UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>MERCY HEALTH SERVICES and FINLEY TRI-STATES HEALTH GROUP, INC.,<br><br>Defendants. | ) | Civil Action No. C94-1023<br><br>Hon. Michael J. Melloy<br><br>**OPPOSITION TO DEFENDANTS' MOTION FOR ORDER TO COMPEL THE PRODUCTION OF DOCUMENTS FROM PLAINTIFF** |

Defendants have moved for an order regarding Document Requests 4, 7, and 13 to which the United States lodged objections. The United States opposes Defendants' Motion For An Order To Compel The Production Of Documents From Plaintiff on the grounds that: (1) the motion is now moot as to Requests 4 and 7 as a result of discovery conferences held subsequent to its filing; and (2) the only documents sought by Request 13 that are still at issue are not relevant to this action (nor likely to lead to the discovery of admissible evidence) and, in any event, are protected from discovery by the intragovernmental deliberative process privilege.

In support of its opposition, the United States submits this Memorandum, the Declaration and Claim of Privilege of Robert E. Litan, and the Declaration of Gregory S. Vistnes.

## I. DEFENDANTS' MOTION TO COMPEL IS MOOT AS TO REQUESTS 4 AND 7

As to Requests 4 and 7, defendants have in correspondence

and their moving papers limited the original requests to documents on which an expert witness relies in forming the expert's report, thereby meeting the United States' objections. The parties have identified expert witnesses and agreed to a timetable for exchange of expert reports. In accordance with Fed. R. Civ. P. 26(a)(2)(B), the United States will produce (as it would have without regard to the instant motion) documents considered by its expert witness on the date scheduled for production of the report, to the extent such documents have not previously been produced. We understand defendants agree that their motion is moot in light of this contemplated discovery.

## II. THE ONLY DOCUMENTS STILL AT ISSUE ARE NOT RELEVANT TO THIS LAWSUIT AND, IN ANY EVENT, ARE PROTECTED FROM DISCOVERY BY THE INTRAGOVERNMENTAL DELIBERATIVE PROCESS PRIVILEGE

### A. Background

On September 15, 1993, the Antitrust Division joined with the Federal Trade Commission in issuing Statements of Antitrust Enforcement Policy in the Health Care Area ("Policy Statements") regarding "their antitrust enforcement policies regarding mergers and various joint activities in the health care area." Exhibit 1: Policy Statements at 1. "The policy statements give health care providers guidance in the form of 'antitrust safety zones,' which describe the circumstances under which the Agencies will not challenge conduct as violative of the antitrust laws as a matter of prosecutorial discretion." Id. at 1-2 (emphasis supplied). The first safety zone applies to hospital mergers

satisfying certain criteria.

Defendants' proposed transaction does not fall within the safety zone for hospital mergers, and defendants have so stipulated.

B. Scope Of Permissible Discovery

Despite these facts, defendants seek the documents in order purportedly to identify the "reasons" for the safety zone, apparently in the hope of questioning the government's choice of safety zone standards that, on their face, exclude defendants' hospitals. In other words, defendants seek, in essence, to challenge the government's exercise of prosecutorial discretion in bringing this case. Defendants would have this Court sanction a line of discovery (and presumably a later line of evidence and argument) that are irrelevant to the key issue the Court must ultimately decide in this lawsuit: whether the defendants' proposed "partnership" is legal or not under applicable antitrust principles and precedent.

That the defendants did not plead any defense related to the government's exercise of prosecutorial discretion nor challenge the allegations of the Complaint under Fed. R. Civ. P. 11 underscores that the legality of the defendants' proposed partnership -- and not the government's decision to challenge it -- is the only issue in this lawsuit.[1] Thus, the documents

[1] Even if defendants had made such allegations, it is well settled that exercises of prosecutorial discretion are, for the most part, not judiciable. Wayne v. United States, 470 U.S. 598, 607 (1985). Discovery should not be permitted under these

requested are beyond the scope of discovery, because they are not "relevant to the subject matter involved in the pending action, . . ." nor reasonably likely "to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

C. Deliberative Process Privilege

Defendants have limited Request 13 from its previously broad scope.[2] Defendants now seek three categories of documents related to the safety zone for certain hospital mergers set forth in the Policy Statements: (1) Senior Officials' Communications; (2) "Post-decisional" documents which reflect "summaries, comments, investigations, explanations, interpretations,

---

circumstances. United States v. Jacob, 781 F.2d 643, 646-47 (8th Cir. 1986) (rejecting request for discovery).

[2] Defendants originally sought all documents relating to the "establishment" of the safety zone for hospital mergers or "utilized in determining" the safety zone. That request focused solely on pre-decisional documents and unquestionably invaded the intragovernmental deliberative processes of the Antitrust Division. The United States objected on the grounds of relevance and privilege.

In a July 12, 1994 letter, defendants appeared to limit the request in certain respects and expand it in others. Exhibit 2. Primarily, defendants seemed to be suggesting that they would shift the focus of the request to post-issuance documents. On July 29, 1994, the United States offered to consider the modified request without requiring defendants to file a new pleading, but sought assurances from defendants that the request was properly understood and some articulation of the possible relevance of the request.

Defendants did not respond. Instead, on August 2, they filed their Second Request For Production Of Documents, seeking documents issued after issuance of the Policy Statements. In a brief telephone conference call on August 3, they refused to articulate any grounds for relevance of this category of documents and advised the United States that they would file a Motion To Compel. The time for responding to the Second Request For Production Of Documents has not yet expired.

applications, analysis or implementation of" the safety zones; and (3) Numerical data and tabulations.

The United States does not have any documents responsive to defendants' first request for "Senior Officials' Communications."

As to the second, the United States has agreed to produce published speeches from Antitrust Division officials issued after the issuance of the Policy Statements. The only other arguably responsive document is a draft document that was prepared contemporaneously with development of the safety zones, but which for the reasons set forth in footnote 5 below is protected by the deliberative process privilege.

Finally, the United States opposes production of the third category of documents, namely, those described by defendants as "all tabulations, accumulations of data, and other statistical or numerical information. . . ." Defendants' Memorandum In Support at 6. Such material is not relevant to this case. Moreover, it is protected from discovery by the intragovernmental deliberative process privilege, as set forth in the Declaration and Claim of Privilege of Acting Assistant Attorney General Robert E. Litan, which is attached as Exhibit 3.[3]

---

[3] Exhibit 3 resolves defendants' procedural arguments regarding invocation of the privilege. Defendants' Memorandum In Support at 9-11. Defendants are not entitled to a schedule of documents withheld because to do so discloses information that the privilege was intended to protect. EPA v. Mink, 410 U.S. 73, 93 (1972) (recognizing that the court should guard against eroding the purposes of the privilege during the process of evaluating its applicability). The United States has, accordingly, submitted a Confidential Schedule of Documents in camera for the Court's review only.

In opposing disclosure of the requested documents, the United States cautions that defendants' arguments regarding tabulations, accumulations of data, and other statistical or numerical information are not supported by the relevant caselaw. Thus, despite defendants' arguments to the contrary, the deliberative process privilege protects from discovery factual material which is intertwined with the policymaking process. Mink, 410 U.S. at 92. Indeed, in certain instances, the deliberative process privilege protects memoranda of a purely factual nature. Brockway v. Dep't of Air Force, 518 F.2d 1184, 1193 (8th Cir. 1975). The privilege protects the process of separating significant facts from the insignificant. Mapother v. Department of Justice, 3 F.3d 1533, 1538-39 (D.C.Cir. 1993). The United States may withhold factual information where, as here, its disclosure will expose the author's thinking as to which facts were relevant. Providence Journal Co. v. Dep't of the Army, 981 F.2d 552, 562 (1st Cir. 1992).[4]

[4] Defendants cite two cases regarding production of factual material which do not apply to the facts of this case. In Pacific Molasses Co. v. NLRB, 577 F.2d 1172, 1183 (5th Cir. 1978), the NLRB had compiled a "statistical report which contains no subjective conclusions, and, as a result, must be considered 'purely factual' in nature." The report was not part of a deliberative process, such as that involved in developing the Policy Statements at issue here. Similarly, in Assembly of California, 968 F.2d 916 (9th Cir. 1992), the data at issue was census data, not factual information gathered and analyzed by governmental officials during the course of their deliberations. Disclosure of the data at issue in that case, in contrast to disclosure of that at issue here, would not have "enable[d] the public to reconstruct any of the protected deliberative process." Id. at 922.

The Declaration and Claim for Privilege establishes that all nine documents on the Confidential Schedule fall squarely within the deliberative process privilege. They were created during the prosecutorial and policy deliberations leading up to publication of the Policy Statements and safety zones. As demonstrated in the Declaration of Gregory S. Vistnes, which is Exhibit 4 to this Memorandum, all numerical data and tabulations reflect the process of separating significant facts from insignificant ones, Mapother, 3 F.3d at 1398-99. Disclosure of that data will thus disclose the thinking of the Division's attorneys and economists as to which facts were relevant. Providence Journal, 981 F.2d at 562. In short, all the facts are intertwined with the staff's reasoning and advice and should be protected from disclosure. Mink, 410 U.S. at 93.[5]

---

[5] The deliberative process privilege also protects from disclosure the draft document (number 8 on the Confidential Schedule) that could have developed, but did not, into an explanation of the Policy Statements.

> Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into decisions; and the lower courts should be wary of interfering with this process.

NLRB v. Sears, Roebuck, 421 U.S. at 151 n.18. The factual discussion in that draft document is intertwined with the staff's reasoning and advice, was not disseminated to the public, and was not adopted as an official explanation. In short, the document was part of the deliberative process.

A similar document, not described in the Confidential Schedule, was prepared by the Federal Trade Commission ("FTC"). The Antitrust Division has referred that document to the FTC for its evaluation of whether it is privileged. Given the expedited

The Court must also consider the context of the creation of the documents at issue in applying the foregoing principles. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138 (1974). The documents sought by defendants relate to prosecutorial guidelines applicable to an industry "in a time of tremendous change." Exhibit 1 at 1. They were developed by staff attorneys and economists of the Antitrust Division of the Justice Department solely to aid the Assistant Attorney General in charge of that Division in deliberating on the question of whether to develop a safety zone for hospital mergers and to decide the standard for that safety zone. As such, they should be protected from disclosure.

## CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Defendants' Motion To Compel.

DATED: August 9, 1994 Respectfully submitted,

---

briefing schedule on this issue, and the lack of relevance in any event of the document, we ask the Court's indulgence with regard to this document. The FTC, an independent agency, should be given the opportunity to review the document for privilege or other grounds for nondisclosure, in the event the Court were to rule that these documents are otherwise within the scope of permissible discovery.

Stephen J. Rapp
United States Attorney

By: _____
Lawrence D. Kudej
Assistant United States Attorney
Northern District of Iowa
P.O. Box 74950
Cedar Rapids, Iowa 52407
Tel: (319) 363-0091
Fax: (319) 363-6110

_____
Mary Beth McGee
Eugene D. Cohen
Richard S. Martin
Jessica N. Cohen
U.S. Department of Justice
Antitrust Division
555 4th Street, N.W.
Room 9901
Washington, D.C. 20001
Tel: (202) 307-1027
Fax: (202) 514-1517

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. | ) | |

DECLARATION AND CLAIM OF PRIVILEGE

I, ROBERT E. LITAN, state as follows:

1. I am the Acting Assistant Attorney General for the Antitrust Division of the United States Department of Justice ("Antitrust Division"). The statements made herein are based upon my personal knowledge and information obtained during the course of my official duties.

2. I am familiar with the document requests served on plaintiff, the United States of America, by the defendants in the above-captioned case, as amended by defendants' memorandum in support of their Motion to Compel, seeking documents related to the Safety Zone for hospital mergers contained in the Statements of Antitrust Enforcement Policy in the Health Care Area, issued by the Department of Justice and the Federal Trade Commission on September 15, 1993 ("Policy Statements").

3. Defendants have moved for the Court to compel

production, among other documents, of all tabulations, accumulations of data, and other statistical or numerical information relating to the safety zone for hospital mergers contained in the Policy Statements. The Antitrust Division has conducted a search of its files and has located nine documents that arguably fall within that category. Eight of these documents are described in the confidential Schedule to this Declaration, which will be submitted to the Court in camera. I have reviewed the 8 documents and the attached Declaration of Gregory S. Vistnes and determined that the 8 documents should be withheld under a claim of intragovernmental deliberative process privilege. (The ninth document is a document of the Federal Trade Commission; therefore the Division has referred that document to the Commission to determine whether it has any privilege to assert regarding its discovery.)

4. The eight documents referred to in paragraph 3 above contain analyses of and recommendations by Antitrust Division economists and attorneys to their superiors during the deliberations leading up to issuance of the Policy Statements. These documents reflect the deliberations, considerations, analyses, and recommendations of Antitrust Division staff and officials concerning the enforcement of the antitrust laws. To the extent there is factual material contained in these documents, the facts were deliberately selected from a great volume of potentially relevant facts; they reflect the thought processes of Antitrust Division staff and officials as to the

types of facts relevant to possible prosecutorial decisions and antitrust enforcement policy, and the facts are inextricably intertwined with the authors' analyses and recommendations.

5. One of the primary responsibilities of the Antitrust Division is to detect and prosecute violations of the federal antitrust laws. Effective discharge of that responsibility depends upon formulation and implementation of sound policies. In order to ensure effective and sound policy-making, the staff and officials of the Antitrust Division must remain free to engage in a candid exchange of views concerning proposed policies. Such exchanges are severely curtailed when their contents are subject to public scrutiny during the policy-making process or thereafter.

6. The eight documents referred to in paragraph 3 above reflect the deliberative processes of the Antitrust Division. I have determined that disclosure of the advice, opinion, facts, and recommendations contained in those documents would inhibit the frank exchange of information and ideas among Antitrust Division officials and staff in the course of their predecisional deliberations concerning enforcement and policy decisions. If these officials and staff anticipate subsequent disclosure and inquisition regarding their views, they will be inclined to temper candor and to restrict advice with resulting detriment to the policy-making process, enforcement of the antitrust laws, and the public interest. Accordingly, I claim the intragovernmental deliberative privilege for the eight documents identified in

paragraph 3 above.

7. In accordance with 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Signed this _____ day of August, 1994.

ROBERT E. LITAN

CONFIDENTIAL SCHEDULE OF DOCUMENTS TO
DECLARATION AND CLAIM OF PRIVILEGE OF
ROBERT E. LITAN

1. A 29-page draft paper discussing possible safe harbor for small hospitals in rural areas. The paper textually cites statistical information to support the analysis and refers to attached maps to support its analysis. The maps analyze the geographic distribution of hospitals of certain sizes. The paper also discusses and refers to an attached table from a publication that summarizes and comments on other published cost studies.

2. A two-page May 25, 1993 draft paper discussing possible safe harbor for hospital mergers. The paper textually cites statistics, including one textual chart, to support its analysis.

3. A fourteen-page May 26, 1993 Memorandum from Jon M. Joyce, former Chief of the Economic Litigation Section of the Antitrust Division to Anne Bingaman, the Assistant Attorney General in charge of the Antitrust Division. The paper submits a May 27, 1993 draft policy position for hospital mergers and a draft May 27, 1993 paper discussing a possible safe harbor for hospital mergers, which textually cites statistics, including one textual chart, to support its analysis. The paper also includes a table from an outside source showing distribution of hospitals by size. The remainder of the document discusses a proposed safety zone other than the one for hospital mergers.

4. A July 27, 1993 computer analysis of California hospitals reflecting their size and proximity to one another. This analysis is comprised of two documents, one of 12 pages and the other of eight pages.

5. An eleven-page collection of draft papers discussing a possible hospital merger safety zone. The papers analyze various possibilities for a safety zone and cite statistics textually as part of the analysis. One attachment shows statistical information for hospitals in the State of Kansas. A separate attachment cites and annotates certain references on hospital size, followed by an analysis of those references and other information in connection with a possible safe harbor.

6. A five-page handwritten report of statistics on hospital closings from 1988 to 1991.

7. A series of ten maps showing the geographic distribution of hospitals in accordance with the size of the hospitals.

8. A 21-page draft September 13, 1993 set of Questions and

Answers regarding hospital mergers and other issues. The draft was never finalized or adopted as a statement of the Antitrust Division.

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. | ) | |

DECLARATION OF GREGORY S. VISTNES

I, Gregory S. Vistnes, state as follows:

1. I am an economist with the Antitrust Division of the Department of Justice.

2. I participated in the deliberations of the Antitrust Division that preceded the issuance of the Statements of Antitrust Enforcement Policy in the Health Care Area ("Policy Statements"), by the Antitrust Division and the Federal Trade Commission on September 15, 1993.

3. I have reviewed Confidential Schedule of Documents to Declaration and Claim of Privilege of Robert E. Litan.

4. The statistics and other data contained in those documents reflect the deliberative processes of the Antitrust Division. Specifically, all selections of statistics and data contained within those documents reflect the opinions and judgment of staff of the Antitrust Division as to matters

appropriate for consideration during the deliberations regarding the Policy Statements before they were issued. The staff selected for inclusion in the documents all tables, maps and other statistical or numerical information. In addition, with the exception of a few tables reproduced from published texts, the staff created all tables and maps from larger publicly-available data bases (1989-90 "Individual Hospital Data," California Healthcare Facilities Commission and the American Hospital Association data set on hospitals).

5. Disclosure of the tables, maps, statistics and numerical information would reveal the thinking of staff as to which facts were relevant to the deliberations leading up to issuance of the Policy Statements.

6. In accordance with 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Signed this _____ day of August, 1994.

GREGORY S. VISTNES