

FILED

UNITED STATE DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

2003 APR 23 AM 11:11

CLEAR U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

STATE OF FLORIDA  
EX REL. CHARLES J. CRIST, JR.,  
ATTORNEY GENERAL,

2: 03 -c v- 177 -FTM-29DNE

Plaintiff,

v.

HCA, INC. (formerly known as Columbia/HCA Healthcare Corporation),  
BIG CYPRESS MEDICAL CENTER, INC.,  
CLEVELAND CLINIC FLORIDA (A NONPROFIT CORPORATION),  
CLEVELAND CLINIC FLORIDA HOSPITAL (A NONPROFIT CORPORATION), and  
CLEVELAND CLINIC FLORIDA HOSPITAL NAPLES NON PROFIT CORPORATION,

Defendants.

**FINAL CONSENT JUDGMENT**

Plaintiff, the State of Florida, by and through Attorney General Charles J. Crist, Jr. (hereinafter "State of Florida"), having filed its Complaint on April 18, 2003, and Plaintiff and the Defendants, HCA, Inc. (formerly known as Columbia/HCA Healthcare Corporation), Big Cypress Medical Center, Inc. (hereinafter collectively "Columbia/HCA Defendants"), Cleveland Clinic Florida (a nonprofit corporation), Cleveland Clinic Florida Hospital (a nonprofit corporation), and Cleveland Clinic Florida Hospital Naples Non Profit Corporation (hereinafter collectively "Cleveland Clinic Defendants"), by their respective attorneys, having consented to

the entry of this Final Consent Judgment without trial or adjudication of any issue of fact or law, and without this Final Consent Judgment constituting evidence against, or admission by, any party with respect to any issue of fact or law;

Now, therefore, without trial or adjudication of any issue of fact or law, it is hereby ORDERED, ADJUDGED AND DECREED:

I.

JURISDICTION

This Court has jurisdiction of the subject matter and each of the parties to this action. The Complaint asserts claims against the Defendants under Section 1 of the Sherman Act, 15 U.S.C. § 1, for treble damages in accordance with Section 4 of the Clayton Act, under 15 U.S.C. § 15, and for permanent injunctive relief in accordance with Section 16 of the Clayton Act, under 15 U.S.C. § 26. The Complaint also asserts claims for treble damages arising under Section 542.18, Florida Statutes, in accordance with Section 542.22, Florida Statutes, and for injunctive relief in accordance with Section 542.23, Florida Statutes. The Complaint also asserts a claim a under Section 542.18, Florida Statutes, for civil penalties in accordance with Section 542.21, Florida Statutes. The parties do not contest this Court's jurisdiction of the subject matter and of the parties.

II.

APPLICABILITY

This Final Consent Judgment applies to the Defendants and to their officers, directors, agents, employees, successors and assigns and to all other persons in active concert or participation with any of them who receive actual notice of this Final Consent Judgment pursuant to Federal Rule of Civil Procedure 65(d).

III.

ALLEGATIONS OF DEFENDANTS' WRONGFUL CONDUCT

The State of Florida has alleged the following wrongful conduct by the Defendants:

1. On or about March 23, 1998, the Columbia/HCA Defendants were competitors or potential competitors of the Cleveland Clinic Defendants in the acute care hospital market in Collier County, Florida, in the open heart surgery market in Broward County, Florida, and in the health care facilities markets in Lee, Hendry, Glades, Charlotte, Sarasota, Manatee, Hillsborough, and Pinellas Counties.
2. On or about March 23, 1998, the Columbia/HCA Defendants and the Cleveland Clinic Defendants entered into an agreement to settle certain administrative litigation, a copy of which it attached as Exhibit A, which had the effect of unlawfully allocating among the Defendants certain geographic and product markets. Exhibit A is referred to herein as the "Agreement."

3. The Agreement allocated the acute care hospital market in Collier County to the Cleveland Clinic Defendants for a minimum of three years.

4. The Agreement allocated a portion of the open heart surgery market in Broward County, Florida, to the Columbia/HCA Defendants for a minimum of three years.

5. The Agreement allocated the health care facilities markets of Lee, Hendry, Charlotte, Sarasota, Manatee, Hillsborough and Pinellas Counties, Florida, to the Columbia/HCA Defendants for seven years.

6. To date the Columbia/HCA Defendants have honored the terms of the Agreement by not entering the markets allocated to the Cleveland Clinic Defendants.

7. To date the Cleveland Clinic Defendants have honored the terms of the Agreement by not entering the markets allocated to the Columbia/HCA Defendants.

8. Among other things, the effects of such concerted action to allocate markets have been the following:

(a). The number of market participants and potential market participants has been reduced;

(b). The price competition among market participants has been unreasonably reduced;

(c). Public entities in Florida and other Florida consumers have been deprived of the benefits of free and open competition for their use of health care facilities.

(d). Prices for the use of health care facilities to public entities and other Florida consumers have been unlawfully increased;

The Defendants deny that their actions were wrongful and/or that their actions resulted in increased prices or injury to the markets. The Defendants assert that their conduct was lawful.

#### IV.

#### PROHIBITED CONDUCT

The Defendants, individually or jointly, shall not:

(1) enter into an agreement or agreements with a competitor or competitors or with a potential competitor or potential competitors that allocate one or more geographic markets in the State of Florida, either temporally or by services provided, in violation of the antitrust laws of the State of Florida and/or of the United States;

(2) honor nor enforce any of the market allocation provisions of the Agreement; and

(3) honor nor enforce any other agreement or agreements Defendants may have entered into with a competitor or competitors or with a potential competitor or potential competitors involving markets or services rendered in the State of Florida that violate the antitrust laws of the State of Florida and/or of the United States.

V.

REQUIRED PAYMENTS

Within thirty (30) days of the entry of this Consent Final Judgment, the Columbia/HCA Defendants shall jointly make the following payments to the following entities:

(1) to the Department of Legal Affairs of the State of Florida the sum of twenty thousand dollars (\$20,000.00) to reimburse the Office of the Attorney General for the cost of its investigation;

(2) to Broward Children's Center, Inc., the sum of fifty thousand dollars (\$50,000.00), the check being delivered to the Department of Legal Affairs of the State of Florida for delivery to Broward Children's Center, Inc.

(3) to SOS Children's Village of Florida, Inc., the sum of fifty thousand dollars (\$50,000.00), the check being delivered to the Department of Legal Affairs of the State of Florida for delivery to SOS Children's Village of Florida, Inc.

Within thirty (30) days of the entry of this Consent Final Judgment, the Cleveland Clinic Defendants shall jointly make the following payments to the following entities:

(1) to the Department of Legal Affairs of the State of Florida the sum of twenty thousand dollars (\$20,000.00) to reimburse the Office of the Attorney General for the cost of its investigation;

(2) to Isabel Collier Read Immokalee Health Park the sum of one hundred thousand dollars (\$100,000.00), the check being delivered to the Department of Legal Affairs of the State of Florida for delivery to Isabel Collier Read Immokalee Health Park.

VI.

COMPLIANCE PROGRAM

Each of the Defendants shall maintain an antitrust compliance program, which shall include:

- (1) distributing within thirty (30) days from the entry of this Final Consent Judgment a copy of this Final Consent Judgment to all of their officers and directors;
- (2) distributing in a timely manner a copy of this Final Consent Judgment to any person who succeeds to a position described in subsection (1);
- (3) briefing annually each person described in subsection (1) on the meaning and requirements of this Final Consent Judgment, penalties for violation thereof and the antitrust laws, including potential antitrust concerns raised by hospitals;
- (4) obtaining from each person described in subsection (1) an annual written certification that he or she has read, understands and agrees to abide by this Final Consent Judgment;
- (5) maintaining for inspection by the State of Florida a record of recipients to whom this Final Consent Judgment has been distributed.

VII.

CERTIFICATIONS

Each of the Defendants shall make the following certifications:

- (1) within sixty (60) days of the entry of this Final Consent Judgment, the Defendants shall advise the State of Florida in writing whether or not they have complied with subsection VI.(1);
- (2) annually, for five years, on or before the anniversary of the entry of this Final Consent Judgment, the Defendants shall advise the State of Florida in writing whether or not they have complied with subsections VI.(2), (3), (4) and (5).

VIII.

ACCESS

For the sole purpose of determining or securing compliance with this Final Consent Judgment, and subject to any recognized privilege, authorized representatives of the State of Florida, upon written request, shall on reasonable notice be permitted:

- (1) access during the regular business hours of the Defendants to inspect and copy all records and documents relating to any matters contained in this Final Consent Judgment;
- (2) to interview the officers, directors, and employees of the Defendants who may have counsel present, concerning any matters contained in this Final Consent Judgment;

(3) to obtain written reports from any or all of the Defendants relating to such Defendant's compliance with the requirements set forth in this Final Consent Judgment.

IX.

PARTIES' REASONS FOR AGREEING TO THIS ORDER

The State of Florida has agreed to the entry of this order, because, while the wrongful conduct and injury to the market are evident, the injury to the market would be difficult and expensive to quantify. The State of Florida believes that the Defendants' observance of the terms of this order will adequately protect the markets in the future. Therefore, the State of Florida has agreed that this order will be the sole remedy it will seek for Defendants' conduct in entering into and implementing the Agreement.

Defendants deny any wrongful conduct or resulting injury and believe that their conduct was lawful, but in light of the cost and uncertainty of protracted litigation, believe settlement under the terms set forth herein is appropriate.

X.

RETENTION OF JURISDICTION

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Consent Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Consent Judgment, to modify

or terminate any of its provisions, to enforce compliance , and to punish violation of its provisions.

XI.

EXPIRATION

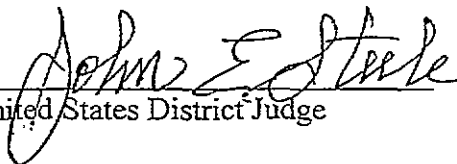
This Final Consent Judgment shall expire five (5) years from the date of entry; provided that the State of Florida may extend the judgment for an additional five (5) years in the event that it believes that a violation of this Final Consent Judgment has occurred.

XII.

PUBLIC INTEREST

Entry of this Final Consent Judgment is in the public interest.

Dated: April 23, 2003

  
United States District Judge

**EXHIBIT A**

SETTLEMENT AGREEMENT BETWEEN BIG CYPRESS MEDICAL CENTER, INC.  
AND CLEVELAND CLINIC FLORIDA HOSPITAL -- NAPLES  
OF DOAH CASE NO. 97-388

Big Cypress Medical Center, Inc., Columbia/HCA Healthcare Corporation, Inc. (both entities hereinafter referred to collectively as Big Cypress) Cleveland Clinic Hospital Florida -- Naples, Cleveland Clinic Hospital Florida, Cleveland Clinic Florida, and The Cleveland Clinic Foundation (all four entities hereinafter referred to as Cleveland Clinic) enter into this settlement agreement to resolve disputes and disagreements among them in a manner that reduces the expense and disruption of litigation and serves the health care needs of the populations they serve. Big Cypress and Cleveland Clinic agree as follows:

1. Big Cypress will withdraw its Certificate of Need Application Number 8610 to establish an acute care hospital in Collier County, Florida within twenty four (24) hours of execution of this agreement.
2. Neither Big Cypress or any entity owned or controlled by Big Cypress will apply for a certificate of need authorizing the establishment of an acute care hospital in Collier County or oppose an application by the Cleveland Clinic for a certificate of need authorizing the establishment of an acute care hospital in Collier County for the next six (6) "hospital batching cycles" as established by Florida Administrative Code Rule 59C-1.008, following the execution of this agreement.
3. Within 30 days of the execution of this agreement, withdrawal of the CON application of Big Cypress, and the filing of official notice of the Agency for Health Care Administration that it supports approval of Cleveland Clinic's CON Application Number 8609,

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Cleveland Clinic will pay to Big Cypress an amount equal to all expenses incurred in seeking to establish an acute care hospital in Collier County and defending litigation involving the approval of CON Number 8619. These expenses shall, include, but are not limited to, consultant fees, application fees, real estate costs, attorney fees, expert witness fees, and litigation costs. In the event that the parties are unable to agree upon the amount of expenses to be paid, either party may demand binding arbitration. Arbitration shall be conducted before a mutually agreed upon arbitrator pursuant to the rules of the American Arbitration Association. Within 50 days of issuance of a final CON to Cleveland Clinic or any entity owned or controlled by Cleveland Clinic approving CON application 8609 or any other CON application of an entity owned or controlled by Cleveland Clinic for an acute care hospital in Collier within the six (6) batching cycles described in paragraph 2, Cleveland Clinic will pay to Big Cypress the difference between \$5,000,000 and the amount previously paid pursuant to this paragraph if that amount does not equal or exceed \$5,000,000. Big Cypress will assign as allowed by law and the applicable contract all of its rights under the existing contract to purchase the land proposed for the location of the Big Cypress Medical Center, Inc.

4. Cleveland Clinic shall fund and support a community program to provide low cost health care to the people of Collier County emphasizing service to children and indigents. This shall include, at a minimum, the commitment to the Florida Health Kids Program made in the CON application. The programs and funding shall be operated and marketed as a 50/50 partnership of the Cleveland Clinic and Columbia/HCA Healthcare Corporation for the benefit of the people of Collier County.

5. Cleveland Clinic will permit Big Cypress to include any hospital in Collier

County owned or controlled by the Cleveland Clinic in any network or managed care agreement.

6. Cleveland Clinic or any entity owned or controlled by it will not establish health care facilities including, but not limited to, physicians' offices, out patient care centers, clinics, and hospitals in Lee, Hendry, Glades, Charlotte, Sarasota, Manatee, Hillsborough, and Pinellas Counties for a period of seven (7) years beginning with the date of execution of this agreement.

7. For a period of seven (7) years beginning with the date of the execution of this agreement, the Cleveland Clinic, through its Professional Staff and/or Columbia/HCA Medical Staff members with whom it may contract, shall exclusively utilize the facilities and services of facilities owned or controlled by Columbia/HCA in Lee County for all non-emergent and elective medical services, including invasive cardiology and open heart surgery, that the Cleveland Clinic is unable to provide at its facilities in either Collier or Broward County.

8. Big Cypress and Cleveland Clinic agree that they will enter into a joint venture or other mutually agreed upon relationship for the continued development and operation of the Parry Berg Cancer Center located in Ft. Myers, Florida upon reasonable terms the Cleveland Clinic and Big Cypress agree they shall negotiate in good faith.

9. Cleveland Clinic shall withdraw its CON application number 8927 for authority to establish an open heart surgery Center in Broward County and withdraw its Administrative Petition in DOAH case Number 98-1113 at any time requested by Big Cypress after execution of this agreement and the filing of official notice of the Agency for Health Care Administration that it supports approval of Cleveland Clinic's CON Application Number 8609, or final approval of CON application number 8609 or any other application of Cleveland Clinic or any entity owned or controlled by it to establish a hospital in Collier County, whichever occurs first.

10. Columbia/HCA or any related entity reserves the right to object to or contest any shared services proposal for an open heart surgery program or the division or splitting of an existing open heart surgery program at any Broward County facility that would result in the Cleveland Clinic instituting open heart surgery services at any facility in Broward County.

11. Cleveland Clinic shall not perform open heart surgery services at its existing or newly approved hospitals in Broward County for a period of three (3) years following the first January anniversary of completion of the first open heart surgery procedure performed under the authority of CON Number 8928. In the event CON Number 8928 is finally denied or expires this provision does not take effect.

12. The obligations of this agreement, other than that in paragraph one (1), take effect upon the filing of official notice of the Agency for Health Care Administration that it supports approval of Cleveland Clinic's CON Application Number 8609 or final approval of CON application number 8609 or any other application of Cleveland Clinic or any entity owned or controlled by it to establish a hospital in Collier County, whichever occurs first.

13. Multiple copies of this agreement may be signed and signatures on separate copies shall have the same force and effect as if the signatures on several copies all appeared upon the same copy.

14. This agreement shall be governed by the law of the State of Florida and may only be enforced in the courts and other tribunals of the State.

15. The individuals signing this agreement represent that they have full authority to bind all the parties indicated.

16. This Settlement Agreement records all terms of the agreement among the parties.

and may only be modified by written agreement of the parties.


17. If the provisions of paragraphs six (6) and (7) are determined in violation of state or federal law and not enforceable by final non-appealable judgment of a state or federal court, those provisions shall be null and void. Cleveland Clinic shall use its best efforts, including if necessary defending or joining in litigation, to uphold the provisions of paragraphs six (6) and seven(7) if they are the subject of legal challenge.

I. Daniel Miller, President, CEO      Date  
Big Cypress Medical Center, Inc.  
Columbia/HCA Healthcare Corporation,  
West Florida Division

Harry K. Moon, M.D.      Date 3/23/98  
Cleveland Clinic Hospital Florida - Naples  
Cleveland Clinic Hospital Florida  
Cleveland Clinic Florida

and may only be modified by written agreement of the parties.

17. If the provisions of paragraphs six (6) and (7) are determined in violation of state or federal law and not enforceable by final non-appealable judgment of a state or federal court, those provisions shall be null and void. Cleveland Clinic shall use its best efforts, including if necessary defending or joining in litigation, to uphold the provisions of paragraphs six (6) and seven(7) if they are the subject of legal challenge.

  
\_\_\_\_\_  
Daniel Miller, President, CEO      Date  
Big Cypress Medical Center, Inc.  
Columbia/HCA Healthcare Corporation,  
West Florida Division

\_\_\_\_\_  
Harry K. Moon, M.D.      Date  
Cleveland Clinic Hospital Florida -- Naples,  
Cleveland Clinic Hospital Florida,  
Cleveland Clinic Florida