Interlocutory Orders, Etc.

UNIVERSAL HEALTH SERVICES, INC.

Docket No. C-4309. *Order, December 27, 2011*

Commission letter denying Respondent's request to extend the time to divest its Las Vegas assets to a Commission-approved acquirer because the Respondent failed to demonstrate either that its efforts to divest the assets or its efforts to resolve staff concerns were sufficient to warrant an extension.

COMMISSION LETTER DENYING MOTION FOR EXTENSION OF TIME TO DIVEST LAS VEGAS DIVESTITURE ASSETS

Dear Messrs. Barbur and Belelieu:

This letter responds to Universal Health Services, Inc.'s Motion For Extension of Time to Divest the Las Vegas Divestiture Assets ("Motion"), filed by you on behalf of Respondents Alan B. Miller and Universal Health Services, Inc., *et al.* (collectively, "Universal" or "Respondents") in the above-captioned matter on October 3, 2011. In its Motion, Universal seeks an extension of time to divest until March 31, 2012. Under the terms of the Decision and Order ("Order") issued in this matter, which were agreed to by Respondents, Universal is required to divest the Las Vegas Divestiture Assets no later than six months after the date the Order became final, *i.e.*, by October 31, 2011, to an acquirer that receives the Commission's prior approval, and in a manner that also receives the Commission's prior approval. Universal has failed to complete the required divestiture within the Order's deadline. For the reasons discussed below, Universal has not met its burden under the Commission's Rules and the applicable legal standards for showing good cause why its Motion should be granted. Accordingly, the Commission has denied the Motion.

In reaching its decision, the Commission has reviewed Universal's Motion and other available information, including that provided by Universal in its periodic reports of compliance, its applications seeking prior approval of proposed divestitures and in supplemental submissions. The Commission has also reviewed Universal's efforts to divest the Las Vegas Divestiture Assets as required by the terms of the Order.

The Order, which became final on April 29, 2011,[1] was issued to resolve competitive concerns arising from Universal's acquisition of Psychiatric Solutions, Inc., which combined two of the largest providers of acute inpatient psychiatric services in three relevant geographic markets: the Las Vegas, Nevada, Metropolitan Statistical Area; the State of Delaware; and the Commonwealth of Puerto Rico. The Order requires Universal to divest the Divestiture Assets, as defined,[2] within specified time periods,[3] in each of the Relevant Areas, as defined:[4] the State of Delaware; the Las Vegas, NV, MSA; and the Commonwealth of Puerto Rico. In particular, Paragraph III.A. of the Order requires Universal to divest the Las Vegas Divestiture Assets, as defined,[5] "[n]o later than six (6) months after the date [the] Order becomes final" (*i.e.*, by October 31, 2011), 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.[6] Paragraph VIII.A. of the Order provides that the Commission may appoint a trustee ("Divestiture Trustee") to, among other things, divest the Las Vegas Divestiture Assets if Respondents have not fully complied with the obligations imposed by Paragraph III. of the Order.

On May 20, 2011, Universal filed an application ("May 20th application") seeking the Commission's prior approval to divest the Las Vegas Divestiture Assets to Signature Healthcare

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[1] On November 15, 2010, the Commission accepted an Agreement Containing Consent Orders in this matter for public comment. The Commission subsequently issued a modified final Decision and Order (*i.e.*, the Order) on April 19, 2011, which became final on April 29, 2011.

[2] Order ¶ I.O.

[3] Order ¶¶ IIA., III.A., IV.A.

[4] Order ¶ I.DD.

[5] Order ¶¶ I.T., V., CC.

[6] Pursuant to a consent settlement with the State of Nevada, Universal must comply with essentially identical divestiture obligations according to the terms of a Final Judgment, filed on November 15, 2010, by the Attorney General for the State of Nevada ("Nevada Attorney General"), in the United States District Court for the District of Nevada.

Services, LLC ("Signature"), an entity wholly owned by Dr. Soon Kim. As described below, the Commission's staff engaged in detailed discussions with Universal and with Signature concerning the proposed divestiture to Signature, and conducted an extensive review of Signature as a "Prospective Acquirer," as defined,[7] of the Las Vegas Divestiture Assets. On September 15, 2011, Universal filed a Notice of Withdrawal of the May 20th application.

In its Motion, Universal requests that the Commission extend the time for divestiture until March 31, 2012, pursuant to Section 4.3(b) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 4.3(b). Commission Rule 4.3(b) provides that "the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or order of the Commission." Under applicable precedent, Universal has the burden of demonstrating good cause, and granting an extension of time rests in the discretion of the Commission.[8] As the Commission's publicly-available guidance makes clear, failure to consummate a required divestiture within the time limit set by the Order (*i.e.*, not just file for approval) is a violation of the Order and can result in liability for civil penalties and other relief pursuant to Section 5(l) of the Federal Trade Commission Act.[9] The Commission has consistently held respondents to a high standard when considering granting an extension of time to divest because, by granting such a request, the Commission would forgo its ability to seek civil penalties or other relief for the period of the extension. Good cause to extend the Order's deadline could include a persuasive showing of extraordinary or unforeseen circumstances not reasonably within a respondent's control that prevented the timely completion of the divestiture, or a showing of some harm that would result from denial of the motion. Conversely, indications of a respondent's lack of diligent efforts to complete a Commission-ordered divestiture as expeditiously as

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[7] Order ¶ I.X.

[8] *United States v. Swingline, Inc.*, 371 F. Supp. 37, 45 (E.D.N.Y. 1974).

[9] 15 U.S.C. § 45(l) *See* Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, at n.30 and accompanying text, http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm.

possible could negate assertions of good cause to extend the divestiture deadline.[10]

Universal states in its Motion that it has worked diligently to divest the Divestiture Assets, and points to its timely divestiture of the Delaware Divestiture Assets,[11] and substantial progress toward a timely divestiture of the Puerto Rico Divestiture Assets,[12] as factors the Commission should take into account in assessing its requested extension of time to divest the Las Vegas Divestiture Assets. Universal's compliance with its obligations regarding the Delaware Divestiture Assets and its compliance efforts regarding the Puerto Rico Divestiture Assets are an indication of Universal's diligence and efforts to comply with the Order's requirements, but do not excuse Universal's failure to have *fully* complied by completing the required divestiture of the Las Vegas Divestiture Assets on time. The Commission has never found partial compliance with an Order's requirements alone to constitute sufficient good cause for extending the time to divest. Universal expressly represented to the Commission in settling this matter that it could accomplish the full relief contemplated by the Order,[13] and is presumed to have understood the obligations it undertook when it signed the consent agreement.

The circumstances surrounding Universal's failure to divest the Las Vegas Divestiture Assets on time were neither

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[10] *See, e.g.*, Letter re: *In the Matter of Service Corporation International, Inc., et al.*, Docket No. C-4174 (April 25, 2008), http://www.ftc.gov/os/caselist/0610156/080501letter.pdf.

[11] Universal was required to divest the Delaware Divestiture Assets by October 31, 2011 (Order ¶ II.A.). It filed an application for approval to divest to PHC, Inc., which was approved by the Commission on June 3, 2011. The divestiture closed on July 1, 2011.

[12] Universal is required to divest the Puerto Rico Divestiture Assets by January 30, 2012 (Order ¶ IV.A.). It filed an application for approval to divest the assets to United Medical Corporation and related individuals and entities on September 28, 2011. Commission action on the application is pending.

[13] Paragraph 13 of the Agreement Containing Consent Orders executed in this matter by Respondents states that, "[b]y signing this Consent Agreement, Proposed Respondents represent and warrant that they can accomplish the full relief contemplated by the attached Decision and Order (including effectuating all required divestitures, assignments, and transfers)."

extraordinary nor unforeseen so as to constitute sufficient "good cause" under Commission Rule 4.3(b) to justify extending the time to divest. In late March 2011, before Universal filed the May 20th application seeking Commission approval of Signature to acquire the Las Vegas Divestiture Assets, the Commission's staff, working in coordination with staff of the Office of the Nevada Attorney General ("NV-AG staff"), notified Universal that, based on publicly-available information, Signature already had plans to enter the relevant Las Vegas, NV, MSA market as a provider of acute inpatient psychiatric services. Staff explained its view that divestiture to Signature, with its apparent imminent plans to enter at a substantial scale, would fail to achieve the remedial deconcentrating effect and purpose of the Order's divestiture requirement in the relevant market. Universal disagreed with staff's assessment and filed the May 20th application.

The Commission's staff and NV-AG staff then conducted a coordinated, in-depth review of Signature as a Prospective Acquirer of the Las Vegas Divestiture Assets. This included review of confidential documents and information submitted by Signature pursuant to compulsory process issued by the Office of the Nevada Attorney General, interviews with third parties, and numerous conversations with representatives of Signature and Universal. Throughout its review, staff regularly and repeatedly informed Universal (and Signature) that, based on information it was receiving, staff continued to have serious concerns about Signature as a committed entrant into the Las Vegas area. Nonetheless, both Universal and Signature persisted in presenting arguments that Signature should still be considered an acceptable acquirer of the Las Vegas Divestiture Assets.[14] Finally, the Commission's staff and NV-AG staff determined that further review would likely yield no new information that would resolve or eliminate staff's concerns. In view of the rapidly-approaching divestiture deadline, the Commission's staff (along with NV-AG staff) informed Universal on August 22, 2011, that staff was prepared to recommend that the Commission deny Universal's application for approval of its proposed divestiture to Signature. Universal subsequently withdrew its May 20th application on

[14] *See* Motion at ¶ 9.

September 15, 2011. Although it immediately began the process to find another candidate to acquire the Las Vegas Divestiture Assets, and filed an application for approval of its proposed divestiture to a new Prospective Acquirer on November 7, 2011,[15] Universal failed to satisfy its obligation to divest the Las Vegas Divestiture Assets by October 31, 2011, as required by the Order.

Based on the foregoing, Universal has not demonstrated that its divestiture efforts prior to the Order's divestiture deadline were sufficient to justify the relief requested. Nor has Universal identified any harm, such as harm to the public, if the Commission denies the Motion.[16] Although Universal was free to continue to urge staff to support its proposed divestiture to Signature, Universal must accept the risk that prolonged discussion, especially in light of the staff's repeated expressions of concern about the proposal that were never resolved by Universal, would adversely affect Universal's ability to complete the divestiture by the Order's deadline. Accordingly, the Commission has determined to deny Universal's Motion.[17]

Failure to complete a divestiture by the Order's deadline is a violation of the Order and creates the potential liability for civil penalties and other relief pursuant to Section 5(l) of the FTC Act.[18] As provided in Paragraph VIII. of the Order, neither the appointment of a Divestiture Trustee nor a decision by the Commission not to appoint a Divestiture Trustee relieves Respondents of their potential liability for civil penalties. In

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[15] On November 7, 2011, Universal filed an application seeking Commission approval for divestiture of the Las Vegas Divestiture Assets to Strategic Behavioral Health, LLC and related entities.

[16] The requirements of the Order to Hold Separate and Maintain Assets, and the oversight of the Hold Separate Trustee appointed by the Commission, will help assure the continued viability, competitiveness and marketability of the Divestiture Assets pending divestiture. They are not substitutes, however, for a timely divestiture, which remains the core remedy in this Order.

[17] In reaching its decision, the Commission, through staff, worked in close coordination with the Office of the Nevada Attorney General. The Commission's decision does not, however, bind or necessarily represent the views of the State of Nevada.

[18] 15 U.S.C.§ 45(l).

denying Universal's Motion, however, the Commission has made no determination to seek a trustee to accomplish the divestiture of the Las Vegas Divestiture Assets at this time, nor has it made a determination to seek civil penalties or other relief for Universal's failure to comply with this divestiture obligation in a timely fashion. Although Universal has not shown that its efforts prior to the divestiture deadline were sufficient to justify the requested time extension, its substantial progress toward proposing a new Prospective Acquirer weighs in favor of allowing Universal to continue the process already underway rather than risk further delay by introducing a Divestiture Trustee at this juncture. The Commission will closely monitor Universal's efforts to complete the process of divesting the Las Vegas Divestiture Assets as expeditiously as possible, consistent with its Order obligations.

The Commission reserves the right to appoint a Divestiture Trustee or take such further action as circumstances warrant.

By direction of the Commission.