UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No. C94-1023
	)	
v.	)	Hon. Michael J. Melloy
	)	
MERCY HEALTH SERVICES and FINLEY TRI-STATES HEALTH GROUP, INC.,	)	
	)	
Defendants.	)	

Reply in Support of United States' Motions in Limine (Nos. 3, 4, 6, 7, and 9)
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Exhibits:

A: Testimony of Mercy's Chairman (Fuller)

B: Testimony of Mercy's Chief Financial Officer (Guetzko)

C: Testimony of Finley Board Member (Chesterman)

D: Testimony of Finley Board Member (Moody)

Overview

This brief replies to defendants' responses to our motions in limine nos. 3, 4, 6, 7 and 9. While there is a sharp dispute between the parties as to most of the issues raised by these motions, it appears that: (i) the differences in the main involve questions of law and legal and evidentiary standards that will have to be resolved at some point (defendants ask that that be done after trial); and (ii) resolving them now will have a significant impact on the trial and the outcome of the case (defendants effectively concede this). Thus, the overriding question before the Court is: Whether the issues posed by the motions can and should be resolved in advance of taking evidence to sharpen and focus the trial. The response argues in the negative and these replies argue in the affirmative.

The response has an unduly narrow, and ultimately wrong, conception of what motions in limine are. Thus, the response apparently is of the view that motions in limine are confined to exclusion of evidence. However, the term "in limine," which comes from the French, does not mean "to limit"; it means: "On or at the threshold; at the very beginning; preliminarily." Black's Law Dictionary 896 (rev. 4th ed. 1968).

In short, motions in limine are motions filed before the case begins to resolve any kind of issues that might impact the trial or the ultimate outcome. Hence, while they commonly are used to exclude evidence, they also can be used to have: evidence declared admissible; trial procedures determined; jury instructions or other rulings of law determined; and limitations put on the uses for particular evidence (e.g., declaring the purposes for which the evidence might be used). Indeed, there is no a priori limitation on what a motion in limine can ask for: They can and are used all the time for all kinds of purposes--and nothing cited by the response is to the contrary. In that context, motions in limine commonly are used to resolve legal questions and set evidentiary standards beforehand, or to determine the purpose for which certain evidence may or may not be

used or inferences that may or may not be made from particular evidence, which usually makes for a more expeditious and informed trial. Obviously, where the determination turns on hearing the evidence first, it is necessary to hear the evidence first; but where the dispute involves questions of law or evidentiary standards or the scope or purpose of evidence, and there is no genuine dispute as to what the evidence at issue is, the determination can be made without hearing the evidence. As we will explain in each of the following replies, we believe that is precisely what the motions present.

Relatedly, the response repeatedly mischaracterizes the motions as seeking wholesale exclusions of evidence. We attempted to be careful in what we asked for. In many instances, what we requested was not exclusion of evidence but, instead, a limitation on the purpose for which it could be used. Thus, we are not seeking to exclude DRG evidence, or contribution margin evidence, or patient-origin evidence, or size of hospital evidence, or even efficiencies, non-profit status and community-board evidence as a categorical matter. Instead, we are objecting to such evidence coming in, as it would if not objected to, for all purposes under Rules 401-02. Toward that end, then, the motions in the main are saying that the challenged evidence cannot be used to support impermissible defenses (e.g., defenses that have been rejected by the courts) or to serve as the basis for an impermissible inference. They are not saying the challenged evidence may not be admissible for some other limited purpose.

Further, the response is premised on the mistaken notion that bench trials follow fundamentally different rules of procedure and evidence than apply in jury trials. While we recognize that, in practice, there are differences between the two, the response fails to appreciate that: "The rules of procedure and evidence apply to all proceedings, including bench trials." Proimos v. Fair Auto. Repair, 808 F.2d 1273, 1278 (7th Cir. 1987). The rules of procedure and evidence are there for a reason, they have a purpose, and counsel and parties are entitled to rely on

them. Of course, the rules always must be construed "to secure the just, speedy, and inexpensive determination of every action" [Fed. R. Civ. P. 1], but they are not to be discarded just because there is no jury. Finally, the response does not quarrel with what is evident to everyone: Given that these motions raise the core evidentiary and legal standard issues here, the outcome of these motions (whenever decided) will have an enormous impact on the trial of this case, and ultimately on the final decision. And while the difference between a 10-day trial and 3-day (or even shorter) trial might weigh a bit heavier in a jury trial, it also would make an enormous difference to everyone involved in this case. Indeed, the reason many courts welcome motions in limine, and the concomitant opportunity to make decisions at the outset, is that they then avoid prolonged proceedings that never should have taken place and could have been avoided by declaring the law at the outset. In fine, there can be a real cost to everyone and to the judicial system and the interests of judicial economy by "putting off until tomorrow that which can be resolved today." We hope to show the Court why that should and need not be done here.

Reply re Motion Nos. 3 and 4 (Non-Profit Status; Community Representatives)[*]

The response assumes, and for purposes of the motion we will not contest, that DRHS will be a non-profit entity, although to date we have received no notice that the IRS has given its

1. The Response's Overriding Flaw. The response (at 1, 4 (emphasis by defendants)) boils down to the following assertions: (i) "The Government must prove that" DRHS not only can, but also "will" "raise prices or otherwise injure consumers"; and (ii) defendants are entitled to attempt to prove, by way of a defense to what otherwise would be a presumptively illegal merger, that prices will not rise after the merger because the DRHS community-representative board members have no "intent" to raise prices and "view their mission as intended to help the community." The first assertion misstates the applicable law (the Government makes its prima facie case by proving only the existence of market power [i.e., an "ability to raise prices"], and need not prove that the power "will" in fact be exercised); and the second assertion (which in effect says that a benevolent monopolist is entitled to different treatment under the antitrust laws) has been rejected squarely by the courts.**

Precisely contrary to the response's assertion (at 1), offered with no authority, the Government need not prove that DRHS will in fact exercise its power to raise prices. All that need be proved to establish a prima facie antitrust violation here is the acquisition of market power. Philadelphia Nat'l Bank, 374 U.S. at 362-63; HCA, 807 F.2d at 1389 ("Section 7 does not require

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approval.

** The response (at 1 n.2) assumes for purposes of the motion "that DRHS could profitably raise prices." That is the correct assumption for the Court to make in ruling on the motion. Accordingly, the question posed is: Assuming DRHS could raise prices, may defendants assert as a defense their stated intention not to do so (based on the supposed non-profit status and community allegiance)?

proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future").

Once the Government makes that showing, as HCA, 807 F.2d at 1389, goes on to explain, a court may look at evidence showing structural forces in the market (e.g., low barriers to entry, presence of competitive alternatives, high elasticity of demand) that demonstrably would negate any "appreciable danger" that the power to raise prices can be exercised (and nothing in our motion seeks to preclude such evidence). But there is not a single case we are aware of, and none cited by the response (including the Carilion case the response is so fond of), that has allowed or would allow what the response proposes here: A defense to an otherwise presumptively illegal merger based on a supposed "promise" by possible future board members to the effect that, even though they could raise prices (as must be assumed for purposes of the motion), they "will not" do so because of their loyalty to the community.

Such a defense could pose practical problems by creating the risk of the trial's devolving into an extended examination of the "character" and "bona fides" of future board members. But the substantive law problem is far more serious because the response's contention--that the intent or promises of possible future board members as to what they might try to decide for years in the future--rightly has been rejected by the courts. University Health, 938 F.2d at 1223-24 ("[t]o hold otherwise would permit a defendant to overcome a presumption of illegality based solely on speculative, self-serving assertions"; hence, defendants' "self-serving declarations" about past and future conduct, even coupled with "public scrutiny" and "public pressure," "would not eliminate altogether the risk that it might act anticompetitively," and therefore the merger is illegal); Philadelphia Nat'l Bank, 374 U.S. at 366-67 (once a prima facie case is shown through high market

shares, the merger must be presumed to be anticompetitive and the district court's reliance on the "testimony of bank officers to the effect that competition among banks in Philadelphia was vigorous after the merger" "was misplaced").

There is a good reason courts do not allow this kind of defense. Thus, as history has taught, and as reflected in the underpinning of the antitrust laws themselves, people and entities act differently in a competitive environment than they do in a non-competitive one--that is an economic and sociologic fact (and not a matter of psychological-intent inquiry), which the courts recognize, which experience teaches, and which common sense says is true. See HCA, 807 F.2d at 1390-91 ("[t]he adoption of the non-profit form does not change human nature"; "'[n]onprofit hospitals, in fact, make rather sizable profits and these profits have been growing over time'" even in the face of public pressure).[***]

2. The Response's Other Flaws. With the response's basic premise gone, there is no impediment to granting the motion. But so there is no mistaken impression, the remainder of the response is equally flawed.

[***] The motion should be granted without further inquiry. However, it merits noting that the "non-profit, community-board" defense asserted here does not comport with reality: (i) there is no assurance yet that DRHS will be a non-profit entity; (ii) even if the so-called community-board members were knowledgeable about hospital pricing and costs (and their backgrounds would indicate otherwise, and they have stipulated that, for example, the Finley board has no proof that community-based boards are any better than other kinds of boards at controlling costs [Trial Brief, App. I at 10]), they will not control pricing decisions--Mercy and Finley's parents ultimately do; and (iii) the community-board members represent employees and firms that currently pay the highest prices charged by the hospitals (full-stated charges), as opposed to the managed care plans that have been able to achieve substantial discounts--which are at serious risk by virtue of this merger (indeed, their concerns of losing the substantial discounts they have obtained for their enrollees are what initiated our challenge here).

a. The response (at 2) cites the Islami case for the proposition that "knowledge of intent may help the court to interpret facts and to predict consequences." That was not a merger case and had nothing to do with a merged firm's "power to raise prices." Rather, it was a peer review case under the rule of reason. Thus, this Court correctly noted that in some antitrust cases intent is relevant and in others it is not [822 F. Supp. at 1385-86], and we certainly have not suggested that "intent" is irrelevant in all antitrust cases. We are saying simply that DRHS' "intent," as reflected in its possible non-profit status and its board's makeup, is irrelevant to the core inquiry here--the ability to raise prices. That is why every court facing the question (other than the discredited district court decision in Carilion, upon which the response places principal reliance) has rejected the very arguments defendants make here. [See cases cited in Motion Nos. 3 and 4]

b. The response's citation to and reliance on (at 3) the district court decision in Carilion should be understood in light of the following: (i) the affirmance was on other grounds; (ii) the district court ultimately did not ground its decision on such evidence; and (iii) the case has been soundly and rightly criticized. [See Motion in Limine No. 3]

c. The response (at 3-4) notes that the hospital merger cases that rejected the defense first took evidence on it. While literally true, that misses the point: It is not unusual for courts to take evidence the first few times a defense is raised, and then to lay down a legal or evidentiary standard to be applied in future cases--that is what precedent and our common law are all about. The point is that there is no factual distinction between what defendants say they want to prove here and what defendants proved in the only appellate hospital merger cases to consider the matter, and then reject it. The response points to no evidence that it would introduce that was not tried in those other cases.

It was not permitted to work there; we do not need a trial to declare now that it will not work here.[****]

d. The response (at 4) describes two instances in the past three years when the Finley board did not raise price on one occasion and lowered it on the other. Even taking the rendition at face value, it is not apparent, with a competitive hospital located just six blocks away, what inference should be drawn from these two incidents. What is apparent, though, is that the University Health rule precluding such inquiries, in addition to promoting sound antitrust law, provides a significant practical benefit as well: It avoids the kind of morass that could occur if a trial were to focus on individual motivations of individual board members through the history of Mercy and Finley's pricing decisions.[*****]

e. To avoid (or obfuscate) the salient point that, under the DRHS partnership agreement, the real power lies with the partners (Mercy and Finley's parents) and not with the DRHS board, the response (at 6-8) asserts that the partners have no authority over service configurations or organizational structures. However, the dispositive point is not what powers the DRHS board has, it is what powers the board does not have. In that vein, the response cannot, and does not, point to anything that could negate the indisputable fact (which we took straight from the express words of

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In this regard, to get around University Health, the response says (at 3 n.2) that defendants will prove that the community-representative board members will convert DRHS into "a conduit for the large purchasers of health care," which essentially is the same contention ("defendants suggest that the hospitals are little more than 'buyer cooperatives' in that the defendants' boards are composed primarily of people aligned with consumer interests") rejected by the Rockford court, 717 F. Supp. at 1285.

It might have been appropriate for the response to reference a seemingly pertinent stipulation: "Mercy's Board of Directors has not changed a price recommendation of Mercy's finance committee in the past three years." [See Trial Brief, App. I at 9]

the partnership agreement, as confirmed by unequivocal deposition testimony [see Motion in Limine No. 3]): The partners have the ultimate power over prices and expenditures and use of profits, and no matter what any board member wants in that regard can make no difference if the partners say differently.******

f. Relatedly, the response (at 4-6) stresses that the community board members will "view their mission as intended to help the community." Yet, even assuming the board had the real power regarding DRHS, and even assuming the community representatives dominated the board, even the response does not try to explain how one, in the context of a hospital pricing or expense decision, ever could determine what is meant by "the community" or "the community interest." And, in view of the commitment of everyone connected with DRHS to keep the money flowing out-of-state, however those terms are defined, there can be no serious contention that a DRHS board member's sole loyalty could be "to the community." Thus, while this "community interest" contention sounds wonderful at first blush--it truly does not hold up upon even minimal scrutiny. Nor could it--the hospital is in the vortex of many competing interests that may be difficult to reconcile at any time, and there is no one interest any board member, even one with power, could serve. To build a defense on such a proposition is an insult to those board members.

****** The response (at 7) suggests that we misleadingly cited the ratification provision of the partnership agreement. Although our paraphrase, upon reflection should have included the following clause (and we apologize for not doing so), our description of the ratification provision, contrary to the response's charge, was substantively correct.

Reply re Motion No. 6 (Efficiencies)

The response begins (at 1-2) with four supposed reasons our motion must fail: (i) the Government itself considers efficiencies in deciding whether to bring suit and courts have considered them (denominated by the response as "[f]irst and most importantly"); (ii) the case law, particularly University Health, permits an "efficiencies defense"; (iii) the Government's articulation of the strict standards for allowing the defense is "faulty"; and (iv) defendants will present "very substantial evidence" at trial and "can meet any standard."

The first two assertions demonstrate the response's fundamental misconception of the motion: We did not argue, as the response sets up in strawman fashion, that an "efficiencies defense" never can or should be considered. Indeed, we openly acknowledged (and repeat here): Of course, courts and the Government have given consideration to the defense. That is not the point. The point is that: (i) While the Government takes "efficiencies" into account in deciding whether or not to exercise prosecutorial discretion, when doing so, it applies the same standards, consistent with the case law, upon which the motion and this reply are based; (ii) no court ever has allowed the defense; and (iii) the courts that have taken evidence on efficiencies have done so only in special circumstances, and have delineated carefully when such evidence may be presented and the standard that evidence must meet. With that understood, the response's latter two assertions focus the inquiry: Does the motion correctly state the standard and can defendants meet it here?

As to the standard, the response argues that we have included certain criteria that should not be included (a "clear and convincing evidence" standard). However, the response does not dispute that certain other criteria must be met (the claimed efficiencies may not be speculative, they must be shown ultimately to inure to the benefit of DRHS' consumers, they must result from the merger (i.e., not be achievable without the merger) and they must be shown to outweigh any anticompetitive harm resulting from the merger).

Accordingly, this reply will proceed as follows: First, we will address the four hurdles the response concedes must be met, and show why they cannot be met here (based on judicial admissions, admissions of Mercy and Finley's highest-ranking people, and public representations made by defendants to generate support for the merger that would have to be retracted to obtain the claimed efficiencies); second, we will address why the standards as set out in our motion are correct; and third, we will explain why what the courts and the Government have done with this defense (which the response does not fairly portray) supports our position.

A. The Four Hurdles Defendants Cannot Meet.[*******]

1. Speculativeness. The response notes (at 13) that, "[i]n every merger, until the transaction is consummated, and the new governing authorities are in place, no final decision can be made to

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The response (at 10) attempts to leave the impression that there are many categories of claimed savings. Actually, there are four: consolidation of services; capital savings; best practices; and administrative. Administrative is relatively minor, and capital savings in large part are inextricably intertwined with consolidation of services (e.g., equipment follows the service). Thus, when reference is made to consolidation of services, substantively, reference also is being made to a large portion of the asserted capital savings. The bottom-line is this: (i) While as a technical matter our motion, if granted, might not eliminate every penny of claimed efficiencies, the response (at 10) is wrong when it says we "don't address many" of the claimed efficiencies; and (ii) as a substantive matter, if the motion is granted, there would be relatively little claimed efficiencies left.

implement any efficiencies, or any other program of the merged entity." This notation: (i) cannot be offered as a blanket justification for every "efficiencies defense," because, then, the "no speculation hurdle" would be eliminated (and even the response concedes that every pertinent decision has imposed a "no speculation standard"); and (ii) misfocuses the inquiry, for the motion did not say that "final decisions" had to be made to overcome the no-speculation hurdle--rather, it said that the indisputable (indeed, conceded) facts make it impossible for defendants to overcome that hurdle in this case.

Thus, contrary to the impression left by the response (at 14-15), which cites three doctors' supposed "belief" that some consolidations will occur, defendants repeatedly have acknowledged facts that lead to one inescapable conclusion: Whether or not there will be any consolidation of services (i.e., closing a service at one of the hospitals and having it offered just at the other) could not be more speculative. To give just a sampling, this is the testimony of defendants' highest-ranking people (attached as Exhibits A-D):

> **Mercy's Chairman:** Consolidation of services after the merger would be "[s]peculation because the decision to combine those has not yet been made." After the merger, "I guess there is a possibility that it [services] could not be consolidated but there is a possibility [they] could be consolidated. I guess what I'm saying is that's an option that has yet to be determined." [Ex. A 160-62 (Fuller)]
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> **Mercy's Chairman:** It would be "difficult and premature" to say now "what, if anything, would be consolidated." [Ex. A 142 (Fuller)]

Mercy's Chief Financial Officer: "No decisions have been made [about where to consolidate services], that is correct." [Ex. B 23 (Guetzko)]

Mercy's Chief Financial Officer: Asked about when the community and doctors would be consulted about possible consolidations, "I don't how long a time frame it was planned to be" to obtain "community and medical staff input into the decision making process." [Ex. B 23-24 (Guetzko)]

Finley Board Member: Regarding possible consolidation of obstetrics, "Well, of course at this point that would be a DRHS type of discussion, and we are in the very early, you know, formative stages of that situation, so I think DRHS would have to be in place, and you know, before--in my opinion I guess before talks of that nature could take place." [Ex. C 52-52 (Chesterman)]

Finley Board Member: Commenting on likelihood of consolidation of services: "Well, what would occur to me is, again this would take study, but I would speculate that perhaps there will be specialization on one campus of a certain activity and specialization on some other area on some other campus where now we have similar activities taking place at both campuses." [Ex. C 97 (Chesterman)]

Finley Board Member: Commenting on possible "disagreement amongst the board members of the DRHS as to whether or not specific services should be consolidated at only one campus," he explained: "Again, these would be focal [sic, vocal] people, opinionated people, sure there would be disagreement." [Ex. C 105-06 (Chesterman)]

Finley Board Member: After explaining that "I do not" "have any idea how long it will take until [I] make a decision to actually implement any consolidation or reconfiguration of services," he admitted that it would be "fair to say it's completely speculative as to how long after reaching this stage in the process anything would be done." [Ex. D 75 (Moody)][********]

These plain, unequivocal statements are confirmed by judicial admission. Thus, contrary to the response's attempted avoidance to the effect that "no final decision" can be made until after the DRHS is created, that is different than what we have here. Here, we have a stipulation, consistent with the above testimony, that no final decision has been made "as to which, if any, clinical programs at Mercy or Finley will be consolidated after the proposed combination occurs." [Motion No. 6] It is one thing to say "no final decision has been made," but quite another, as the stipulation does here [see also Ex. C 118 (Chesterman) (it "is possible, certainly" that "the decision may be actually not to consolidate a particular service at one campus or the other")], to leave looming the inference and possibility of their never being any consolidations.[*********]

The efficiency claims rejected by the court in University Health, 938 F.2d at 1223 (asserting efficiencies in the nature of eliminating "unnecessary duplication"), were no more speculative than these candid admissions.

The cited admissions also demonstrate why the response's reference (at 12) to the Peat Marwick work is irrelevant for purposes of this motion. Specifically, the motion argues that the claimed consolidation efficiencies must be rejected not because if implemented they would not produce savings (although in large part they would not [see Trial Brief, App. L (Taylor)]), but because the necessary precedent condition to any such savings (i.e., whether or not to do any consolidation of services) concededly is a matter of sheer speculation.

But perhaps most importantly, holding defendants to their judicial admissions and sworn testimony here also holds them to what they have represented to the community in repeated public statements. In short, defendants "sold" the idea of DRHS by stressing that it would not eliminate any "choice" that people currently enjoy. [See Motion in Limine No. 1 and App. A] And that representation can be true only if there is no consolidation of services--for any consolidation of a service at one hospital or the other necessarily means the elimination of a "choice." Not only would it be unfair to let defendants have it both ways, this community pressure (and defendants' overt concerns about it) shows that there is a real possibility that the supposed consolidations never will occur.

In sum, the response asks to allow a defense based on: (i) explicit, conceded speculation (which all the pertinent cases warn must not be done); and (ii) the retraction of unequivocal judicial admissions and public representations (which the most basic notions of honesty and integrity say should not be permitted).**********

2. Benefits to DRHS' Consumers. The response (at least tacitly) acknowledges (at 17) that, where the defense is permitted, defendants must prove that any cost savings will be passed on to the hospitals' consumers, and defendants say they can meet this hurdle by showing

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The motion (at 20) cited some of the Mercy chairman and chief financial offer testimony, as to which the response says nothing. Nor does the response challenge the motion's statement (at 19) that there could be significant opposition on the part of the community and the medical staffs to any consolidation of services. Nor does the response dispute the motion's statement (at 19) that most of the savings are projected to occur years in the future--adding an additional speculative layer.

competitive pressure from regional hospitals and the community leadership on the board.**********

The problem with that response is that: Right now, Mercy faces competitive pressure from a hospital six blocks away and has community representatives on the board, and yet it still is directed each year to transfer about 30% of its profits out-of-state; and after the merger, whatever else might be said, Mercy necessarily will face less competition, DRHS will be controlled by Mercy's parent and not by its board (at least as to pricing and money transfers), and, under the partnership agreement, the out-of-state money transfers will continue to be made to and directed by Mercy's out-of-state parent. Nothing in the response disputes that. Indeed, the response (at 19 n.7) just punts on the issue.

3. Necessity of the Merger to Achieve the Savings. The response (at 15-17) says that it needs the merger to obtain its claimed "best practices" savings (i.e., savings from adopting the most efficient procedure after benchmarking with data from other hospitals). It cites nothing in support. Instead, it says (at 16) that the Dubuque medical staffs would be "concerned about the value of data" from non-Dubuque hospitals with which to do the benchmarking. Whatever the response means in this regard, while practices vary across regions and the country, that is precisely why, to determine the "best practice," hospitals do regional and

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As a matter of pure judicial economy, it makes no sense to justify the efficiencies defense by virtue of competition from regional hospitals. If the regional hospitals are found to be in the market, there will be no need for defendants to press an efficiencies defense; on the other hand, if the regional hospitals are found to be outside the market, they cannot help the efficiencies defense. In short, there is no reason to hear about regional hospitals in support of any efficiencies defense.

national benchmarking all the time, and engage in benchmarking without merging with anyone, let alone with their next-door competitor. [See Trial Brief, App. L (Taylor report)]**********

What is clear from the response is that, even if what it says is true (that it would be more difficult to achieve best practices without the merger, which we believe in all events is a flawed contention [see Trial Brief, App. L (Taylor report)]), the response does not deny that at least some such efficiencies could be achieved without this merger. As a result, even if the response were right, the only permissible best practice efficiencies would be the difference between what could be achieved with the merger and what could be achieved without. But this computation, the response would have to concede, has not been done and is not intended to be done. What we face then, by necessity, is a best practices claim that necessarily and impermissibly is overstated.**********

4. Weighing the Competitive Harm. The response (at least tacitly) acknowledges (at 19) that, where the defense is permitted, defendants must show that the claimed savings will outweigh any competitive harm, and do not challenge the motion's cited authority to this effect. When we asked them in interrogatory how they would do this, they responded that the competitive harm was "zero." The response (at 20) apparently abandons that position to allow for competitive harm "equal [to] some fraction of the discounts to managed care payors for

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If the response is serious that there is something peculiar about Dubuque that would make data from the rurals or the regionals inapt for benchmarking purposes, then it will be interesting to see how they contend that the rurals and regionals compete in the same geographic market with Mercy and Finley.

Relatedly, the response does not even mention or try to rebut the motion's point that this merger, as opposed to a merger with a non-Dubuque hospital, is necessary to achieve any supposed cost savings. That silence may be due to the tension defendants likely see between their efficiencies defense and their expansive market definition.

inpatient services." Ignoring that that number potentially exceeds $3 million per year and is growing [see Trial Brief, App. I at 9 (stipulations about expected growth of managed care plans in Dubuque)], defendants still have not explained how they would do the "weighing," for they have failed to account for any other competitive harms, including the loss of competition on the level of full-stated charges to all consumers, on competition to keep costs down, and on quality the merger concededly represents [see Trial Brief, App. I at 9 (stipulation: the merger "will end the competition between Mercy and Finley on price, quality and otherwise")]. Compare University Health, 938 F.2d at 1223 (explaining the heavy burden on a defendant in this regard precisely because such efficiencies are "difficult to measure" and "difficult to calculate the anticompetitive costs against which to compare" the efficiencies: "Because of these difficulties, we hold that a defendant who seeks to overcome a presumption that a proposed transaction would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers" and must do so "'in what economists label ""real"' terms""--"[t]o hold otherwise would permit a defendant to overcome a presumption of illegality based solely on speculative, self-serving assertions").**********

B. The Applicable Standards.

The response (at 19-20) misstates the motion's merger-to-monopoly point, and then goes on to state that the Government has in the past faced mergers-to-monopoly and not challenged them where the claimed efficiencies outweighed the competitive harm. First, that the Government has prosecutorial discretion is undenied; second, the response's description is incomplete and inaccurate; third, even if there were, whatever may have happened in such other instances is not relevant here to what stands the courts apply in assessing defenses; and fourth, if any inference were to be drawn from the response's misstated premise, it would be that the Government does not here see where any alleged savings outweigh the competitive harm--and it certainly has not seen where defendants have so shown.

The motion explained that the efficiencies defense has been considered only in certain narrow circumstances, and then, under tight standards, and no case has allowed it. The response does not dispute that each of the standards is stated correctly by the motion (except for the "clear and convincing" standard). Rather, the response rests (at 8) on the assertion that no single case has applied all the standards or hurdles. That really is misleading: There are three principal cases, and each one dealt with different defendants trying different variations of the so-called defense--none of which succeeded.

Reading those cases as a whole leads to an inescapable conclusion: If the asserted defense is based on speculation, or the savings might not be achieved or might not benefit the hospitals' consumers, or could be achieved without the merger, or are not shown to outweigh any competitive harm, then the defense must be rejected. The difference between our case and those cases is there defendants failed on fewer than all four factors--here the defense should be rejected on all of them (although any one is sufficient).

As to the "clear and convincing" standard, the response ignores our cited authority (Rockford, a hospital merger case) and cites (at 8) Baker Hughes (not a hospital case). That case did not involve an efficiencies defense. Rather, it involved evidence being introduced to rebut the Government's prima facie case. Accordingly, what the court held was: Where the Government has the burden on a claim, it is error to impose on defendants a "clear and convincing" standard where they are negating an element of that claim. That is not the case here: Thus, we are not talking about evidence to rebut an element of the Government's case, we are talking about an affirmative defense, and as such, nothing in Baker Hughes would preclude application of the higher standard. Put more concretely: The Government's case is

to prove market power; as to negating that proof, the standard would be preponderance of the evidence. The efficiencies defense does not negate any element of the Government's case--it is a defense that has nothing to do with market power (indeed, it assumes market power has been proved, and then asserts that, nevertheless, there are offsetting efficiencies to justify the merger (a classic "confess and avoid" affirmative defense, albeit not a favored one)). As such a defense, it is appropriate to apply a "clear and convincing" standard on the defendants because of the courts' acknowledged risks that, otherwise, a trial could bog down into an "'intractable'" nightmare. University Health, 938 F.2d at 1223.

Finally, there are at least two additional good reasons, consistent with basic notions of fairness, that courts have applied the standard we have presented here. First, a high standard is appropriate where the claim is based on information that is within the exclusive control of one party, which is the case here. Second, a high standard is appropriate in view of the ease of "creating a case" through "speculative, self-serving assertions" [University Health, 938 F.2d at 1223], particularly when compared with the difficulty of "proving a negative."

C. Treatment of the Defense by the Courts and the Government.

The response goes to lengths to point out that the courts and the Government look at possible efficiencies for various reasons. We do not dispute that. Nor is it relevant.

The issue posed by the motion is: Can defendants here meet the special "circumstances," high evidentiary standard, and four hurdles (especially, the speculation hurdle) to be allowed to take this case into the kind of intractable trial that necessarily will ensue, or should they be held to their sworn admissions, judicial admissions, and public representations that lead but to one conclusion: If ever there was an efficiencies defense grounded in

speculation, it is this one. Our point is: When due consideration is give to a very few, but definitively conceded, facts that the law has declared are dispositive of an efficiencies defense, the defense is not, and should not be, available to defendants here.

D. Scope of the Motion.

The problem with the response is that it fundamentally misconstrues the motion. Thus, the motion focused on setting the evidentiary standards that must be met for this defense to proceed. It did not ask, as the response erroneously seems to assume, for exclusion of any particular piece of evidence if it has some other relevance. So, the response's contentions about relevance to other issues is not a reason to deny the motion. The motion was pointed at the heart of the defense--it did not seek, as the response seems to say, a general exclusion order.

Reply re Motion No. 7 (Hearsay)

The response concedes that the affidavits, declarations, and depositions raised by the complaint are, under the federal rules and the cited cases, inadmissible hearsay. And, we understand the response to say (at 1-2) that defendants will not seek to introduce any affidavits or declarations as "substantive evidence" in their own right or any depositions other than for witnesses not available at trial. Accordingly, the motion should be granted (for all it sought was the exclusion of such documentary materials as "substantive evidence").**********

The response goes to great lengths to justify defendants' economist's reliance on affidavits. Our motion did not seek any exclusion on that basis--it merely said that, just because a testifying expert relies on inadmissible evidence (which may be permissible), that does not make such evidence admissible (a proposition the response does not challenge). Hence, at trial we might challenge the reasonableness of an expert's relying on such matters, but as long as there is no request to introduce them as "substantive evidence," as the response says defendants acknowledge will not be done, they are beyond the scope of our motion.

Reply re Motion No. 9 (Discovery)

The response misconstrues the motion. We are not asking for sanctions for a failure to make discovery (i.e., a failure to answer Interrogatory 21(iii)). To the contrary, we are asking that defendants be bound by their answer to Interrogatory 21(iii), and should not be permitted to give evidence at trial that was called for by that interrogatory (which as defendants interpreted it in opposing our motion to compel (at 2), "asks the Hospitals to identify how [would one] determine whether [DRHS'] prices were 'uncompetitive,'" in addition to specifying the services and the hospitals by which any comparison would be made).

Our position in this regard is based on a basic precept of the discovery rules: A party's discovery responses set the outer limits for trial evidence. Indeed, that is what the discovery rules are all about; that is why interrogatories are asked in the first place; and that is why the courts, as reflected in the decisions cited in our motion--unchallenged by the response, do not allow parties to conduct "trials by ambush," e.g., by going beyond the notice they were supposed to give in their interrogatory answers.

The more important point, however, ignored by the response is this: We asked a straightforward question as to how consumers could tell if DRHS' prices were to become uncompetitive. In effect, defendants threw up their hands and gave no answer. We think there is a sound reason for that--many consumers will have difficulty knowing because hospital pricing is not like supermarket pricing (it's not advertised and it's complicated and, contrary to the response's description (at 3 [referring to a doctor witness who is scheduled to testify on behalf of defendants] of someone needing neurosurgery going shopping for neurosurgery prices), no trial is needed to establish that hospital services in the main are bought on a package

basis in medical/surgical insurance plans before they are needed, not after the patient needs surgery). The trial should not now see a parade of people who supposedly have divined an "answer" beyond what defendants stated in a verified, binding interrogatory answer.

The response (at 3-4) accuses the Government of acting improperly by having "misleadingly fail[ed] even to mention" that a motion to compel regarding this interrogatory is pending. First, we mentioned it expressly during a recent status conference; second, it is bizarre to suggest that we were concealing what is happening in this Court; and third, the pendency of the motion to compel is irrelevant (i.e., we are asking now, on the eve of trial, and the discovery cut-off having passed, that defendants be bound by their answer, not that they answer further).

Finally, the response (at 4) asserts that the interrogatory is "extremely broad." Whatever merit that objection might have had (and it never did), the objection never was made--indeed, no timely objection ever was made to the interrogatory. What defendants did say, to justify their opposition to giving any further information (at 3) was: "One could hardly imagine what more the answer would require." And now, in an astounding reversal, the response notes (at 4 n.1) that defendants "may wish to introduce evidence of how a comparison for particular procedures could be made between Mercy and Finley on the one hand, and other hospitals outside of Dubuque, on the other hand." That is precisely what the interrogatory called for, precisely the information they did not give, and precisely what they should not be permitted to do at trial.

Conclusion

The issues appear to be sharply focused. The one inarguable conclusion is that resolution of these motions will alter the look and length of the trial. That is exactly what motions in limine are supposed to do.

September 18, 1994.

Respectfully submitted,

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Exhibit A (Fuller)
Exhibit B (Guetzko)
Exhibit C (Chesterman)
Exhibit D (Moody)