UNITED STATES OF AMERICA **0810259**
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

In the Matter of	)	
	)	
Carilion Clinic	)	**Docket No. 9338**
a corporation.	)	**[Public Record Version]**
	)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Carilion Clinic acquired Odyssey IV, LLC d/b/a the Center for Advanced Imaging ("CAI") and the Center for Surgical Excellence, LLC ("CSE") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11(b) of the Clayton Act, as amended, 15 U.S.C. § 21(b), stating its charges in that respect as follows:

NATURE OF THE CASE

1. On August 22, 2008, Carilion acquired CAI and CSE, the only independent (non-hospital-owned) provider of advanced outpatient imaging services and outpatient surgical services in the Roanoke, Virginia area. Prior to the acquisition, CAI was well-known for its quality, service, convenience, and low-cost, and its operation prompted Carilion to improve its own services. CSE similarly enjoyed a strong reputation for quality and convenience, and its acquisition occurred at the precise moment when CSE was most likely to expand its existing cluster of outpatient surgical services.

2. Carilion's acquisition of CAI occurred five years after CAI opened as an advanced imaging center. CAI offered advanced outpatient imaging services similar to Carilion, but at a lower price. CAI also offered fast scheduling (including same-day service for Magnetic Resonance Imaging ("MRI") scans), extended operating hours, and 24-hour turnaround time for reporting results to referring physicians. CAI's quality, convenience,

and low-cost presented a serious threat to Carilion. For example, Carilion recognized that CAI was effective at winning physician referrals in the Roanoke area, and opposed CAI's state application for additional MRI equipment, noting that "CAI has affected our volumes, and we anticipate a much larger loss of volume with the addition of a 1.5T scanner at [CAI's] facility," and that "CAI's introduction of a second scanner threatens the viability of our [hospital] System."

3. CAI's owners soon recognized their operation was a success, and sought to open an independent outpatient surgical center. In 2006, CAI's owners purchased an existing outpatient facility that had one operating room and multiple procedure rooms, and renamed the facility CSE. CSE was later awarded a highly-contested Certificate of Public Need ("COPN") and an outpatient surgical hospital license from the Commonwealth of Virginia, and ambulatory service center ("ASC") certification from Medicare. Notably, Carilion opposed CSE's COPN application, arguing that CSE offered "the very same services offered at Carilion." CSE's plans were to expand the cluster of outpatient surgical services it provided in competition with Carilion.

4. As a result of the acquisition, Carilion now faces only one competitor, HCA Lewis-Gale ("HCA"), in the provision of advanced outpatient imaging and surgical services. The acquisition significantly reduced competition in the two affected markets, and will result in higher prices and reduced non-price competition for these services.

5. Health plans are the direct customers for advanced outpatient imaging and surgical services. However, higher prices for these services are passed on to employers, unions, and other group purchasers of health insurance plans, and such costs are ultimately borne by patients in the Roanoke area through higher premiums and out-of-pocket expenditures.

RESPONDENT CARILION CLINIC

6. Carilion is the dominant hospital system in Southwest Virginia, controlling approximately 80 percent of the hospital beds in the Roanoke area. It has an ownership interest in eight acute care hospitals and various other healthcare businesses throughout Southwest Virginia, including outpatient clinics, nursing homes, a psychiatric hospital, a pediatric hospital, laboratory testing facilities and physician practices. Carilion's flagship hospital facilities, Roanoke Memorial Hospital and Roanoke Community Hospital, are the largest providers of healthcare services in the Roanoke area.

7. Carilion has grown substantially over the years, primarily by acquiring its competitors. Since 1990, Carilion has acquired five acute care hospitals as well as two joint venture hospitals. Also, Carilion has acquired numerous physician practices over the years and now employs over 500 physicians.

8. In addition to the newly-acquired CAI, Carilion provides outpatient imaging services at the following locations in the Roanoke area: Carilion Roanoke Memorial Hospital at 1906 Belleview Avenue, Roanoke, Virginia; Carilion Roanoke Community Hospital at

101 Elm Avenue, Roanoke, Virginia; and Carilion Clinic, Brambleton Center at 3707 Brambleton Avenue, Roanoke, Virginia.

9. In addition to the newly-acquired CSE, Carilion provides outpatient surgical services at the following locations in the Roanoke area: Carilion Clinic, Brambleton Center at 3707 Brambleton Avenue, Roanoke, Virginia; Carilion Roanoke Community Hospital, 101 Elm Avenue, Roanoke, Virginia; and Carilion Roanoke Memorial Hospital, 1906 Belleview Avenue, Roanoke, Virginia. Carilion also operates an ASC as a joint venture partner with various physicians. The ASC, Roanoke Ambulatory Surgery Center, is located at 1102 Jefferson Street, SE, Roanoke, Virginia.

10. Carilion is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the Commonwealth of Virginia, with its office and principal place of business located at 213 Jefferson Street, Suite 720, Roanoke, Virginia. For the fiscal year ending 2008, Carilion had revenues of $2.48 billion.

11. Carilion is, and at all relevant times has been, engaged in "commerce" as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, or in activities affecting commerce. Prior to the acquisition, CAI and CSE were engaged in "commerce" as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, or in activities affecting commerce.

12. Carilion's acquisition of CAI and CSE constitutes an acquisition under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

THE ACQUISITION

13. On August 22, 2008, Carilion acquired all of the membership interests of Odyssey IV, LLC d/b/a CAI and CSE for **[**

REDACTED

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14. Pursuant to the acquisition, Carilion acquired total ownership and control of CAI, located at 2923 Franklin Street, Roanoke, Virginia, and CSE, located at 2107 Rosalind Avenue, Roanoke, Virginia.

15. **[**

REDACTED

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THE RELEVANT PRODUCT MARKETS

Advanced Outpatient Imaging Services

16. One relevant product market in which to analyze the competitive effects of the acquisition is advanced outpatient imaging services sold to private payors, including commercial health plans. Advanced outpatient imaging services are a cluster of imaging services, including primarily MRI and Computerized Tomographic Imaging ("CT") scanning, used to obtain images of the internal anatomy.

17. There are no services that are reasonably interchangeable with or viable substitutes for advanced outpatient imaging services.

Outpatient Surgical Services

18. Outpatient surgical services constitute a relevant product market in which to analyze the competitive effects of the acquisition. Outpatient surgical services are a cluster of procedures performed at hospitals or certified freestanding clinics (commonly called outpatient surgery hospitals or ASCs) that do not require an overnight stay at a hospital.[1] Outpatient surgery services include a wide variety of surgical services, such as interventional spine surgeries, vascular access surgeries for cancer and dialysis patients, open rotator cuff repair, and laser coagulation of the prostate (for urine flow).[2]

19. There are no services that are reasonably interchangeable with or viable substitutes for outpatient surgical services.

THE RELEVANT GEOGRAPHIC MARKET

20. The relevant geographic market in which to analyze the acquisition is the Roanoke area, which includes the Counties and Cities of Roanoke and Salem, Virginia. This area extends roughly 15 to 20 miles around Roanoke and Salem. The existence of this relevant geographic market is evidenced, by among other things, the ability of Carilion to impose significant and non-transitory price increases upon private payers in the purchase of advanced outpatient imaging services and surgical services.

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[1] A freestanding clinic is "certified" when it has received a COPN and a license to operate as an outpatient surgery hospital from Virginia, and Medicare certification as an ASC provider.

[2] In some areas, including the Roanoke area, there are ASCs dedicated to providing specialized ophthalmological procedures such as cataract, refractive, and LASIK surgeries. These surgical procedures do not compete with the cluster of outpatient surgical services that constitute the relevant product market in this matter.

21. Hospitals and other providers outside of the relevant geographic market do not compete with Carilion for the provision of advanced outpatient imaging or surgical services in the relevant geographic market. Few patients who live within the relevant geographic market travel outside its borders to seek these outpatient services. Indeed, patients generally expect to be able to access such services within 30 minutes of their homes.

22. The next closest provider for the services outside of the relevant geographic market is located 35 miles away from the Roanoke area.

MARKET STRUCTURE AND THE MERGER GUIDELINES PRESUMPTION

Advanced Outpatient Imaging Services

23. Under the 1992 DOJ and FTC Horizontal Merger Guidelines ("Merger Guidelines") and relevant case law, Carilion's acquisition of CAI is presumptively unlawful in the market for advanced outpatient imaging services.

24. Under the Herfindahl-Hirschman Index ("HHI"), which is the standard measure of market concentration under the Merger Guidelines, an acquisition is presumed to create or enhance market power or facilitate its exercise if it increases the HHI by more than 100 points and results in a post-acquisition HHI that exceeds 1,800 points. The acquisition at issue created market concentration well in excess of these thresholds. For advanced outpatient imaging services, the acquisition increased the HHI by **[REDACTED]**. The acquisition resulted in Carilion controlling **[REDACTED]** of the market for advanced imaging services in the Roanoke area.[3] It also created a duopoly for imaging services in the Roanoke area, leaving HCA as the only competitor to Carilion.

Outpatient Surgical Services

25. The acquisition reduced the number of outpatient surgical services providers in the Roanoke area from three to two. The only other ASC in the area is owned by HCA. Thus, the acquisition represents a merger-to-duopoly for outpatient surgical services.

26. CSE had just begun operations as an ASC immediately prior to the acquisition, because it obtained the required Medicare certification weeks before it was acquired. As a result, it is difficult to measure market shares and market concentration quantitatively, because pre-acquisition data do not accurately reflect CSE's competitive significance in the marketplace. CSE was planning to expand its outpatient surgical services substantially

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[3] For MRI services, the acquisition increased the HHI by **[REDACTED]** (based on number of procedures). For CT services, the acquisition increased the HHI by **[REDACTED]** (based on number of procedures). The acquisition resulted in Carilion controlling **[REDACTED]** of the market for MRIs and **[REDACTED]** of the market for CT scans in the Roanoke area.

upon receiving its Medicare certification, and likely would have become a significant independent provider of outpatient surgical services in competition with Carilion but for the acquisition.

ANTICOMPETITIVE EFFECTS

The Competitive Significance of CAI and CSE

27. Prior to the acquisition, CAI and CSE offered patients independent imaging and surgery services in a facility more accessible than Carilion's or HCA's hospital-based services. In addition to offering convenience to patients, CAI and CSE offered high-quality services at prices substantially lower than Carilion's or HCA's pricing.

28. The availability and number of alternative providers is the primary source of a health plan's leverage to negotiate competitive rates on behalf of its members. Thus, an acquisition that reduces a health plan's choice of providers reduces the health plan's leverage when negotiating with a provider, and leads to higher prices. That effect is even more pronounced when the number of alternatives is few, as is the case here.

29. Independent freestanding centers, like other healthcare providers, compete for several types of "customers," including health plans, physicians, and patients. CAI and CSE competed for inclusion in health plans' networks primarily by offering low prices for the services that they provide to the plans' enrollees. Independent freestanding centers that do not offer competitive pricing risk exclusion from a health plan's network because hospital-based and hospital-owned outpatient service centers constitute viable substitutes for the services provided by the centers. For example, prior to the acquisition, health plans in Roanoke had the option of contracting with Carilion and not contracting with CAI or CSE. This implicit threat forced CAI and CSE to offer very competitive rates, which were significantly lower than Carilion's rates.

30. Independent freestanding centers also compete with hospitals to win loyalty from patients and referring physicians on the basis of quality, customer service, location, price and cost-effectiveness of services. Before being acquired by Carilion, CAI and CSE advertised directly to patients and physicians in the local print and television media, touting the centers' advantages relative to Carilion, including the centers' reputations for high quality, low-cost, and accessible health care.

31. Prior to the acquisition, competition from CAI and CSE spurred Carilion to improve the quality, services, and amenities at its own outpatient facilities, to the benefit of consumers, and would have spurred such competition in the future.

The Anticompetitive Effects of the Acquisition

32. The acquisition will reduce the number of imaging and surgical services providers in the Roanoke area from three to two, and will eliminate substantial price and non-price competition that benefitted patients, employers, and health plans in the Roanoke area.

33. Post acquisition, health plans can no longer threaten, implicitly or explicitly, to exclude CAI or CSE from their networks, now that the centers are owned by Carilion. This substantially reduces the health plans' leverage, and substantially increases Carilion's leverage, when negotiating rates for services to be provided at these centers. The result will be Carilion's unilateral ability to charge health plans higher prices for CAI's and CSE's services. Indeed, Carilion concedes that it will increase prices post-acquisition for CAI's and CSE's services.

34. The acquisition's anticompetitive price effects will directly and substantially harm patients by increasing their out-of-pocket costs. For example, once Carilion implements its fee structure to the services provided at CAI, the out-of-pocket cost for a brain MRI for many patients will increase by almost 900%, from approximately $40 to $350.

35. Post-acquisition, Carilion's only competitor for imaging and surgical services, HCA, will have little incentive to compete aggressively against Carilion in the stable duopoly. Thus, the likelihood of coordinated interaction between Carilion and HCA is increased with the elimination of the only independent, non-hospital-owned competitor.

ENTRY BARRIERS

36. Entry into the relevant markets will not deter or counteract the likely anticompetitive effects of the acquisitions.

37. Among other entry barriers, opening a new imaging or surgical center requires state approval through the Virginia COPN Program, a process that entails substantial uncertainty and, even if successful, can take almost two years to complete. Carilion and HCA routinely oppose such applications through administrative and judicial proceedings, further decreasing the likelihood of approval and prolonging the approval process.

38. At the time that CSE filed for COPN approval, Carilion stated in its opposition that "[a]s far as Carilion is aware, approval of a physician-owned outpatient surgical hospital with one general purpose operating room with no hospital affiliation or no exclusivity condition is unprecedented."

39. In addition to COPN approval, a new entrant into the outpatient surgical services market cannot be reimbursed as an ambulatory care facility until it is Medicare certified. This process cannot begin until after COPN approval, and can take an additional 12 months or more to complete.

EFFICIENCIES

40. The acquisition will not result in improved quality of care or other efficiencies that offset the likely competitive harm.

41. Prior to the acquisition, CAI and CSE were well known as high-quality providers of imaging and surgical services. The acquisition will not improve quality of care in any manner that could not have been achieved without the acquisition.

VIOLATION

42. The allegations of Paragraphs 1 through 41 are repeated and realleged as though fully set forth here.

43. The acquisition of CAI and CSE by Carilion will substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

NOTICE

Notice is hereby given to the Respondents that the twenty-fourth day of March, 2010, at 10:00 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission and Clayton Acts to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14^{th}) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge will schedule an initial pre-hearing scheduling conference to be held not later than ten (10) days after the answer is filed by the last answering respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (and in any event no later than five (5) days after the answer is filed by the last answering respondent). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving a respondent's answer, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisition challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Divestiture of CAI and CSE, and associated assets, in a manner that restores the outpatient centers as viable, independent competitors in the relevant markets.

2. Divestiture of certain before or after-acquired physician practices that were sources of referral support to CAI or potentially participating surgeons for CSE.

3. A prohibition against any transaction between Carilion and the restored CAI and CSE that combines any of their assets or facilities in the relevant geographic market, except as may be approved by the Commission.

4. A requirement that, for a period of time, Carilion provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of its hospitals or other health facilities in the relevant geographic market with any other hospitals, health facilities or physicians in the relevant geographic market.

5. A requirement to file periodic compliance reports with the Commission.

6. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore CAI and CSE as viable, independent competitors in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this twenty-third day of July, 2009.

By the Commission.

Donald S. Clark
Secretary

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