

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright
Terrell McSweeney

)	
In the Matter of)	
)	
H.I.G. Bayside Debt & LBO Fund II, L.P.,)	
 a partnership,)	
)	Docket No. C-
and)	
)	
Crestview Partners, L.P.,)	
 a partnership.)	
)	

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Surgery Center Holdings, Inc., a subsidiary of H.I.G. Bayside Debt & LBO Fund II, L.P. (“H.I.G.”), of Symbion Holdings Corporation, a subsidiary of Crestview Partners, L.P. (“Crestview”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets, and having accepted the executed Consent Agreement and placed 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 the following Decision and Order (“Order”):

1. Respondent H.I.G. Bayside Debt & LBO Fund II, L.P., is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 1450 Brickell Avenue, 31st Floor, Miami, Florida 33131. Surgery Center Holdings, Inc., is a subsidiary of Respondent H.I.G. Bayside Debt & LBO Fund II, L.P.
2. Respondent Crestview Partners, L.P., is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 667 Madison Avenue, 10th Floor, New York, New York 10065. Symbion Holdings Corporation is a subsidiary of Crestview Partners, L.P.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and this proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “H.I.G.” means H.I.G. Bayside Debt & LBO Fund II, L.P., its directors, officers, partners, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships, subsidiaries (including Surgery Center Holdings, Inc.), divisions, groups, and affiliates controlled by H.I.G., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition is completed, H.I.G. includes Symbion.
- B. “Crestview” means Crestview Partners, L.P., its directors, officers, partners, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships, subsidiaries (including Symbion Holdings Corporation), divisions, groups, and affiliates controlled by Crestview, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition is completed, Crestview does not include Symbion.

- C. “Surgery Partners” means Surgery Center Holdings, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships, subsidiaries, divisions, groups, and affiliates controlled by Surgery Partners, and the respective directors, officers, employees, agents representatives, successors, and assigns of each; after the Acquisition is completed, Surgery Partners includes Symbion.
- D. “Symbion” means Symbion Holdings Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships, subsidiaries, divisions, groups, and affiliates controlled by Symbion, and the respective directors, officers, employees, agents representatives, successors, and assigns of each.
- E. “Respondents” means H.I.G., Surgery Partners, Crestview, and Symbion, individually and collectively.
- F. “Acquisition” means the acquisition of Symbion Holdings Corporation by Surgery Center Holdings, Inc., pursuant to the Agreement and Plan of Merger, dated June 13, 2014.
- G. “Ambulatory Surgical Center” means a certified freestanding clinic in which Outpatient Surgical Services are provided.
- H. “ASC Business” means the operation of an Ambulatory Surgical Center and includes but is not limited to the provision of Outpatient Surgical Services at an Ambulatory Surgical Center, and also includes all other services, businesses, and operations related to the Ambulatory Surgical Center.
- I. “ASC Employees” means the Blue Springs Employees (or the Orange City Employees, if the SP Membership Interest is required to be divested).
- J. “Blue Springs Surgery Center” means Orange City Surgical, LLC, a Delaware limited liability company, and includes the Ambulatory Surgical Center located at 1053 Medical Center Dr., Orange City, FL 32763.
- K. “Blue Springs Employees” means all Persons who are full-time employees, part-time employees, contract employees, or independent contractors of Respondents whose duties, at any time after the date six (6) months preceding the date Respondents execute the Agreement Containing Consent Order in this matter, related or relate to the ASC Business of the Blue Springs Surgery Center.
- L. “Closing Date” means the date on which Respondents (or a Divestiture Trustee, if one is appointed by the Commission) consummate a transaction to divest the

Symbion Membership Interest (or the SP Membership Interest, if required to be divested) to the Commission-approved Acquirer.

- M. “Commission-approved Acquirer” means the entity approved by the Commission to acquire the Symbion Membership Interest (or the SP Membership Interest, if required to be divested) pursuant to this Order.
- N. “Confidential Business Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, patient lists and information, physician referral lists, price lists, Payor contract terms, other contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- O. “Direct Cost” means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide Transition Services. “Direct Cost” to a Commission-approved Acquirer for its use of any of Respondents’ employee’s labor shall not exceed the then-current average wage rate for such employee, including benefits.
- P. “Divestiture Agreement” means any agreement between one or both the Respondents and a Proposed Acquirer (or a Divestiture Trustee appointed pursuant to Paragraph VIII. of this Order and a Proposed Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to divestiture of the Symbion Membership Interest (or the SP Membership Interest, if required to be divested), that have been submitted to the Commission for its approval to accomplish the requirements of this Order, including, but not limited to, the Transition Services Agreement.
- Q. “Divestiture Trustee(s)” means any person or entity appointed by the Commission pursuant to Paragraph VIII. of this Order to act as a trustee in this matter.
- R. “Governmental Approvals” means any permission issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.
- S. “Management Agreement” means an agreement between the Blue Springs Surgery Center or a Person acting on its behalf (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested, or a Person acting on its behalf), and a Management Company pursuant to which such Management Company shall provide administrative and management services to the Ambulatory Surgical Center.

- T. “Management Company” means the Person or entity managing the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), other than Symbion or H.I.G.
- U. “Operating Agreement” means an agreement providing for the operation of the limited liability company that owns and operates the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) and establishing the relative rights and responsibilities of the members of the company.
- V. “Orange City Employees” means all Persons who are full-time employees, part-time employees, contract employees, or independent contractors of Respondents whose duties, at any time during the six (6) months preceding the date Respondents execute the Agreement Containing Consent Order in this matter or at any time after the date Respondents execute the Agreement Containing Consent Order in this matter, related or relate to the ASC Business of the Orange City Surgery Center.
- W. “Orange City Surgery Center” means Orange City Surgery Center, LLC, a Florida limited liability company, and includes the Ambulatory Surgery Center located at 975 Town Center Dr., Orange City, FL 32763.
- X. “Outpatient Surgical Services” means a broad cluster of procedures that do not require an overnight stay at a healthcare facility, including, but not limited to, arthroscopic knee surgery, cataract removal, colonoscopy, and anesthetic injections for pain management.
- Y. “Payor” means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other person, including, but not limited to: health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; health maintenance organizations; government health benefits programs; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.
- Z. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, or other business or legal entity.
- AA. “Proposed Acquirer” means any proposed acquirer of the Symbion Membership Interest (or the SP Membership Interest, if required to be divested) that is submitted to the Commission for its approval under this Order; Proposed Acquirer of the Symbion Membership Interest may include Dr. Mark W. Hollmann.

- BB. “SP Membership Interest” means all of H.I.G.’s rights in and title to H.I.G.’s interest in the Orange City Surgery Center.
- CC. “Symbion Membership Interest” means all of Symbion’s rights in and title to Symbion’s interest in the Blue Springs Surgery Center.
- DD. “Third-Party Consents” means all consents and approvals from any Person other than the Respondents that are necessary to complete transfer to the Commission-approved Acquirer of the Symbion Membership Interest (or the SP Membership Interest, if required to be divested).
- EE. “Transition Services” means services relating to an ASC Business, including, but not limited to, assistance relating to billing, accounting, governmental regulation, human resources management, information systems, and purchasing, as well as providing assistance in acquiring, obtaining access, and customizing all software used in the provision of such services; *provided, however*, that Transition Services shall not include negotiating Payor contracts.
- FF. “Transition Services Agreement” means an agreement between Respondents and the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) to provide Transition Services to the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested).

II.

IT IS FURTHER ORDERED that:

- A. No later than sixty (60) days after the final Order is issued, Respondents shall divest the Symbion Membership Interest, absolutely and in good faith and at no minimum price, to Dr. Mark W. Hollmann, if he receives the prior approval of the Commission, or to another acquirer that receives the prior approval of the Commission, and only in a manner (including a Divestiture Agreement and an Operating Agreement, with all required agreements fully executed) that receives the prior approval of the Commission.
- B. Prior to the Closing Date, Respondents shall secure all assignments, Third-Party Consents, Governmental Approvals, and waivers, including rights of approval and rights of first refusal, from all private and governmental entities that are necessary for the divestiture of the Symbion Membership Interest (or the SP Membership Interest, if required to be divested) and for the continued operation of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) as an ongoing ASC Business in

substantially the same manner as the business was operated prior to the Acquisition, including execution of the applicable Operating Agreement.

- C. The purpose of the divestiture is to ensure the continuation of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) as an ongoing viable enterprise engaged in the provision of Outpatient Surgical Services independent of Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that, pending divestiture of the Symbion Membership Interest (or the SP Membership Interest, if required to be divested), Respondents shall:

- A. With respect to the Symbion Membership Interest, the Blue Springs Surgery Center, and the ASC Business of the Blue Springs Surgery Center:
1. Ensure that the ASC Business of the Blue Springs Surgery Center is managed separate, apart, and independent of Respondents' other businesses and assets as required by this Decision and Order and the Hold Separate Order and shall vest the Blue Springs Surgery Center with all rights, powers, and authority necessary to conduct its business;
 2. Take no actions that interfere with existing relationships with third parties, including Payors, providers, suppliers, and others having business relations with the Blue Springs Surgery Center;
 3. Not exercise direction or control over, or influence directly or indirectly, the ASC Business of the Blue Springs Surgery Center or any of its operations, except to the extent that Respondents must exercise direction and control over the business as is necessary to assure compliance with the Hold Separate Order, the Consent Agreement, the Decision and Order, and all applicable laws;
 4. Take all actions necessary to maintain the marketability of the Symbion Membership Interest and the economic viability and competitiveness of the Blue Springs Surgery Center, and the ASC Business of the Blue Springs Surgery Center, to minimize any risk of loss of competitive potential for the Blue Springs Surgery Center or the ASC Business of the Blue Springs Surgery Center, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Blue Springs Surgery Center or the ASC Business of the Blue Springs Surgery Center, except for ordinary wear and tear; and

5. Not sell, transfer, encumber, or otherwise impair the Symbion Membership Interest (except as required by the Decision and Order), take no action that lessens the marketability of the Symbion Membership Interest or the full economic viability or competitiveness of the Blue Springs Surgery Center, or the ASC Business of the Blue Springs Surgery Center.
- B. With respect to the SP Membership Interest, the Orange City Surgery Center, and the Orange City Surgery Center, Respondents shall:
1. Maintain the management of the Orange City Surgery Center, in the regular and ordinary course of business and in accordance with past practice and as may be necessary to preserve the marketability of the SP Membership Interest and the viability and competitiveness of the Orange City Surgery Center and the ASC Business of the Orange City Surgery Center, to minimize any risk of loss of competitive potential of the Orange City Surgery Center and the ASC Business of the Orange City Surgery Center, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Orange City Surgery Center or the ASC Business of the Orange City Surgery Center, except for ordinary wear and tear;
 2. Use their best efforts, in a manner consistent with past practices, to preserve the existing relationships with third parties, including Payors, providers, suppliers, and others having business relations with the Orange City Surgery Center;
 3. Take all actions necessary to maintain the economic viability, marketability, and competitiveness of the SP Membership Interest, the Orange City Surgery Center, and the ASC Business of the Orange City Surgery Center, and prevent the destruction, removal, wasting, deterioration, or impairment of the Orange City Surgery Center or the ASC Business of the Orange City Surgery Center, except for ordinary wear and tear; and
 4. Not sell, transfer, encumber, or otherwise impair the SP Membership Interest (except as required by the Decision and Order), and take no action that lessens the full economic viability, marketability, or competitiveness of the SP Membership Interest, the Orange City Surgery Center, or the ASC Business of the Orange City Surgery Center.

IV.

IT IS FURTHER ORDERED that:

- A. Respondents shall, at the option of the Commission-approved Acquirer, provide Transition Services to the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) pursuant

to a Transition Services Agreement, subject to the prior approval of the Commission.

- B. Respondents shall provide Transition Services to the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) necessary and sufficient to assure the operation of the ASC Business of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) in substantially the same manner that such business was operated prior to the Acquisition and to provide Outpatient Surgical Services in at least the same manner as were provided prior to the Acquisition.
- C. Respondents shall provide the Transition Services required by this Paragraph at least at the same level and quality as such services are or have been provided by or to Respondents with respect to the other ASC Businesses that they manage or have managed, including the services Symbion provided to the ASC Business of the Blue Springs Surgery Center and Surgery Partners provided to the ASC Business of the Orange City Surgery Center.
- D. Subject to the prior approval of the Commission, the term of the Transition Services Agreement shall be six (6) months with an option by the Commission-approved Acquirer to extend the term for up to another six (6) months.
- E. All services provided by Respondents to the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested) pursuant to the Transition Services Agreement shall be at no more than Respondents' Direct Cost.
- F. Prior to or during the term of the Transition Services Agreement, Respondents shall provide an opportunity for the Commission-approved Acquirer, its agent, an agent of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company:
 - 1. To meet personally, and outside of the presence or hearing of any employee or agent of any Respondents, with any one or more of the ASC Employees; and
 - 2. To make offers of employment or to enable the Commission-approved Acquirer, its agent, an agent of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company to make offers of employment to any one or more of the ASC Employees.

- G. For a period beginning upon execution of the Agreement Containing Consent Order and ending one (1) year from the date of termination of the Transition Services Agreement, Respondents shall:
1. Not interfere, directly or indirectly, with the hiring or employing of any ASC Employees, not offer any incentive to such employees to decline employment with the Commission-approved Acquirer, its agent, an agent of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company, and not otherwise interfere with the recruitment of any ASC Employees by the Commission-approved Acquirer, its agent, an agent of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company;
 2. Remove any impediments within the control of Respondents that may deter these employees from accepting employment including, but not limited to, waiving any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed or to perform his or her duties;
 3. Not make any counteroffer to any ASC Employees who receive a written offer of employment from the Commission-approved Acquirer, its agent, an agent of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee; and
 4. Not, directly or indirectly, solicit or otherwise attempt to induce any of the ASC Employees who have accepted offers of employment with the Commission-approved Acquirer, its agent, an agent of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company to terminate his or her employment with the Commission-approved Acquirer, its agent, an agent of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company; *provided, however*, that Respondents may:
 - a. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at ASC Employees; or

- b. hire ASC Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph G.4.; *provided further, however*, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any ASC Employee if the Commission-approved Acquirer has notified Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Commission-approved Acquirer, its agent, an agent of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), or the Management Company.

V.

IT IS FURTHER ORDERED that the Divestiture Agreement approved by the Commission:

- A. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreement; and
- B. Shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a failure to comply with this Order. If any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order.

VI.

IT IS FURTHER ORDERED that:

- A. After the Closing Date, Respondents shall not use, solicit, or access, directly or indirectly, any Confidential Business Information of the Blue Springs Surgery Center (or the Orange City Surgery Center, if the SP Membership Interest is required to be divested), and shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish such Confidential Business Information, directly or indirectly, to or with any Person other than:

1. As necessary to comply with the requirements of this Order or the Hold Separate Order;
 2. Pursuant to a Divestiture Agreement; or
 3. To comply with applicable law, regulations, and other legal requirements.
- B. No later than five (5) days after the Acquisition is completed, Respondents shall provide written notification of the restrictions, prohibitions, and requirements of this Paragraph VI. to all of Respondents' employees, agents, and representatives employed at, or with responsibilities relating to, the Blue Springs Surgery Center or the Orange City Surgery Center, or who had or have access to or possession, custody, or control of any Confidential Business Information relating to the Blue Springs Surgery Center or the Orange City Surgery Center; such notification shall include a plain language explanation of the requirements of this Order and a description of the consequences of failing to comply with the requirements. Respondents shall provide such notification by US mail or by e-mail, with return receipt requested acknowledging receipt of the notification or similar transmission.
- C. Respondents shall maintain complete records of all such notifications at Respondents' corporate headquarters and keep a file of all receipts and acknowledgments for one (1) year after the Closing Date.
- D. Respondents shall provide the Commission-approved Acquirer (and the Monitor and the Hold Separate Monitor, if appointed) with a copy of such notification and with copies of all other certifications, notifications, and reminders sent to Respondents' personnel.
- E. Respondents shall, no later than thirty (30) days after the Acquisition is completed:
1. Obtain, as a condition of continued employment, from each of Respondents' employees, agents, and representatives who had or have access to or possession, custody, or control of any Confidential Business Information of the Blue Springs Surgery Center and the Orange City Surgery Center an executed confidentiality agreement that complies with the restrictions, prohibitions, and requirements of this Order and the Hold Separate Order; and
 2. No later than thirty (30) days after the Closing Date, institute procedures and requirements and take such actions as are necessary to ensure that Respondents' personnel comply with the restrictions, prohibitions, and requirements of this Paragraph VI., including all actions that Respondents would take to protect their own trade secrets and confidential information.

VII.

IT IS FURTHER ORDERED that:

- A. At any time after the Respondents sign the Agreement Containing Consent Order in this matter, the Commission may appoint a Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Divestiture Agreement, including the Transition Services Agreement and the Order to Hold Separate and Maintain Assets.
- B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have 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 Respondents of the identity of any proposed monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.
- C. No later than ten (10) days after appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights, powers, and authorities necessary to permit the monitor to perform his/her duties and responsibilities, pursuant to this Order in a manner consistent with the purposes of this Order.
- D. If a Monitor is appointed, Respondents 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 Respondents' compliance with the Respondents' obligations under the Order, 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 Order and in consultation with the Commission.
 - 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
- E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order and the Divestiture Agreement.

- F. Respondents 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 Respondents' compliance with the Order and the Divestiture Agreement.
- G. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
- H. Respondents 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 preparation 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, willful or wanton acts, or bad faith by the Monitor.
- I. Respondents shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in the agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Order, the Divestiture Agreement, or the Transition Services Agreement. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order and the Divestiture Agreement.
- J. Respondents may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- K. 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 related to Commission materials and information received in connection with the performance of the Monitor's duties.
- L. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VII.

- M. 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 Order.
- N. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee or Monitor pursuant to the relevant provisions of this Order or the Hold Separate Monitor pursuant to the Hold Separate Order.

VIII.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested the Symbion Membership Interest as required by Paragraph II. of this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to divest, at the Divestiture Trustee’s option, either the Symbion Membership Interest or the SP Membership Interest in a manner that satisfies the requirements of this Order, including Paragraph II. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VIII. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee’s powers, duties, authority, and responsibilities:
 - 1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee. The Commission shall require the Divestiture Trustee to sign a customary confidentiality agreement.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.
3. Within ten (10) days after appointment of the Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture or transfer required by the Order.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the 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 Divestiture Trustee, by the court; *provided, however*, the Commission may extend the divestiture period only two (2) times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture under this Order. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VIII. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
6. The Divestiture 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 Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to a Commission-approved Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring person, and if the Commission determines to approve more than one such acquiring person, the Divestiture Trustee shall divest to the acquiring

Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such person within five (5) days of receiving notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the assets that are required to be divested by this Order.
8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture 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 losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets required to be divested by this Order.
10. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture under this Order.
11. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

- C. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VIII.
- D. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

IX.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until the Respondents have fully complied with the provisions of Paragraphs II., III., IV., and VIII. (if applicable) of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II., III., IV., and VIII. (if applicable) of this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II., III., IV., and VIII. (if applicable) of this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their reports copies of all non-privileged written communications to and from such parties, all non-privileged internal memoranda, and all non-privileged reports and recommendations concerning completing the obligations; and
- B. One (1) year from the date this Order is issued, annually for the next nine (9) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

X.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

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

XI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and upon five (5) days' notice to Respondents made to their principal United States office, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business hours of such Respondent 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 such Respondent relating to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of such Respondent; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

XII.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date the Order is issued.

By the Commission.

Donald S. Clark
Secretary

ISSUED:
SEAL