



HunterMaclean

HunterMaclean

Attorneys at Law

200 E. Saint Julian Street

Post Office Box 9848

Savannah, GA 31412-0048

T. MILLS FLEMING

Phone 912.236.0261

Fax: 912.236.4936

www.huntermaclean.com

mfleming@huntermaclean.com

August 5, 2009

Office of the Assistant Attorney General
Antitrust Division
Department of Justice
Main Justice Building
Room 3109
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Re: **Request for a Business Review Letter**

Dear Sir or Madam:

The purpose of this letter is to request a business review letter on behalf of Memorial Health, Inc. ("Memorial") and St. Joseph's/Candler Health System, Inc. ("St. Joseph's/Candler") (collectively, the "Requesting Parties"), pursuant to the regulations set forth in 28 C.F.R. § 50.6. Specifically, the Requesting Parties request a business review as to whether the terms of the joint purchasing arrangement described herein would violate any federal antitrust law enforced by the United States Department of Justice ("DOJ").

Section I of this business review request provides background information on the Requesting Parties. Section II details the terms of the proposed joint purchasing agreement. Section III provides an analysis of why the terms of the joint purchasing agreement do not violate federal antitrust laws. Section IV sets forth the business review letter request.

I. BACKGROUND INFORMATION ON REQUESTING PARTIES

Memorial, a Georgia non-profit corporation and tax exempt entity pursuant to Internal Revenue Code ("IRC") Section 501(c)(3), is an integrated health care system, organized and operated for the purpose of providing health care services in Savannah, Georgia, and the surrounding communities in southeast Georgia and the low-country area of South Carolina. Memorial is affiliated with and controls Memorial Health University Medical Center, Inc., a Georgia non-profit corporation, which operates Memorial Health University Medical Center, an acute tertiary care hospital in Savannah, Georgia. Memorial's primary office is located at 4700 Waters Avenue, Savannah, Georgia 31404.

Like Memorial, St. Joseph's/Candler is a Georgia non-profit corporation which is organized, operated, and recognized by the Internal Revenue Service as a tax exempt organization under IRC Section 501(c)(3). It is also an integrated health care system and is organized and operated for the purpose of providing health care services in Savannah, Georgia, and the surrounding communities in southeast Georgia and the low-country area of South Carolina. St. Joseph's/Candler is affiliated with and controls Saint Joseph's Hospital, Inc., which operates St. Joseph's Hospital (an acute tertiary care hospital in Savannah, Georgia), and Candler Hospital, Inc., which operates Candler Hospital (an acute tertiary care hospital in Savannah, Georgia). St. Joseph's/Candler's primary office is located at 5353 Reynolds Street, Savannah, Georgia 31405. St. Joseph's/Candler was created on April 1, 1997 as a result of Saint Joseph's Hospital, Inc.'s and Candler Hospital, Inc.'s entering into a Joint Operating Agreement with a single board of directors controlling both hospitals. The Federal Trade Commission approved this transaction.

There are several other smaller community hospitals located outside of the Savannah, Georgia area. In other words, Memorial Health University Medical Center, St. Joseph's Hospital and Candler Hospital are the only acute tertiary care hospitals in southeastern Georgia. Each of the Requesting Parties have an approximately equal share of the market for inpatient hospital admissions in Savannah, Georgia, with Memorial Health University Medical Center's having a 49.9% share and St. Joseph's Hospital's and Candler Hospital's collectively having a 50.1% share in calendar year 2007, the last full year for which such figures are available. Also, the two health care systems are of similar size, with Memorial Health University Medical Center having 530 licensed beds and 2008 net revenue of approximately \$454 million, and Saint Joseph's Hospital and Candler Hospital collectively having 636 licensed beds and 2008 net revenue of approximately \$425 million.

II. TERMS OF THE PROPOSED JOINT PURCHASING ARRANGEMENT

The Requesting Parties propose to enter into the Exclusive Joint Purchasing Agreement, attached hereto as Exhibit A ("Agreement"). As a procedural matter, the Requesting Parties' respective CEOs will each appoint three individuals to serve on a purchasing committee ("Purchasing Committee"). It is anticipated that these individuals will be the Chief Financial Officer, Chief Operating Officer and Director of Purchasing for each Requesting Party. The Purchasing Committee will determine which types and categories of medical and surgical supplies, implants and devices are to be covered by the Agreement ("Covered Products"). The Requesting Parties contemplate initially including spinal implants, total joint implants, cardiac rhythm management (CRM) devices, drug-eluting stents and more generic hospital supplies such as bandages, antiseptics, surgical gowns and masks under the Agreement.

With respect to each Covered Product, the Purchasing Committee will evaluate and clinically review the products offered by various vendors of the Covered Product. The Purchasing Committee will first evaluate which of the vendors' products are clinically safe and effective and will then consider their relative price and other terms and provisions pertinent to their purchase



and delivery. In conducting its evaluation and review, the Purchasing Committee shall seek input from members of the respective Requesting Parties' medical staff, nursing and clinical staff, management and leadership, as it deems appropriate. Generally, the Purchasing Committee will designate one or more vendors for each Covered Product, which shall be the "Designated Vendor(s)" for that Covered Product.

The Agreement will require the Requesting Parties to purchase Covered Products exclusively from the Designated Vendor(s) selected by the Purchasing Committee and strictly in accordance with the terms and provisions, including pricing terms, established by the Purchasing Committee and set forth in purchase agreements negotiated by the Purchasing Committee on behalf of the Requesting Parties (the "Purchase Agreements"). The Requesting Parties shall not directly or indirectly purchase from a vendor other than a Designated Vendor any product which may reasonably serve as a substitute for a Covered Product. However, in the event the Designated Vendor(s) for a Covered Product are not able to meet their supply commitment to a Requesting Party due to a circumstance beyond the control or influence of that Requesting Party, the Covered Product may be purchased by that Requesting Party from a vendor other than the Designated Vendor(s) during such period of time that the Designated Vendor(s) are unable to meet their commitment. The Purchase Agreements may also require the Requesting Parties 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.

The terms and conditions of the Purchase Agreement with respect to a Covered Product will govern all shipments of the Covered Product purchased by the Requesting Parties, will be uniform for all of the Requesting Parties, and will constitute the complete and exclusive agreement between the Requesting Parties and the Designated Vendor(s) for that Covered Product. The Purchase Agreement for a Covered Product will provide, among other things, that (i) each of the Requesting Parties will order that Covered Product directly from the Designated Vendor for that Covered Product, (ii) the Designated Vendor will ship or deliver the Covered Product directly to that Requesting Party and will invoice that Requesting Party directly for the purchase price of the Covered Product, and (iii) the Requesting Party will be solely responsible for paying such invoice and shall handle all returns, credits and complaints directly with the Designated Vendor.

III. ANALYSIS OF THE PROPOSED JOINT PURCHASING AGREEMENT

Section 1 of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."¹ Although joint purchasing arrangements do affect commerce, they have generally been regarded as procompetitive.² To this end, the United States Supreme Court has noted that such agreements are designed to increase economic

¹ 15 U.S.C. § 1.

² See e.g., *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 295 (1985).



efficiency and render markets more, rather than less, competitive.³ As will be discussed below, the Agreement has significant procompetitive benefits, including volume discounts and reduced transaction costs and, therefore, should be approved by the DOJ.

In 1996, the Federal Trade Commission and the DOJ (collectively, the "Agencies") issued the "Statements of Antitrust Enforcement Policy in Health Care" (the "Antitrust Policy") which included nine statements regarding mergers and various joint activities in the health care area.⁴ Statement 7 specifically addresses joint purchasing arrangements between health care providers and notes that such arrangements will pass antitrust muster unless (i) under the arrangement, the participants can effectively exercise market power in the purchase of the products, or (ii) the arrangement may facilitate price fixing or otherwise reduce competition in the market for the products or services sold by the participants in the joint arrangement.⁵

In addition, the Agencies established an "antitrust safety zone" which states that, absent extraordinary circumstances, they would not challenge a joint purchasing arrangement if:

1. The purchases account for less than 35% 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% of the total revenues from all products or services sold by each competing participant in the joint purchasing agreement.⁶

For purposes of the Agencies' analysis of this business review request, the relevant market is defined as "a product or a group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm...that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant."⁷ This analysis is consistent with Statement 7 which provides further that the relevant supply market for hospital supplies is likely to be national or at least regional in scope.⁸ Given that there are thousands of individual purchasers of medical hardware and supplies, including hospitals, nursing homes and other health care facilities, the Requesting Parties' herein

³ *Id.* (noting that the joint purchasing arrangements permit the retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies and ensure ready access to a stock of goods that might otherwise be unavailable on short notice).

⁴ U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy (September 27, 1994) available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm> [hereinafter "Antitrust Policy"].

⁵ *Id.*

⁶ *Id.*

⁷ U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 1.0 (1997).

⁸ Antitrust Policy, *supra* note 3.



described supply purchases would account for less than 35% of total sales in the relevant market.⁹

The Requesting Parties contemplate only designating national vendors as Designated Vendors for the Covered Products, which Products are distributed in a national market. The Requesting Parties have contemplated the following vendors during their initial discussions: Stryker, Globus Medical, Boston Scientific and Medtronic. In addition, the Requesting Parties have no plans of designating local suppliers as Designated Vendors. Although the Requesting Parties currently contemplate only using national vendors, if they decide to include regional vendors, they will ensure that their purchases do not exceed the 35% threshold. Therefore, we believe that the Agreement would meet the first requirement of the antitrust safety zone.

The Agreement requires that before adding any Covered Product to the Agreement, the Requesting Parties will confirm that the costs of all Covered Products account for less than 20% of the total revenue of all products sold by each Requesting Party. The Requesting Parties have information systems capable of conducting real time reviews and calculating the revenues to determine whether this threshold is exceeded. The Requesting Parties are cognizant of this threshold and have pledged to actively monitor the data to ensure that this threshold is not exceeded in a material manner. Based on the foregoing, the Agreement falls within the purview of the applicable antitrust safety zone and should not be challenged by the DOJ.

Even if the DOJ determines that the Agreement does not fall within the relevant antitrust safety zone, the Agreement should not be challenged because, as noted in the Antitrust Policy, most joint purchasing agreements among hospitals or other health care providers do not raise antitrust concerns.¹⁰ For example, the Agencies have noted the efficiencies achieved by these agreements and that these efficiencies benefit consumers by virtue of the volume discounts and reduced transaction costs.¹¹ The Agencies' analysis and conclusion is consistent with the rule of reason (as opposed to the per se) analysis used by courts in assessing whether such agreements achieve the requisite "legitimate economies of scale" for the benefit of the consumer.¹² To this end and if the Agreement is analyzed under the rule of reason analysis, the ultimate inquiry is whether the

⁹ Herbert Hovenkamp, Competitive Effects of Group Purchasing Organizations' (GPO) Purchasing and Product Selection Practices in The Health Care Industry, available at <https://www.higpa.org/pressroom/hovenkamp.pdf> (April 2002). Additionally, some commentators have taken an expansive view of the geographic market. They argue that the relevant market includes those buyers that sellers can ship to outside the local geographic area when prices are depressed. The distant buyers provide a way for sellers to avoid taking the lower price offered by the local buyer. Therefore, if the prices are high enough to compensate for the transportation costs, then those buyers should also be included in the geographic market. Roger D. Blair and Jeffrey L. Harrison, Cooperative Buying, Monopsony Power, and Antitrust Policy, N.W. U. L. Rev. 331, 360 (Winter 1992).

¹⁰ Antitrust Policy, *supra* note 3.

¹¹ *Id.*

¹² Addamax Corp. v. Open Software Foundation, Inc. 888 F. Supp. 274 (D. Mass. 1995) (holding that because joint purchasing agreements often produce legitimate economies of scale, courts have generally refused to find these agreements illegal under the per se standard).



joint buyer activity will have an adverse effect on price or output in the input market that is not offset by the procompetitive effects in the input market or the end-product market.¹³

Even under such an inquiry, the adverse effect on the price in the input market for vendors of medical and surgical supplies, implants and devices will be minimal, considering the Requesting Parties are only two participants in a national market. Any such adverse effect will be substantially outweighed by the procompetitive effects on the end-product market. Since medical and surgical supplies, implants and devices are especially susceptible to scale economies, the Requesting Parties will be able to realize substantial savings through the Agreement.¹⁴ Therefore, the Agreement would pass antitrust scrutiny under a rule of reason analysis.

IV. BUSINESS REVIEW LETTER REQUEST

The Requesting Parties hereby request a business review letter confirming that the terms of the Agreement described herein:

1. Fall under the antitrust safety zone described in Statement 7 of Antitrust Enforcement Policy in Health Care; or
2. Do not raise antitrust concerns under the federal antitrust laws enforced by the DOJ.

Should you have any questions or comments, or would like to discuss this matter in further detail, please do not hesitate to contact Memorial's counsel, T. Mills Fleming (mfleming@huntermaclean.com) or Kristie A. Edenfield (kedenfield@huntermaclean.com) at (912) 236-0261, and/or St. Joseph's/Candler's counsel, Lenny Panzitta (lpantzitta@panzitalaw.com) at (912) 236-5833.

Thank you for your consideration of this matter.

¹³ Jonathan M. Jacobson & Gary J. Dorman, Joint purchasing, monopsony and antitrust, The Antitrust Bulletin (Spring 1991).

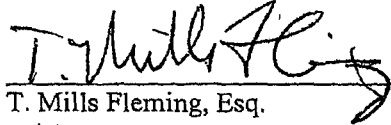
¹⁴ Hovenkamp, *supra* note 7, at 9. (Noting that medical hardware and supplies usually have significant fixed costs, including research and development costs. The greater the proportion of fixed costs, the more significant economies that are generated from large volume sales.)



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Sincerely,

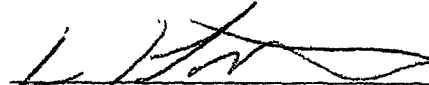
HUNTER, MACLEAN, EXLEY & DUNN, P.C. PANZITTA LLC



T. Mills Fleming, Esq.



Kristie A. Edenfield, Esq.
Counsel for Memorial Health, Inc.



Leonard J. Panzitta, Esq.
Counsel for St. Joseph's/Candler Health
System, Inc.

cc: Joshua H. Soven

