



## DEPARTMENT OF JUSTICE

Antitrust Division

**CHRISTINE A. VARNEY**

Assistant Attorney General

---

Main Justice Building  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001  
(202) 514-2401 / (202) 616-2645 (Fax)  
E-mail: antitrust.atr@usdoj.gov  
Web site: <http://www.usdoj.gov/atr>

September 4, 2009

T. Mills Fleming, Esq.  
Hunter, Maclean, Exley & Dunn, P.C.  
Attorneys at Law  
200 E. Saint Julian Street  
Post Office Box 9848  
Savannah, GA 31412-0048

Leonard J. Panzitta, Esq.  
Panzitta LLC  
200 E. Saint Julian Street  
Suite 605  
Savannah, GA 31401

Dear Messrs. Fleming and Panzitta:

This letter responds to your August 5, 2009 request on behalf of your respective clients Memorial Health, Inc. (“Memorial”), and St. Joseph’s/Candler Health System (“St. Joseph’s/Candler”) for the issuance of a business review letter pursuant to the Department of Justice’s Business Review Procedure, 28 C.F.R. § 50.6. Memorial and St. Joseph’s/Candler propose that hospitals with which they are affiliated enter an exclusive joint purchasing agreement (the “Agreement”) with respect to the purchase of certain medical and surgical supplies. Memorial and St. Joseph’s/Candler have requested a statement of the Department of Justice’s current enforcement intention with respect to the Agreement. For the reasons discussed below, the Department has no present intention to challenge the entering into or operation of the Agreement.

### Factual Background

You represent that Memorial and St. Joseph’s/Candler are both 501(c)(3) non-profit organizations and are integrated health-care systems which provide health care services in Savannah, Georgia, and surrounding communities in Southeast Georgia and the low-country area of South Carolina.<sup>1</sup> Memorial and St. Joseph’s/Candler respectively are affiliated with and control corporations that operate acute tertiary care hospitals in Savannah.<sup>2</sup> Memorial is

---

<sup>1</sup> August 5, 2009 letter from T. Mills Fleming, Kristie Edenfield and Leonard Panzitta to Office of the Assistant Attorney General (hereafter “August 5, 2009 Letter”) at 1-2.

<sup>2</sup> *Id.*

affiliated with and controls a corporation that operates Memorial Health University Medical Center (“Memorial Hospital”); St. Joseph’s/Candler is affiliated with and controls a corporation that operates St. Joseph’s Hospital and Candler Hospital.<sup>3</sup> These three hospitals are the only acute tertiary care hospitals in southeast Georgia.<sup>4</sup> Memorial Hospital has approximately a 49.9% share and St. Joseph’s Hospital and Candler Hospital together have approximately a 50.1% share of all inpatient admissions in Southeast Georgia.<sup>5</sup>

You propose that, pursuant to the Agreement, the CEO’s of Memorial and St. Joseph’s/Candler will appoint members of a purchasing committee (the “Purchasing Committee”) which will jointly evaluate certain medical and surgical supplies, implants and devices to determine which of those items will be covered by the Agreement (the “Covered Products”).<sup>6</sup> The Purchasing Committee will designate one or more vendors (the “Designated Vendors”) for each Covered Product.<sup>7</sup> Covered Products initially will include spinal implants, total joint implants, cardiac rhythm management devices, drug eluting stents and generic hospital supplies such as bandages, antiseptics, surgical gowns and masks.<sup>8</sup>

Pursuant to the Agreement, Memorial and St. Joseph’s/Candler will be required to purchase Covered Products exclusively from Designated Vendors and strictly in accordance with terms and provisions, including pricing terms, established by the Purchasing Committee and set forth in purchase agreements negotiated on behalf of Memorial and St. Joseph’s/Candler (the “Purchase Agreements”).<sup>9</sup> Purchase Agreements may require Memorial and St. Joseph’s/Candler to commit to purchase a specified amount of a Covered Product in order to obtain a volume discount or other favorable contract terms with a Designated Vendor.<sup>10</sup>

Pursuant to the Agreement, Memorial and St. Joseph’s/Candler will not purchase from a vendor other than a Designated Vendor any product which may reasonably serve as a substitute for a Covered Product.<sup>11</sup> However, in the event that a Designated Vendor for a Covered Product

---

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 2-3.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

is not able to meet its supply commitment to Memorial or St. Joseph's/Candler due to a circumstance beyond the control or influence of Memorial and St. Joseph's/Candler, a Covered Product may be purchased from a vendor other than a Designated Vendor during such period of time that the Designated Vendor is unable to meet its commitment.<sup>12</sup>

You represent that before designating any product as a Covered Product, Memorial and St. Joseph's/Candler will confirm that the cost of all Covered Products accounts for less than 20 percent of the total revenue of all products sold by, respectively, Memorial or St. Joseph's/Candler.<sup>13</sup> You further represent that Memorial and St. Joseph's/Candler "have information systems capable of conducting real time reviews and calculating the revenues to determine whether this [20 percent] threshold is exceeded."<sup>14</sup> You further represent that Memorial and St. Joseph's/Candler contemplate designating as Designated Vendors only national vendors whose Covered Products are distributed in a national market and "have no plans of designating local suppliers as Designated Vendors."<sup>15</sup> You also represent that if Memorial and St. Joseph's/Candler some day decide to purchase products from regional vendors, they will ensure that their purchases will account for less than 35 percent of such vendors' regional sales in the relevant market.<sup>16</sup> Accordingly, you represent that the purchase of any Covered Products pursuant to the Agreement will account for less than 35 percent of the sale of those Covered Products by Designated Vendors in the relevant market.<sup>17</sup>

You represent that Memorial and St. Joseph's/Candler will not discuss or agree upon the price or other terms which either party intends to charge or collect for Covered Products or the allocation of payors and patients to whom either party intends to market Covered Products.<sup>18</sup> Finally, you represent that because medical supplies and services are susceptible to economies of scale, the Agreement is likely to produce volume discounts and reduce transaction costs.<sup>19</sup>

## Legal Analysis

In the *Statements of Antitrust Enforcement Policy in Health Care ("Health Care Statements")*, the U.S. Department of Justice and the Federal Trade Commission (collectively,

---

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Exclusive Joint Purchasing Agreement (Exhibit A to August 5, 2009 Letter) at § 5.1.

<sup>19</sup> August 5, 2009 Letter at 4, 6.

“the Agencies”) provided guidance concerning the Agencies’ antitrust enforcement policy with respect to joint purchasing arrangements between health care providers.<sup>20</sup> Statement 7 of the *Health Care Statements* provides that joint purchasing arrangements between health care providers are unlikely to raise antitrust concerns unless “(1) the arrangement accounts for so large a portion of the purchase of a product or a service that it can effectively exercise market power in the purchase of the product or service, or (2) the products or services being purchased jointly account for so large a proportion of the total cost of the services being sold by the participants that the joint purchasing arrangement may facilitate price fixing or otherwise reduce competition. If neither factor is present, the joint purchasing arrangement will not present competitive concerns.”<sup>21</sup>

Statement 7 also provides an “antitrust safety zone” under which, absent extraordinary circumstances, the Agencies will not challenge such a joint purchasing arrangement. The requirements to be covered by the safety zone are the following: “(1) the purchases [of any product covered by the arrangement] account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and (2) the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement.”<sup>22</sup>

Based on your representations that (1) the parties will only collectively purchase products from vendors who sell the products in a national market and with respect to whom your purchases will be less than 35 percent of their sales in the relevant market, and (2) the cost of all products purchased pursuant to the Agreement will account for less than 20 percent of the total revenues from all products or services sold by, respectively, Memorial or St. Joseph’s/Candler, the Antitrust Division concludes that the Agreement meets the requirements of the antitrust safety zone. If, contrary to your representations, either of these conditions is not met, then the Agreement may produce anticompetitive effects and violate the antitrust laws.

As noted, you represent that because medical and surgical supplies, implants and devices are especially susceptible to scale economies, the Agreement will enable the parties to achieve substantial savings. To the extent that these savings generate benefits for customers, the Agreement could have the procompetitive effect of increasing output and lowering costs for consumers.

Based on your representations that Memorial Hospital, St. Joseph’s Hospital and Candler Hospital are the only acute tertiary care hospitals in southeast Georgia, the Antitrust Division notes the possibility that the parties may use the Agreement to act jointly with respect to matters beyond the scope of the Agreement. The Division further notes that such activity may be

---

<sup>20</sup> Dep’t of Justice & Fed. Trade Comm’n, *Statements of Antitrust Enforcement Policy in Health Care*, Statement 7 (Aug. 1996).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at Statement 7.A.

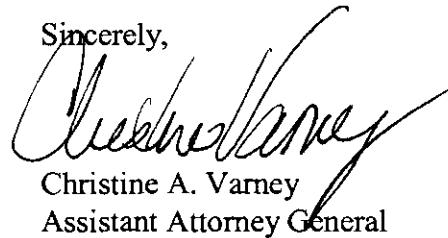
T. Mills Fleming, Esq.  
Leonard J. Panzitta, Esq.  
Page 5

anticompetitive notwithstanding the Division's conclusion that the Agreement meets the requirements of the antitrust safety zone.

Based on the representations made in your request, the documents and information submitted in support of your request, the information obtained during our own review and the additional qualifications set forth above, the Agreement is unlikely to produce anticompetitive effects. Accordingly, the Department of Justice, Antitrust Division, has no present intention to challenge the entering into or operation of the Agreement. This letter expresses the Division's current enforcement intention and is predicated on the accuracy of the information and assertions that you have presented to us, as well as the additional qualifications set forth in this letter. In accordance with its normal practice, the Division reserves the right to bring an enforcement action in the future if the actual activities of Memorial or St. Joseph's/Candler prove to be anticompetitive in purpose or effect in any market.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within thirty (30) days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

A handwritten signature in black ink, appearing to read "Christine A. Varney".

Christine A. Varney  
Assistant Attorney General