respondent shall provide the New Company with sufficient working capital to operate the paragraph II Assets at their respective current rates of operation, and to carry out any capital improvement plans for the paragraph II Assets which have already been approved.

n. Columbia/HCA shall continue to provide the same support services to the paragraph II Assets, as are being provided to those Assets by Columbia/HCA as of the date this Agreement is signed. Columbia/HCA may charge the paragraph II Assets the same fees, if any, charged by Columbia/HCA for such support services as of the date of this Agreement. Columbia/HCA personnel providing such support services must retain and maintain all Material Confidential Information of the paragraph II Assets on a confidential basis, and, except as is permitted by this Agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of respondent's businesses. Such personnel shall also execute a confidentiality agreement prohibiting the disclosure of any Material Confidential Information of the paragraph II Assets.

o. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) twelve (12) 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 paragraph II Assets ("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, competitiveness, and marketability of such Assets.

p. Columbia/HCA shall circulate, to its management employees responsible for the operation of hospitals (including non-psychiatric facilities) either in the relevant area defined in the consent order in this matter, or in the city of Richmond or Henrico or Chesterfield counties in Virginia, a notice of this Hold Separate and consent order in the form attached as Attachment A.

q. The New Board shall serve at the cost and expense of Columbia/HCA. Columbia/HCA shall indemnify the New Board against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the New Board directors.

r. The New Board shall have access to and be informed about all companies who inquire about, seek, or propose to buy any paragraph II Assets.

s. The New Board shall report in writing to the Commission every thirty (30) days concerning the New Board's efforts to accomplish the purposes of this Hold Separate.

4. Should the Commission seek in any proceeding to compel respondent to divest any of the paragraph II 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 purposes of determining or securing compliance with this Agreement, and 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 representatives of the Commission:

a. Access, during office hours of respondent and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the 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, directors, or employees of respondent, who may have counsel present, regarding such matters.

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

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Columbia/HCA Healthcare Corporation has entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission relating to the divestiture of Poplar Springs Hospital in Petersburg, Virginia and certain related assets and businesses ("Poplar Springs"). Until after the FTC's order becomes final and Poplar Springs is divested, Poplar Springs must be managed and maintained as a separate, ongoing business, independent of all other Columbia/HCA businesses. All competitive information relating to Poplar Springs must be retained and maintained by the persons involved in the operation of Poplar Springs on a confidential basis, and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Columbia/HCA business. Similarly, all such persons involved in Columbia/HCA shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves Poplar Springs.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject Columbia/HCA to civil penalties and other relief as provided by law.

IN THE MATTER OF

THIRD OPTION LABORATORIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3628. Complaint, Nov. 29, 1995--Decision, Nov. 29, 1995

This consent order requires, among other things, an Alabama company and its officers to pay \$480,000 to be used either for refunds to consumers or as disgorgement to the U.S. Treasury, and to send a notice to consumers and distributors of the beverage, Jogging in a Jug, advising them of the consent order which requires the respondents to possess competent and reliable scientific evidence to substantiate any representation they make about the performance, safety, benefits, or efficacy of any food, dietary supplement, or drug they market in the future. In addition, the consent order prohibits the deceptive use of testimonials or endorsements and requires the respondents to clearly and prominently include a disclosure statement in future advertisements.

Appearances

For the Commission: *Toby M. Levin* and *Loren G. Thompson*.

For the respondents: *Bruce A. Rawls* and *Ross Forman*, *Burr & Forman*, Birmingham, AL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Third Option Laboratories, Inc., a corporation; and William J. McWilliams, Danny Bishop McWilliams, and Susan McWilliams Bolton, individually and as officers 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 Third Option Laboratories, Inc., is an Alabama corporation with its principal office or place of business at 2806 Avalon Avenue, Muscle Shoals, Alabama.

Respondent William J. McWilliams is the President, and an owner and director of the corporate respondent. His principal office