LAGUE, NEWMAN & IRISH

A Professional Corporation

Attorneys at Law

600 Terrace Plaza P.O. Box 389 Muskegon, Michigan 49443

616 • 725 • 8148 Fax 616 • 726 • 3404

Eric R. Gielow
Michael W. Irish
Karen L. Kayes
Anthony J. Kolenic, Jr.
Richard C. Lague
Chris Ann McGuigan

David R. Munroe
William M. Newman
Chris D. Slater
Philip M. Stoffan
J. Scott Timmer
Alvin D. Treado

September 22, 1994

Mr. David Jordan
Assistant Attorney General
Antitrust Division
United States Department of Justice, Room 3107
Tenth and Constitution Avenue, N.W.
Washington, D.C. 20530

RE: Expedited Business Review Approval Request
on Behalf of Mid-South Physician Alliance, Inc.
Our File: 4554-002

Dear Mr. Jordan:

Pursuant to the Department of Justice's Expedited Business Review Procedure (58 Fed. Reg. 6132 (1993) and 28 CFR §50.6), we request the Department's review of a Tennessee for-profit corporation's anticipated activities in forming an integrated health care delivery system. Because Mid-South Physician Alliance, Inc. (MSPA) is a collective undertaking of a multi-specialty physician network and because MSPA's establishment of a pricing structure will require the gathering and analysis of information from otherwise competing providers of health care services, we request an analysis of both types of activities and have provided information regarding both aspects of the venture.

Our request is made upon the basis of the best information known to date and upon reasonable estimates of future activity. Where possible, MSPA will implement any suggested modifications which address any antitrust concerns of the Department. We verify that this expedited business review procedure has been invoked in good faith. We have made a diligent search for documents and information required to be submitted pursuant to the procedure and the Department's guidance. We have provided complete disclosure of all responsive material in existence as of the date of this request.

1. **Identifying information; Structure.**

The Mid-South Physician Alliance (the "Alliance" or "MSPA") and the Mid-South Health Plan (the "Health Plan" or "MSHP") are being incorporated in the State of Tennessee as for-profit organizations organized under the Tennessee Business Corporation Act. The Charter of the Alliance was filed with the Tennessee Secretary of State on September 2, 1994. As required by Tennessee statutes, the Charter of the Health Plan was submitted to the State's Commission of Commerce and Insurance on September 22, 1994. Physicians in the targeted service area (see Exhibit A) will be given an opportunity, subject to applicable securities regulations, to purchase stock in both entities. The Health Plan has been established to provide a vehicle to accept and manage risk-bearing contracts with self-insured employers and third-party payers in the service area. As described below, participating physicians will own 100% of the Alliance and a majority of the Health Plan. All of their investment is at risk in both organizations.

Class A shares will be issued to primary care physicians, who will be eligible to purchase one unit of stock (consisting of shares in both the Alliance and the Health Plan) for an initial purchase price of One Thousand Dollars ($1,000.00). They will each receive one vote per share in each organization for that purchase. Class B shares of both entities will be issued to specialist physicians, who will be eligible to purchase one unit of stock at a price of Two Thousand Dollars ($2,000.00). Class A shares will be owned by the individual primary care physicians, who are typically solo practitioners. Class B shares may be beneficially owned by the practice groups of the individual physicians in order to ensure that the quality and coverage conditions under which an individual physician joins MSPA are sustained throughout the duration of an individual's membership.

Class C shares in the Health Plan (MSHP) will be sold to investors (who need not necessarily be physicians) at a purchase price established by the Board of Directors of MSHP after the sales of Class A and B shares have been completed. Capital raised from Class C shares will be used to augment the funds raised by the sale of Class A and B shares to an amount sufficient to meet the funding requirements of MSHP's various activities, described more fully below. Class C shares will have limited voting rights, as described in the charter of the Health Plan, attached as Exhibit I.

The MSPA Board of Directors will be comprised of twelve physicians, six of whom will be elected by primary care physicians and six of whom will be elected by specialty physicians. One of the "primary care" directors will at all times be a pediatrician. Three of the specialty physicians will at all times be drawn from the specialists affiliated with the three organizing clinics, and a

fourth "specialist" director will be a specialist in obstetrics and gynecology. MSPA expects to employ a full-time executive director to manage the operations of the organization.

The Health Plan will be governed by a Board of Directors elected by the shareowning physicians (Class A and B stock) and other investors (Class C stock). At all times, the physicians shall elect the majority of the directors of the Health Plan. The intent of the Health Plan structure is to make the physician-investors responsible for the management of the services and assets of the Health Plan.

2. **Expected participants.**

MSPA intends to recruit approximately 650 physicians from throughout its intended service area, described in Exhibits A and B.

The service area was originally defined by evaluating the patient origin records of the organizing specialty clinics in the Memphis service area. These three clinics (hereinafter "Organizers"), which have provided the initial impetus of MSPA and MSHP, include the Semmes-Murphey Clinic (neurology and neurosurgery), The Campbell Clinic (orthopaedic surgery), and The Cardiology Group of Memphis, P.A. (cardiology services). These three Organizers, along with a nascent group of primary care physicians with admitting privileges at two of the largest hospital systems in Memphis, have sought to identify a diverse group of physicians who will be able to respond to the health care needs of area employers. The health care service needs of the area's employers were estimated by a series of interviews conducted by an outside consultant, who then worked with an actuary to develop target numbers of participating physicians in each specialty. Additional physicians were added to the list to ensure that patients would have adequate access to care (appropriate distances, alternate choices, etc.).

All participants in MSPA will be physicians licensed to practice in the state in which they are currently practicing. In addition, all participants will be required to pass stringent credentialing standards designed to assure high-quality care. Finally, all participating physicians will be made aware of the need to monitor the costs, quantity and quality of services they order.

3. **Objectives of MSPA.**

The venture seeks to respond to the need for a competitive managed care product which has been discussed by the Organizers with the Memphis Business Group on Health (MBGH) and large employers in the area. In order to be able to accept capitated contracts, the Organizers are sponsoring the

creation of the Mid-South Health Plan, which will be an HMO licensed by the State of Tennessee to provide care directly to residents of the service area, and accept the insurable risks related to that care. In addition, MSPA will, during the formation of the HMO, enter into discounted fee-for-service and other risk-bearing contracts with third-party payers in the area, along with direct risk-bearing contracts with area employers. Through these contracts, MSPA seeks to reduce the overall level of health care expenditures in the service area, while providing information to its members which will allow them to manage the cost and quality of the care of patients covered by these contracts more efficiently than has been previously possible.

More specifically, MSPA seeks to:

a) Provide a system by which area physicians can deliver high quality, cost-effective and competitive health services.

b) Create a provider contracting vehicle which will provide an alternative to the current limited choices in the Memphis service area.

c) Establish a mechanism for physicians to share in the risk and rewards of health service benefit plans through assumption of the delivery and equity risks of the health care marketplace.

d) Establish a managed care organization owned by physicians, making them accountable for the cost-benefit of their treatment decisions.

e) Through ownership and data acquisition, offer physicians the capability to deal directly, constructively and efficiently with the organization which bears the costs of their treatment choices.

f) Maintain the capability of physicians and patients to select their institutional provider based on the most appropriate and cost effective treatment location, rather than being restricted by contracts established by large monolithic hospital systems. ("Institutional providers" include hospitals, free-standing surgery centers, clinical laboratories, diagnostic imaging centers, etc.)

g) Demonstrate that physician-managed care can succeed as a model of a health care delivery system which is able to respond rapidly to changes in the marketplace and changes in the capabilities of institutional providers.

The Health Plan, through the services provided by MSPA physicians, will focus on the management of individual patients' health care service needs by employing the "gatekeeper" model as envisioned by nearly every health care

reform proposal currently under review. Thus, MSPA will be positioned to participate in any future changes in the health care delivery system.

Finally, as an entity comprised entirely of physicians, MSPA will be able to respond to the changing needs of Tennessee's reformed health care system for the uninsured (TENNCARE), without the overwhelming capital requirements of institutionally based providers.

4. **Market description.**

Demand for services. The Memphis health care service area has been slow to adopt the consolidations and reorganizations which have been ongoing in other areas of the country. See Exhibit E for one report of change which is triggered by market entries. Although the physicians in the service area tend to be heavily weighted towards specialists, area employers have increasingly demanded additional accountability from health care providers and an increased reliance on primary care physicians as "managers" of care.

In 1989, the MBGH issued a request for proposal for health care services on behalf of several area employers covering several thousand participating employees and their dependents. That initial contract was awarded to a panel of providers under the aegis of Baptist Memorial Healthcare System, one of the largest hospital systems in the country. No other organization has ever been able to successfully compete for this contract.

As yet, managed care organizations have had relatively little success in establishing contracts with area employers, who have generally preferred to renew health insurance benefits contracts based on traditional, fee-for-service relationships with providers (See Exhibit D). The rapidly escalating costs of those "cost-plus" contracts, however, has generated an increasing awareness by employers of the need to reform their relationships and ask providers to bear part of the risk of escalating costs in care as well as escalating demands for the quantity of health care services.

Recently, the Organizers contacted MBGH and offered to create a provider entity capable of responding to the needs of MBGH to provide a counter-balance to the Baptist contract. With the encouragement of MBGH, the Organizers responded to the most recent request for proposals for the MBGH health benefits contract, but were unable to win the bid because they had not yet built the structure outlined in this Request. There were no other physician-driven entities able to bid. As they begin operations, MSPA and its Health Plan will provide a competitive counter-balance to the Baptist hospital-focused provider entity, the Baptist Health Services Group.

Based on interviews with large employers in the service area, the market for health care appears to be very diverse. Employees drive considerable distances into the Memphis metropolitan area from as much as 100 miles away. In addition, Memphis-based employers have facilities scattered throughout an approximately 100-mile radius of the city. (See Exhibit C for additional information). Thus, the market for physician services is diffused across a wide region which incorporates not only portions of Tennessee but substantial areas of Mississippi, Arkansas, Missouri and Western Kentucky. (See Exhibit A).

Supply of physicians. Currently, there are 4,397 physicians in the market, distributed as shown in Exhibit B. MSPA intends to recruit no more than 658 of these physicians, for a total share of the physicians' supply market of not more than 15%.

5. **MSPA Services.**

MSPA, through its contracts with the Health Plan, employers and third-party payers, will assist its members in providing high-quality, cost-effective and competitive health care services throughout the service area. The Health Plan will contract on behalf of its participating providers for either discounted fee-for-service, or for a capitated fee structure in which the organization and its stockholders will be at risk for the quantity and cost of health care services delivered to covered employees. MSPA and MSHP intend that their risk-bearing relationships will be price-effective in the marketplace and recognize their risk and need to respond to price and volume demands.

MSPA will provide its members with an integrated claims processing and management system, at the same time using that claims information to provide its members with an analysis of the relationship between the services provided by individual physicians and the associated patient outcomes. Any claims-based analysis provided to members will not include information related to the cost of individual services, but will focus on the relative efficacy of physician choices.

6. **Current services offered by individual participants in MSPA.**

To the best of our knowledge, each prospective member of MSPA currently provides physician services to area residents under contracts negotiated with third-party payers, employers and other organizations. Some of those contracts will, over time, be replaced by contracts negotiated on behalf of its members by MSPA. However, the administrative efficiencies of MSPA, working with a central administrative and contracting staff, are expected to reduce the overhead of its members.

In addition, the efforts of primary care physicians to establish a reliable referral base of specialists in whom they have confidence and with whom they can have ongoing communication, have been hampered by the diverse patient base and wide-spread location of the various specialists. Thus, MSPA will assist the current activities of primary care physicians to manage the aggregate of care demanded by their patients.

7. **Competitive analysis of the market.**

In the relevant geographic market there are a total of approximately 4,397 physicians. Of these, approximately 1,976 are primary care physicians. Of these, no more than 16% are expected to participate in MSPA. A more detailed breakdown of both primary and specialty physicians expected to participate appears in Exhibit B.

Information about the institutional providers in the service area is summarized in the article from *Health Care Systems Strategy Report*, which appears as Exhibit E. Specific information about the volume of patients seen by individual physicians and the extent to which individual physicians participate with third-party payers is not available. An analysis of the third-party payer penetration of the market, which can be taken to approximate the percentage of the market which will be effected by the activities of MSPA, is attached as Exhibit D.

8. **Restrictions on competition with MSPA members.**

As can be seen by the attached MSPA Bylaws (Exhibit I), the organization is non-exclusive and there is no limitation on the ability of any member to join any other organizations or other competing entities.

This ability of participating members to replace their MSPA participation with other more beneficial opportunities will provide a balance to the potential of the negotiations with payers to drive down price to the extent of reducing the quality and scope of the health care services available to residents. If the price-quality balance is not appropriate to the marketplace, the venture will not attract business and the activities of the physicians in MSPA will thus have no effect on the marketplace. Conversely, if the price-quality balance is competitive, its members will be supportive of its activities and the market will respond appropriately.

9. **Restrictions on flow of information from MSPA to its members.**

MSPA will not provide any information allowing individual members to develop a fee structure which approximates the fee structure of the minimum acceptable contract terms which MSPA will use in defining the extent of

MSPA's agency authority to bind its members to contracts. Neither will MSPA receive any of the information about the fees of area physicians which will be used by the independent third-party consultant in the development of MSPA's various fee-for-service and capitated arrangements.

The Bylaws of MSPA address this restriction directly at Article II, §14:

> Shareholder's Access to Information. No shareholder shall have access to another shareholder's patient fee or pricing information or other financial information, including but not limited to salary and fringe benefits for associates or employees. Furthermore, no shareholder shall have access to any data or information gathered by any third-party administrator or consultant engaged by the corporation to enable the corporation carry out the purposes for which it is formed.

10. **Ten largest (projected) customers for the venture.**

A recent study by DeMarco & Associates, a national health care consulting firm, was based on interviews with several of the largest employers in the service area. These businesses, and a summary of the interviewers' comments, appear as part of Exhibit C. Within the first 36 months of operation, MSPA and MSHP are expected to affect the quality and costs of health care available to approximately 30,000 of the 150,000 employees in the Memphis service area, covered by the consultants interviews, dispersed throughout the region defined in Exhibit A. The entire labor force is approximately 600,000.

In addition to developing contracts with individual employers, the Health Plan will seek to contract with the MBGH coalition of 65 employers when that contract is up for renewal, effective January, 1995. If it is successful in obtaining that contract, MSPA will be participating in the health care services of an additional 150,000 covered lives. Most of these contracts are risk-bearing.

It is important to note in this context that "risk" includes not only the cost and quantity of health care services required during the one or two-year term of the contract, but also the market risk that escalating costs or uncontrolled demand will cause MSPA to lose the contract with the third-party payer, or cause the Health Plan to be unable to renew its direct risk contracts. This provides a strong incentive to avoid ongoing price escalation during the term or between the terms of their contracts. If cost or demand escalates beyond forecast levels, MSPA will simply lose its market share and its competitive influence on the market.

11. **Requirements for entry into any relevant service market; Other potential competitors.**

As discussed above, Memphis hospitals are engaged in creating alliances with physicians. In addition, existing panels of physicians who have contracted with third-party payers in the area (as analyzed in Exhibit D), are expected to provide an effective counterbalance to MSPA's panel of providers.

A major constraint on MSPA's growth, or on the growth of any competitor, will be the willingness of primary care physicians to enter into multiple gatekeeper arrangements. Given the relatively small base of patients which MSPA will be able to deliver to any one primary care physician for the foreseeable future, most area primary care physicians will be entering into multiple gatekeeper arrangements, thus removing the major restraint on entry into the market by other similar aggregations of physicians or institutional providers.

12. **Expected business efficiencies.**

The existence of an integrated group of physicians is expected to deliver a number of efficiency-based benefits to the health care service market. They include:

a) The administrative cost of processing claims will be substantially reduced through the use of a central management information system and claims administration office. This will allow participating physicians to reduce their own overhead and eliminate an inflationary pressure on physicians' fees.

b) The total cost of health care will be reduced through two mechanisms: the well-proven effect of risk contracts and the equally well-established effect of a feedback process to participating physicians. This feedback, which will be an important component of MSPA's service to its members and to the employers with whom it contracts, will allow accurate analysis of the effects of individual physician's treatment decisions as compared to an aggregate of their peers.

c) The use of a shared patient information system would reduce record-keeping costs as well as speed transmission of patient information from the gatekeeper physician to the referral specialist.

d) The contracting costs of employers and third party-payers will be reduced through the ability to contract with a single source for an entire panel of providers. One often overlooked cost of health care is the cost each third-party payer must incur to contract with providers before it can enter the market place. With this hurdle lowered, more third-party payers in direct contracts can be created, thus increasing the amount of competition for the health care benefit coverage.

e) The continual cost/quality exploration by MSPA of the ancillary services ordered and managed by its participating physicians will add value and increase the cost competitiveness of the market as its information system will be able to assess the relationship between cost and outcome.

f) The existence of an efficient referral system will minimize the time required by primary physicians to seek referral links for their patients who need specialist care, thus eliminating another administrative overhead cost.

13. **Documents reflecting the formation of MSPA.**

The Charters and Bylaws of MSPA and MSHP, along with the minutes of the initial meetings of both entities, are attached as Exhibit I. The preliminary discussion of the venture which has been given to participating physicians is also attached as Exhibit G. The Charters for both organizations were filed with the Tennessee Secretary of State during the first part of September, 1994. The initial Boards of Directors of MSPA and MSHP have been elected and are listed in the enclosed minutes.

14. **Documents concerning the business plan and strategy of MSPA or of any venture participant.**

At the present time, the business plans of MSPA and MSHP have not been finalized, pending the receipt of the analysis by the Department of Justice. In general, the business plan will include the various services and contracting postures outlined in this business review request, and will be amended as suggested by the Department of Justice to conform with applicable regulations and policies.

15. **Documents discussing or relating to the legality or illegality under antitrust laws of this venture.**

No such documents exist. However, the issue of compliance with the antitrust statutes and standards have been discussed in the organization of both MSPA and MSHP, with the Organizers, with the initial Board of Directors of both

organizations and with all prospective members. As an example of the organization's commitment to compliance with antitrust laws, the Bylaws of MSPA provide that the Board of Directors may retain a third party to gather information and carry out the purposes for which MSPA was formed, "all in compliance with applicable antitrust and other federal and state laws." Article XII, §2. To ensure compliance, this expedited review request was authorized by MSPA. In addition, MSPA intends to fully comply with any standards promulgated by the Department of Justice or the Federal Trade Commission as they may be issued from time to time.

The methods by which the price structure of the venture will be developed and the planned contract negotiations process are described in the sections which follow.

16. **Exchange of information.**

MSPA and, if necessary, the Health Plan, will retain an independent third-party consultant to create a data base, prepare a statistical analysis and develop a recommended fee structure and a capitated fee plan for the MSPA Board. All physician-specific information obtained by the consultant shall be privileged and confidential to the consultant and shall not be made available to the MSPA Directors or to any member of the organization.

Further, no individual MSPA participant will be able to obtain a copy of the actual recommended fee structures as developed by the consultant. The entire schedule will be available only to MSPA's Board, its executive director and its management staff. Individual physicians, therefore, will not have access to information regarding the fees charged or deemed acceptable by their individual competitors, nor will they have information as to the fee schedule which will be used as a negotiating basis for MSPA. cf. MSPA Bylaws Article 2, §14 and Article XII, §2. Accordingly, MSPA believes that its development of a fee schedule will not assist otherwise competing physicians to raise or lower the fees they charge to patients not covered by MSPA-negotiated contracts.

17. **Purpose and objectives of the information exchange.**

By assembling this information and developing a recommended fee structure, MSPA will be able to compete aggressively in the marketplace by providing the health care services of its members at a cost lower than other provider entities. This collection and analysis of fee information is necessary in order to carry out

the corporate purposes of MSPA and its Health Plan. The administrative efficiencies of one agent contracting on behalf of a fully-developed, economically and administratively-integrated physician panel are only available through an efficient method of gathering information and establishing a price at which the providers and the payers will be satisfied.

18. **Nature, type, timeliness and specificity of information obtained.**

The independent consultant will gather information concerning utilization, quality standards, cost of purchased services, fees, charges and clinical outcomes. The consultant will aggregate this data and compare it with standards available in the marketplace and with generally published relative value scales.

19. **Method by which information will be exchanged.**

It is expected that the independent consultant will use a survey questionnaire or telephone interviews with a statistical sample of MSPA participants from whom the consultant will obtain information. Once the information is gathered, however, it will not be shared with any individual survey participant. In addition, as noted above, the results of the survey will not be distributed to any individual MSPA participant. It is the stated goal of MSPA to prevent the MSPA fee and contracting methodology from being used as a price-setting device by any MSPA member. In fact, MSPA will adopt a protocol specifically designed to avoid such a situation. See Exhibit F.

20. **Market characteristics.**

See discussion at Sections 4, 5, 6 and 7.

21. **Non-participants in the information exchange.**

Providers who are not participants in MSPA will not be part of the statistical sample used to develop the pricing information model discussed above. Thus, the fee information developed by MSPA and used in its negotiating process will not provide an overall summary of the market fee structures. The assumption is that non-participating physicians will either be forming or participating in other provider-organized entities, or that they will proceed as before, ignorant of the fee structures which are being developed by third-party payers.

22. **Ten largest customers involved in the exchange.**

The participants in the market who will be most affected by the information gathered by MSPA are expected to be the employers and third-party payers with whom MSPA contracts. However, any individual contract participant will not be given MSPA's fee structure. Instead, MSPA's process requires that it review contract proposals offered to it by third-party payers and test them against its pre-authorized contracting limitations. If a payer's contract does not comport with MSPA's minimum acceptable terms, the MSPA Board of Directors will not be empowered to enter into the contract. In no case will the executive director be authorized to share specifics of the MSPA fee schedule except to the extent of demonstrating to an individual payer the gap between their proposal and MSPA's terms.

23. **Safeguards to prevent disclosure of specific information to competitors.**

As stated above, the independent consultant will create the data base, prepare the analysis and furnish recommendations only to the Board and management of MSPA. Except for the final analysis and recommendation, no physician member, other than the twelve members of the Board of Directors, will have access to the final recommendation. No member, even a member of the Board of Directors or the executive director of MSPA, will have access to any discrete information held by any consultant participating in the gathering of fee information or its analysis. Further, no member shall have access to any other member's fee, pricing or volume information. Violation of these conditions will be grounds for immediate termination of any member's Participation Agreement with MSPA.

We hope the foregoing description and the attached exhibits have provided ample information on which to base your review. Please contact the undersigned or Philip M. Stoffan if you have specific questions concerning this matter.

Thank you for your consideration of this request.

Very truly yours,

Richard C. Lague
For the Firm

cc: MSPA Board of Directors
MSHP Board of Directors