

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

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

In the Matter of

CARILION CLINIC,
a corporation.

Docket No. 9338

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having heretofore issued its Complaint charging Carilion Clinic (“Carilion” or “Respondent”) with a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Respondent having been served with a copy of that Complaint, together with a notice of contemplated relief; and

Respondent Carilion, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent Carilion of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent Carilion that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Carilion Clinic is a 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 South Jefferson Street, Suite 720, Roanoke, Virginia.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Carilion” or “Respondent Carilion” means Carilion Clinic, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Carilion Clinic, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Decision and Order” means the:
 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission.
- D. “Orders” means the Decision and Order and this Order to Maintain Assets.

II.

IT IS FURTHER ORDERED that from the date on which Respondent Carilion signs the Consent Agreement and until the CAI Effective Date:

- A. Respondent Carilion shall take such actions as are necessary to maintain the economic viability, marketability and competitiveness of the CAI Business to minimize any risk of loss of competitive potential for the CAI Business, and to prevent the destruction, removal,

wasting, deterioration, or impairment of the CAI Business, except for ordinary wear and tear. Respondent Carilion shall not sell, transfer, encumber or otherwise impair the CAI Business (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the economic viability, marketability or competitiveness of the CAI Business.

- B. Respondent Carilion shall retain all of Respondent Carilion's rights, title, and interest in the CAI Business.
- C. Respondent Carilion shall maintain the operations of the CAI Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the CAI Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the CAI Business. Respondent Carilion's responsibilities shall include, but are not limited to, the following:
 - 1. Respondent Carilion shall provide the CAI Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the CAI Business;
 - 2. Respondent Carilion shall continue, at least at their scheduled pace, any additional expenditures for the CAI Business authorized prior to the date the Consent Agreement was signed by Respondent Carilion including, but not limited to, all research, development, manufacture, distribution, marketing and sales expenditures;
 - 3. Respondent Carilion shall provide such resources as may be necessary to respond to competition against the CAI Business and/or to prevent any diminution in sales of the CAI Business prior to the CAI Effective Date;
 - 4. Respondent Carilion shall make available for use by the CAI Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business;
 - 5. Respondent Carilion shall provide the CAI Business with such resources and funds as are necessary to maintain the viability, marketability and competitiveness of the CAI Business; and
 - 6. Respondent Carilion shall provide such support services to the CAI Business as of the date the Consent Agreement was signed by Respondent Carilion.

- D. Respondent Carilion shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise, to what has been associated with the CAI Business as of the date the Consent Agreement was signed by Respondent Carilion.
- E. Respondent Carilion shall provide all of the Designated CAI Carilion Employees with reasonable financial incentives to continue in their positions consistent with past practices and/or reasonable financial incentives as may be necessary to preserve the marketability, viability and competitiveness of the CAI Business pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Carilion until the CAI Effective Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional reasonable financial incentives as may be necessary to prevent any diminution of the relevant CAI Business' competitiveness.
- F. Respondent Carilion shall not interfere with the hiring or employing of the Designated CAI Carilion Employees as described in Paragraph III of the proposed Decision and Order, and shall remove any impediments within the control of Respondent Carilion that may deter these employees from accepting employment with the CAI Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent Carilion that would affect the ability or incentive of those individuals to be employed by the CAI Acquirer. In addition, Respondent Carilion shall not make any counteroffer to a Designated CAI Carilion Employee who receives a written offer of employment from the CAI Acquirer.

PROVIDED, HOWEVER, subject to the conditions of continued employment prescribed in this Order to Maintain Assets, this Paragraph II.F. shall not prohibit Respondent Carilion from continuing to employ any Designated CAI Carilion Employee under the terms of such employee's employment with Respondent Carilion prior to the date of the written offer of employment from the CAI Acquirer to such employee.

- G. Respondent Carilion shall not use, directly or indirectly, any Confidential Business Information Related To the CAI Business other than as necessary to comply with the following:
 - 1. The requirements of the Orders; and
 - 2. Applicable law.
- H. Respondent Carilion shall not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the CAI Acquirer or other persons specifically authorized by the CAI Acquirer to receive such information.
- I. Respondent Carilion shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the CAI Business to Respondent Carilion's employees associated with Respondent Carilion's imaging facilities other than CAI.

- J. Respondent Carilion shall institute procedures and requirements to ensure that:
 - 1. Respondent Carilion employees with access to Confidential Business Information Relating To the CAI Business do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 - 2. Respondent Carilion employees associated with Respondent Carilion's imaging facilities do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- K. Respondent Carilion shall require any Persons with access to Confidential Business Information Relating To the CAI Business to enter into agreements, within ten (10) days after the date this Order to Maintain Assets becomes final, not to disclose any Confidential Business Information Relating To the CAI Business to Respondent Carilion or to any third party except as otherwise permitted by this Order to Maintain Assets. Copies of such agreements shall be retained by Respondent Carilion, and provided to the Commission.
- L. The purpose of this Order to Maintain Assets is to maintain the economic viability, marketability and competitiveness of the CAI Business until the CAI Effective Date, to minimize any risk of loss of competitive potential for the CAI Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the CAI Business, except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that from the date on which Respondent Carilion signs the Consent Agreement and until the CSE Effective Date:

- A. Respondent Carilion shall take such actions as are necessary to maintain the economic viability, marketability and competitiveness of the CSE Business to minimize any risk of loss of competitive potential for the CSE Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the CSE Business, except for ordinary wear and tear. Respondent Carilion shall not sell, transfer, encumber or otherwise impair the CSE Business (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the economic viability, marketability or competitiveness of the CSE Business.
- B. Respondent Carilion shall retain all of Respondent Carilion's rights, title, and interest in the CSE Business.
- C. Respondent Carilion shall maintain the operations of the CSE Business in the regular and ordinary course of business and in accordance with past practice (including regular repair

and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the CSE Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the CSE Business. Respondent Carilion's responsibilities shall include, but are not limited to, the following:

1. Respondent Carilion shall provide the CSE Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the CSE Business;
 2. Respondent Carilion shall continue, at least at their scheduled pace, any additional expenditures for the CSE Business authorized prior to the date the Consent Agreement was signed by Respondent Carilion including, but not limited to, all research, development, manufacture, distribution, marketing and sales expenditures;
 3. Respondent Carilion shall provide such resources as may be necessary to respond to competition against the CSE Business and/or to prevent any diminution in sales of the CSE Business prior to the CSE Effective Date;
 4. Respondent Carilion shall make available for use by the CSE Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business;
 5. Respondent Carilion shall provide the CSE Business with such resources and funds as are necessary to maintain the viability, marketability and competitiveness of the CSE Business;
 6. Respondent Carilion shall provide such support services to the CSE Business as of the date the Consent Agreement was signed by Respondent Carilion.
- D. Respondent Carilion shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise, to what has been associated with the CSE Business as of the date the Consent Agreement was signed by Respondent Carilion.
- E. Respondent Carilion shall provide all the Designated CSE Carilion Employees with reasonable financial incentives to continue in their positions consistent with past practices and/or reasonable financial incentives as may be necessary to preserve the marketability, viability and competitiveness of the CSE Business pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Carilion until the CSE Effective Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional reasonable financial incentives as may be necessary to prevent any diminution of the relevant CSE Business' competitiveness.

- F. Respondent Carilion shall not interfere with the hiring or employing of the Designated CSE Carilion Employees as described in Paragraph III of the proposed Decision and Order, and shall remove any impediments within the control of Respondent Carilion that may deter these employees from accepting employment with the CSE Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent Carilion that would affect the ability or incentive of those individuals to be employed by the CSE Acquirer. In addition, Respondent Carilion shall not make any counteroffer to a Designated CSE Carilion Employee who receives a written offer of employment from the CSE Acquirer.

PROVIDED, HOWEVER, subject to the conditions of continued employment prescribed in this Order to Maintain Assets, this Paragraph III.F. shall not prohibit Respondent Carilion from continuing to employ any Designated CSE Carilion Employee under the terms of such employee's employment with Respondent Carilion prior to the date of the written offer of employment from the CSE Acquirer to such employee.

- G. Respondent Carilion shall not use, directly or indirectly, any Confidential Business Information Related To the CSE Business other than as necessary to comply with the following:
1. The requirements of the Orders; and
 2. Applicable law.
- H. Respondent Carilion shall not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the CSE Acquirer or other persons specifically authorized by the CSE Acquirer to receive such information;
- I. Respondent Carilion shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the CSE Business to Respondent Carilion's employees associated with Respondent Carilion's ambulatory surgery facilities other than CSE;
- J. Respondent Carilion shall institute procedures and requirements to ensure that:
1. Respondent Carilion employees with access to Confidential Business Information Relating To the CSE Business do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 2. Respondent Carilion employees associated with Respondent Carilion's ambulatory surgical facilities (including its joint venture ambulatory surgical facility) do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.

- K. Respondent Carilion shall require any Persons with access to Confidential Business Information Relating To the CSE Business to enter into agreements, within ten (10) days after the date this Order to Maintain Assets becomes final, not to disclose any Confidential Business Information Relating To the CSE Business to Respondent Carilion or to any third party except as otherwise permitted by this Order to Maintain Assets. Copies of such agreements shall be retained by Respondent Carilion, and provided to the Commission.
- L. The purpose of this Order to Maintain Assets is to maintain the economic viability, marketability and competitiveness of the CSE Business until the CSE Effective Date, to minimize any risk of loss of competitive potential for the CSE Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the CSE Business, except for ordinary wear and tear.

IV.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent Carilion signs the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that Respondent Carilion expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. The Commission shall select the Monitor, subject to the consent of Respondent Carilion, which consent shall not be unreasonably withheld. If Respondent Carilion has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Carilion of the identity of any proposed Monitor, Respondent Carilion shall be deemed to have consented to the selection of the proposed Monitor.
- C. Not later than ten (10) days after appointment of the Monitor, Respondent Carilion shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Carilion's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.
- D. Respondent Carilion shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor Respondent Carilion's compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission including, but not limited to:

- a. Assuring that Respondent Carilion expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders; and
 - b. Monitoring any agreements between Respondent Carilion and either the CAI Acquirer or the CSE Acquirer.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Carilion's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request Related To Respondent Carilion's compliance with its obligations under the Orders. Respondent Carilion shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Carilion's compliance with the Orders.
 4. The Monitor shall serve, without bond or other security, at the expense of Respondent Carilion on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Carilion, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
 5. Respondent Carilion shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.
 6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent Carilion of its obligations under the Orders.
 7. Respondent Carilion may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *PROVIDED, HOWEVER*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an

appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.

- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
 - 1. The Commission shall select the substitute Monitor, subject to the consent of Respondent Carilion, which consent shall not be unreasonably withheld. If Respondent Carilion has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Carilion of the identity of any proposed Monitor, Respondent Carilion shall be deemed to have consented to the selection of the proposed Monitor.
 - 2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent Carilion shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Carilion's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Monitor pursuant to the Decision and Order and the Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

V.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every sixty (60) days thereafter until Respondent Carilion has fully complied with its obligations under Paragraphs II and III of the related Decision and Order in this matter, Respondent Carilion 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 this Order to Maintain Assets and the related Decision and Order; *PROVIDED, HOWEVER*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent Carilion pursuant to Paragraph VII.A. of the Decision and Order.

VI.

IT IS FURTHER ORDERED that Respondent Carilion shall notify the Commission at least thirty (30) days prior to any proposed:

- A. dissolution of the Respondent Carilion;
- B. acquisition, merger or consolidation of Respondent Carilion; or
- C. other change in the Respondent Carilion, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Maintain Assets.

VII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent Carilion, Respondent Carilion shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of Respondent Carilion and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent Carilion related to compliance with this Order to Maintain Assets, which copying services shall be provided by Respondent Carilion at its expense; and
- B. to interview officers, directors, or employees of Respondent Carilion, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The latter of:
 - 1. the day after the CAI Effective Date;
 - 2. the day after the CSE Effective Date;
 - 3. the day the related Decision and Order becomes final; or
- C. The day after the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: October 6, 2009