UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. CLASSIC CARE NETWORK, INC; NORTH SHORE UNIVERSITY HOSPITAL; NORTH SHORE UNIVERSITY HOSPITAL AT GLEN COVE; BROOKHAVEN MEMORIAL HOSPITAL MEDICAL CENTER; CENTRAL SUFFOLK HOSPITAL; GOOD SAMARITAN HOSPITAL; HUNTINGTON HOSPITAL; JOHN T. MATHER MEMORIAL HOSPITAL; and SOUTH NASSAU COMMUNITIES HOSPITAL; Defendants.	Civil Action No. 94-5566 Filed: 12/5/94

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. §16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On November_____, 1994 the United States filed a civil antitrust complaint pursuant to Section 4 of the Sherman Act as amended, 15 U.S.C. §4, against the defendants Classic Care Network, Inc; North Shore University Hospital; North Shore University Hospital at Glen Cove; Brookhaven Memorial Hospital Medical Center; Central Suffolk Hospital; Good Samaritan Hospital; Huntington Hospital; John T. Mather Memorial Hospital; and South Nassau Communities Hospital. The complaint alleges that beginning at least as early as April of 1991, and continuing at least until January of 1992, the defendants created a joint sales agency, the purpose and effect of which was to eliminate discounting on inpatient hospital rates to licensed health maintenance organizations (HMOs) and to limit discounting on outpatient hospital rates to HMOs and managed care plans in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. §1. As a consequence of this arrangement, HMOs that operated in Nassau and Suffolk counties were prevented from contracting with the defendants for competitive rates for inpatient hospital services and both HMOs and managed care plans were limited to contractual discounts on outpatient rates of no more than 10% off any defendant hospital's established rate for any outpatient procedure.

The complaint seeks injunctive relief to prevent the defendants from continuing to participate in, or entering into any unlawful agreements between themselves or with any competing hospitals that would restrain price competition for the delivery of inpatient or outpatient hospital services to purchasers of those services, such as HMOs and third-party payers, and that would ultimately raise the prices that individual consumers pay for health insurance coverage.

On November _____, 1994 the United States and defendants filed a Stipulation pursuant to which the parties consented to entry of the attached proposed Final Judgment. This Final Judgment, as explained more fully below, enjoins the defendants from entering into agreements between themselves or any competing hospital in Queens, Nassau, or Suffolk Counties that would eliminate or reduce price competition in connection with the provision of inpatient or outpatient hospital services to purchasers of those hospital services.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act unless the government withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

II.

FACTS GIVING RISE TO THE ALLEGED VIOLATION

At trial the Government would have contended the following:

1. Classic Care Network, Inc. (Classic Care) is a not-for-profit corporation organized and existing under the laws of the State of New York. Its principal place of business is Nassau County, New York. Defendant Classic Care was formed by the defendant hospitals and each is a member of Classic Care and is represented with a seat on Classic Care's board of directors.

2. The defendant hospitals are each voluntary non-profit hospitals that provide both general acute care inpatient services and outpatient medical services in connection with the diagnosis, care and treatment of patients. Each has its principal place of business located in Long Island, New York, and each is independently owned and operated with the exception of North Shore University Hospital at Glen Cove which is an affiliate of North Shore University Hospital. Various of the defendant hospital members of Classic Care compete with each other and other hospitals in Nassau and Suffolk Counties for patients who are members of HMOs and managed care plans.

3. Third-party payers provide health insurance coverage including coverage for inpatient hospitalization and outpatient hospital services for patients who either individually, or through their employers, have subscribed for that coverage and who pay a fixed rate or premium for that coverage. Third-party payers include both HMOs and managed care payers.

4. An HMO is an entity that, for a set premium, provides for comprehensive health care services including inpatient and outpatient hospital services to its members. Employers contract with HMOs to provide health care services to their employees and dependents.

5. An HMO in New York State must be licensed by the State in order to operate. In 1992, twelve licensed HMOs contracted to deliver health care services to approximately 358,000 individuals in Nassau and Suffolk Counties who had enrolled in those HMOs.

6. An HMO in New York must provide both inpatient and outpatient services to its members in order to be licensed by the State. HMOs frequently provide these services by contracting directly with independent hospitals. HMOs provide reimbursement payments for inpatient services to the defendant hospitals at rates that are either determined by the State's diagnosis related group (DRG) reimbursement system or at a discounted rate determined by voluntary agreement between the HMO and the hospital that is subject to the approval of the New York State Commissioner of Health pursuant to N.Y. Ins. Law §2807-a 3. and §2807-c 2.(b)(i) (McKinney Supp. 1993).

7. Voluntary agreements between HMOs and hospitals for the delivery of hospital services can include the adoption and utilization of per diem-based inpatient hospital rates. A per diem-based inpatient hospital rate rewards third-party payers such as HMOs with lower overall hospital prices for their members who require hospitalization based on efficient patient management and shorter lengths of stays at hospitals.

8. Under New York State law, both HMOs and managed care payers may enter into contracts with the defendant hospitals for discounted rates in connection with the provision of outpatient services to their subscribers or plan members.

9. HMOs and managed care payers compete with each other to obtain employer contracts and enrollees on the basis of price, services, convenience and other factors including the reputations of contracted providers, such as hospitals. They frequently seek to minimize their costs while also arranging for the participation of a sufficient number of reputable hospitals and other providers to attract members. HMOs and managed care firms periodically direct their members away from higher cost hospitals in favor of lower cost providers of hospital services in order to minimize their costs.

10. General acute care hospitals compete for patients on the basis of price, quality, reputation and services. Defendant hospitals endeavor to maintain or increase their patient occupancy rates, admissions and the utilization of their outpatient services by seeking contracts with HMOs and managed care organizations pursuant to which those entities influence or direct their enrollees to use the facilities of defendant hospitals.

11. In response to efforts by various HMOs to obtain discounts off inpatient hospitalization rates and to direct patients away from higher cost hospital providers in Nassau and Suffolk Counties to lower cost hospitals, the defendant hospitals formed Classic Care in the fall of 1991 and signed a memorandum of understanding pursuant to which each defendant agreed (a) that no member of Classic Care would enter into any contract with an HMO or managed care payer without the collective approval of the defendant hospitals; and (b) that Classic Care would be the exclusive bargaining agent for the defendant hospitals in connection with any negotiations relating to contracts with HMOs and managed care firms.

12. In connection with that memorandum of understanding, each of the defendant hospitals entered into an understanding and agreement that no discounts would be permitted off any Classic Care member's inpatient hospital rates in contracts with HMOs and that discounts off any defendant hospital's outpatient rates to HMOs or managed care payers would be limited to no more than 10% off their existing prices for those services. The defendants also agreed to refrain from entering into contracts with HMOs that sought to convert DRG rates on inpatient hospital services to per diem rates for those same services, and agreed on the terms and conditions upon which any most favored nation clause would be accepted by the defendant hospitals.

13. The agreements had the following effects: (a) price competition between the defendant hospitals for the sale of inpatient hospital services to licensed HMOs was unreasonably restrained; (b) price competition between the defendant hospitals for the sale of outpatient services to licensed HMOs and managed health care payers was unreasonably restrained; and (c) HMOs and managed health care entities were deprived of the benefits of free and open competition in connection with the purchase of hospital services by those entities.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. §16 (b)-(h).

Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(e), the proposed Final Judgment may not be entered unless the Court finds that such entry is in the public interest. Paragraph XV. of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is intended to ensure that the defendant Classic Care refrain from acting as an exclusive bargaining agent on behalf of the defendant hospitals or otherwise acting as conduit or coordinating agency for collective decision making by the defendant hospitals relating to participation in contracts with third-party payers and managed care plans and with respect to any pricing terms as may be contained in such contracts. In addition, the proposed Final Judgment is intended to ensure that the defendant hospitals reach independent decisions and refrain from engaging in collective anticompetitive practices in their contractual negotiations with purchasers of inpatient and outpatient hospital services such as HMOs and managed care plans.

A. Prohibitions and Obligations

Paragraph IV.A. of the proposed Final Judgment contains prohibitions that run against both the defendant Classic Care and the defendant hospitals. Pursuant to Paragraph IV.A., each defendant is enjoined and restrained from directly or indirectly entering into any agreement with any hospital in the Long Island area concerning the negotiation, selection, approval, acceptance or refusal of any contract with any third-party payer for the delivery of hospital services; the terms or amounts of any fee to any third-party payer; the utilization of per diem-based fees in any agreement with any third-party payer; or communicating any negotiated fee to any hospital in the Long Island area. The "Long Island area" is defined in Paragraph II.F. as Queens, Nassau and Suffolk Counties in the State of New York.

Paragraph IV.B. is intended to enjoin and restrain the defendant hospitals from directly or indirectly utilizing the defendant Classic Care or any other agent to set, maintain or determine any fee of any hospital in the Long Island area.

Paragraph IV.C. enjoins and restrains the defendant Classic Care from directly or indirectly entering into any agreement with any hospital in the Long Island area concerning the terms or amounts of any fee charged to a third-party payer; entering into any agreement with any hospital in the Long Island area to hold itself out as an exclusive negotiating agent with any third-party payer; developing, adopting or distributing any fee schedule for use with any third-party payer; and recommending that any hospital withdraw from or refuse to enter into any agreement with any third-party payer.

Paragraph IV.D. requires that both the defendant Classic Care and the defendant hospitals terminate any agreement or portion thereof entered into with any other defendant that conditions any actual or possible agreement between a hospital and a third-party payer on the formal or informal approval, review or acquiescence of any other defendant.

Paragraph V.A. of the proposed Final Judgment provides that nothing in Paragraph IV. shall prevent a defendant from participating in an integrated joint venture. An integrated joint venture is defined by Paragraph II.E. as a joint arrangement in which hospitals that would otherwise be competitors pool resources to provide hospital services and share a substantial risk of adverse financial results.

Paragraph V.B. provides a procedure whereby defendants may seek plaintiff's approval for any kind of joint venture not covered by Paragraphs V.A. and II.E. of the proposed Final Judgment.

Paragraph VI. permits the defendants to enter into agreements relating to a lawful merger or acquisition.

Paragraph VII. affirms that this judgment is not intended to place a limit on the First Amendment rights of defendants to petition federal or state government executive agencies.

Paragraph VIII. requires each defendant to maintain an antitrust compliance program. Paragraph VIII. provides that this program at a minimum shall include: A. distributing within 60 days from the entry of this Final Judgment, a copy of this Final Judgment and Competitive Impact Statement to all officers, directors, trustees and administrators; B. notifying within 60 days from the entry of this Final Judgment, all officers, directors, trustees and administrators that the defendant will not be bound by any agreement that requires the approval of the defendant Classic Care or any other defendant hospital in connection with any actual or possible agreement between the defendant and any third-party payer; C. distributing in a timely manner a copy of this Final Judgment and Competitive Impact Statement to any successor corporation or person who succeeds to a position as officer, director, trustee, or administrator; D. holding a briefing annually for

all operating officers, directors, and administrators on (1) the meaning and requirements of this Final Judgment including the consequences of non-compliance with this Final Judgment; and (2) the application of the federal antitrust laws to the defendant's activities including potential antitrust concerns raised by hospitals (a) engaging in agreements or arrangements with competitors to set or maintain any fee or to limit discounts on any fee, or (b) engaging in agreements with a competitor to refrain from dealing with a third-party payer; E. obtaining from each operating officer or administrator an annual written certification that he or she has (1) read, understands, and agrees to abide by this Final Judgment; (2) has been advised and understands that noncompliance with this Final Judgment may result in his or her conviction for criminal contempt of court and/or fine and (3) is not aware of any violation of this Final Judgment; F. maintaining for inspection by plaintiff a record of recipients to whom this Final Judgment and Competitive Impact Statement have been distributed and from whom the certification required by Paragraph VIII.E. has been obtained; and G. conducting an audit of its activities within 60 days from the entry of this Final Judgment and annually to determine compliance with this Final Judgment.

Paragraph IX. requires various certifications of the defendants. Paragraph IX.A. requires each defendant to certify to plaintiff within 75 days after entry of the Final Judgment that defendant has made the distribution and notification required by Paragraph VIII. of the Final Judgment. Paragraph IX. B. requires each defendant to certify to plaintiff annually for five (5) years after the entry of the Final Judgment whether defendant has complied with the provisions of Paragraph VIII. C.,D.,E.,F. and G. above.

Paragraph X. provides that nothing in the Final Judgment shall bar the United States from seeking, or the Court from imposing, against defendants or any person any other relief available under any applicable provision of law for violation of the Final Judgment.

Paragraph XI. provides that an authorized representative of the Department of Justice may visit defendants' offices, after providing reasonable notice, to review their records and to conduct interviews regarding any matter contained in the Final Judgment. Paragraph XI. requires defendants to submit, upon plaintiff's request, written reports, under oath, relating to any matter contained in the Final Judgment.

B. Scope of the Proposed Final Judgment

Paragraph III. of the Final Judgment provides that the Final Judgment shall apply to each defendant and to each of its officers, administrators, servants, representatives, agents employees, successors, and assigns and to all other persons in active concert or participation with any of them who receive actual notice of the Final Judgment by personal notice or otherwise.

Paragraph XIV. of the proposed Final Judgment provides that the Final Judgment shall remain in effect for 5 years.

C. Effect of the Proposed Judgment on Competition

The relief in the proposed Final Judgment is designed to ensure that each defendant hospital, using its independent judgment, acts unilaterally with respect to: (1) any decision by that hospital to enter into a contract with a third-party payer for the delivery of hospital services; (2) the terms or amounts of any fee; or the utilization of per diem-based fees in any agreement with any third-party payer. In addition, the proposed Final Judgment enjoins each defendant hospital from communicating any negotiated fee, including any actual or possible discount to any other hospital, or from utilizing the defendant Classic Care or any other agent to set, maintain or determine any fee of any hospital in the Long Island area. The Defendant Classic Care is specifically enjoined and restrained from: (1) entering into any agreement with any hospital in the Long Island area concerning the terms or amounts of any fee charged to a third-party payer; (2) entering into any agreement

with any hospital in the Long Island area to hold itself out as an exclusive negotiating agent with any third-party payer; (3) developing or distributing any fee schedule for use with any third-party payer; and (4) recommending that any hospital withdraw from or refuse to enter into any agreement with a third-party payer. Finally, the proposed Final Judgment requires that each defendant terminate any agreement or portion thereof entered into with any other defendant that conditions any actual or possible agreement between a hospital and a third-party payer on the formal or informal approval or acquiescence of any other defendant.

Accordingly, the proposed Final Judgment is intended to ensure that third-party payers, including HMOs and other firms that deliver managed health care to their subscribers and patients, can obtain the benefits of competitive prices and price terms in connection with the negotiation of contracts with the defendants for the delivery of hospital services.

The Department of Justice believes that the proposed Final Judgment contains adequate provisions to prevent further violations of the type upon which the Complaint is based and to remedy the effects of the alleged conspiracy.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. §15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered as well as

costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the judgment has no prima facie effect in any subsequent lawsuits that may be brought against defendants in this matter.

V.

PROCEDURES AVAILABLE FOR THE MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided in Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(d), any person believing that the proposed Final Judgment should be modified may submit written comments to Ralph T. Giordano, Chief, New York Field Office, U.S. Department of Justice, Antitrust Division, 26 Federal Plaza, Room 3630, New York, N.Y. 10278, within the 60 day period provided by the Act. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. Paragraph XII. of the proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment would be a full trial of the case. In the view of the Department of Justice, such a trial would involve substantial cost to the United States and is not warranted since the proposed Final Judgment provides the relief that the United States seeks in its complaint, which effectively will prevent any recurrence of the alleged violation.

VII.

DETERMINATIVE MATERIALS AND DOCUMENTS

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b), were considered in formulating the Proposed Final Judgment.

Respectfully submitted,

Geoffrey Swaebe

Patricia L. Jannaco

Attorneys
U.S. Department of Justice
Antitrust Division
26 Federal Plaza, Room 3630
New York, N.Y. 10278
Telephone (212) 264-0383