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Honorable James F. Rill  
Assistant Attorney General  
Antitrust Division  
10th and Constitution Avenue, N.W.  
Room 3107  
United States Department of Justice  
Washington, DC 20530

Re: Request for Business Review Letter Regarding Third Party Payor  
Negotiations By Clinical Practice Plans At Case Western Reserve University  
School of Medicine/University Hospitals of Cleveland, Ohio

Dear Mr. Rill:

This request is submitted on behalf of the nineteen (19) physician practice groups ("Practice Groups") based at Case Western Reserve University and the affiliated University Hospitals of Cleveland, Ohio ("University Hospitals"). The Practice Groups and University Hospitals are being subjected to substantial and increasing pressures from third party payors to facilitate the contract bargaining process between third party payors and the Practice Groups. In order to respond to the pressures of the health care marketplace in Cleveland, the Practice Groups have fashioned a mechanism which will expedite negotiations. Before conducting negotiations in the fashion outlined below, however, I have been asked to request a business review letter stating the enforcement intentions of the Antitrust Division relating to the proposed activities of the Practice Groups.

University Hospitals is a teaching hospital affiliated with the School of Medicine at Case Western Reserve University in Cleveland, Ohio. University Hospitals is one of six (6) tertiary care hospitals in Cleveland, all of which are in competition with each other. Three of these tertiary care hospitals, University, Mt. Sinai and the internationally famous Cleveland Clinic are all located within approximately one-half mile of each other in the area known as University Circle in Cleveland. In addition to the six tertiary care hospitals, there are at least an additional twenty (20) hospitals located in the Greater Cleveland Area. The area is substantially overbedded and the marketplace is very competitive.

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On-site physician services at University Hospitals are delivered by hospital-based physicians who are specialized into thirteen (13) departments each of which represents a different medical specialty. The Surgery Department is further broken down into seven (7) surgical sub-specialty groups. Each of the departments is organized as a separate fully integrated practice entity. (For a complete list of those entities, see Exhibit 1). The physicians within each practice group confine their practices to the group and are not in competition with each other.

Every physician in these Practice Groups has a full-time faculty appointment at the School of Medicine of Case Western Reserve University and is a member of the staff at the affiliated University Hospitals. This physician structure is one that evolved over many years as a result of forces and reasons with which no one today is entirely familiar.

One consequence of the physician structure which has evolved is that from a technical legal standpoint, a third party payor is required to conduct separate negotiations and enter into contracts, if there is a successful negotiation, with nineteen (19) different Practice Groups. Besides being unwieldy, the process has resulted in a state of affairs where various third party payors have various agreements with differing numbers of physician entities at University Hospitals. The confusion of this state of affairs when added to the burden of nineteen separate negotiations, has reached the point where the contracts with varying third party payors are a virtual morass of various permutations, a situation that has become unacceptable in the market place.

The third party payors, and in particular managed care payors, are increasing pressure upon University Hospitals and the Practice Groups to facilitate this process. As a consequence, University Hospitals is also urging the Practice Groups to facilitate the process by which third party payor contracts are negotiated.

Independently, the Practice Groups have been advised by at least one third party payor that unless the process is facilitated, that third party payor intends to move all of its business to other hospitals and physicians. It has been stated on several occasions to me by representatives of several third party payors, that a third party payor can conduct business far more simply with the Cleveland Clinic, which is organized so that its physicians are all employees of the Clinic. Accordingly, the third party payor need negotiate only one contract with the Clinic and the Clinic can bind all of its physicians. This, contrasted against the situation outlined at University Hospitals, will likely result in an increasing shift of patients away from University Hospitals to the Cleveland Clinic which will serve to lessen substantially the competition, which has been intense, between University Hospitals and the Cleveland Clinic.

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As a result of the pressure being brought to bear, all of the Practice Groups have asked the author of this letter to serve as a facilitator and single independent negotiator for the purpose of simplifying and expediting the negotiating process.

We initially designed a process whereby third party payors would be advised that the undersigned had been retained to simplify the contracting process and that I was authorized by all of the groups to negotiate the terms (other than fees) of a contract which would be acceptable, in my opinion, to all the Groups. I would also advise the third party payor that the third party payor is free to conduct negotiations directly with any individual Practice Group, and, similarly, any individual Practice Group is free to conduct negotiations directly with a third party payor at any time. Assuming that the negotiations are conducted through me, at the conclusion of those negotiations, any Group would still be free, either to accept or reject the contract as negotiated. If any Group rejected the contract, it could then re-negotiate or decide not to contract. Ultimately, any Group electing to contract would contract on its own behalf, directly with the third party payor. Under this design, all matters relating to the negotiation of fees would still be conducted individually between the third party payor and each of the Practice Groups. Accordingly, it would still be necessary for the third party payor to negotiate with nineteen different Groups relative to fees.

The administration of University Hospitals has advised the Groups that a negotiating process whereby I am unable to negotiate fees does not go far enough in expediting the process and will result in a substantial loss of business over time to both University Hospitals and the Practice Groups. Accordingly, we are proposing that in addition to negotiating the other terms of the contract in accordance with the foregoing procedures, I would be authorized to negotiate fees on behalf of the Groups.

The procedure for fee negotiation would operate as follows. I would be provided with CPT Codes (procedures and prices) from each of the Practice Groups and advised, confidentially, by each of the Groups the range of authority for negotiating the fees. None of the pricing information from any group would be shared with any of the other Groups. I would then negotiate on behalf of each Group with the third party payor. The process would otherwise be identical to the process outlined above for non-fee contract issues. Fees would remain confidential to me and each individual Group with regard to its own fees.

### MARKET SHARE

A recent market share analysis (August, 1987) conducted by University Hospitals concluded that University Hospitals' geographic service area is focused upon Eastern Cuyahoga and Lake Counties in Northeast Ohio. All six tertiary care hospitals described earlier are located in this geographic service area. Exhibit 2 outlines the service area, both primary and secondary.

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A market share analysis by segment and patient origin is included as Exhibit 3. In no event does University Hospitals' market share exceed seventeen percent (17%), even within its most dense geographic and product market.

Based upon interviews with the administrators of each of the Practice Groups, it is generally believed that the market share of the Practice Groups reflects, for the most part, the geographic markets and market penetration of University Hospitals. A market estimate by each Practice Group is included as Exhibit 4.

Facilitating the contracting process with third party payors as outlined in this request will probably have no substantial impact increasing the Practice Groups' low market shares. Rather, expediting and increasing the number of third party payor contracts will likely result in more managed care arrangements whose populations are generally shifted from traditional insurance programs. In effect, the patient pool already seen by the Practice Groups will be shifting from one insurance mechanism to another. The fact that the shift is into the managed care programs is clearly pro-competitive. The growth enjoyed by managed care programs such as HMOs, PPOs, etc. over the last decade is due in large part to the ability of managed care payors to hold down medical costs. While the proposed mechanism will not dramatically increase market penetration, it will serve to stem what is likely to be an increasing and substantial flow of patients to fewer competitors, most notably the Cleveland Clinic. Stemming the flow of patients will be pro-competitive in that it will maintain the healthy competition which now exists in the tertiary care market.

#### LACK OF COMPETITION BETWEEN PRACTICE GROUPS

As discussed above, each of the Practice Groups is a fully integrated joint venture. Each Practice Group operates as a business venture, and each of the physicians confines his or her practice to the business of the Practice Group.

In theory only, it might be argued that the Practice Groups are in limited competition with each other. An analysis has been made of those procedures which could be performed by more than one (1) of the Practice Groups. The results of that analysis are attached hereto as Exhibit 5. Each of the Practice Groups was asked to list those procedures which could be performed by more than one (1) Practice Group. While common procedures exist, their number is not substantial in terms of all procedures performed. Based upon the responses, common procedures appear to account for less than 4% of all the procedures performed. It also must be recognized that the Practice Groups are highly organized by specialty and the practice is conducted in the context of a highly integrated and coordinated teaching facility, coordinated not only by the Practice Groups, but also the School of Medicine and the affiliated University Hospitals.

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In addition to the integration of practices by the departments themselves, the practices are coordinated by the Dean of the School of Medicine. Each group is "taxed" 3% of its gross practice revenues by the School of Medicine to further the educational function of the School of Medicine. The Dean of the School of Medicine also has a major role in the determination of salaries paid by the practice groups to each of their physicians.

University Hospitals also has a significant role in integrating the Practice Groups and the procedures they perform through the physician credentialing process.

Within the Department of Surgery, each sub-specialty practice group is "taxed" 5% of gross revenues by the Department of Surgery. A substantial portion of these "tax proceeds" are used for the administration and integration of the sub-specialty groups.

Clearly, the Practice Groups are not functioning as "competitors" in the private medical marketplace. Rather, they practice in the highly integrated setting of a teaching institution (the School of Medicine) and a teaching hospital (University Hospitals). Indeed, the overall and common objective of all of the Practice Groups is the education and training of physicians in the clinical setting.

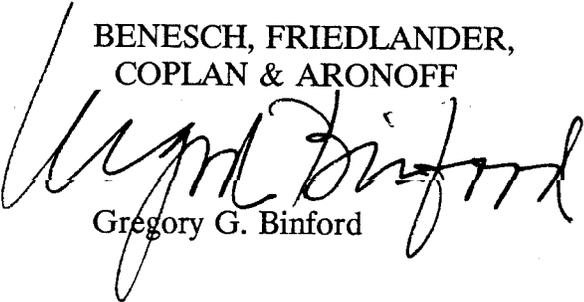
For the foregoing reasons, it is submitted that the Practice Groups are integrated *vis a vis* each other and do not operate as "competitors."

#### CONCLUSION

In view of the above analysis, it is hereby submitted that the proposed activities of the Practice Groups meet all the antitrust concerns of the Department of Justice. It is, therefore, respectfully requested that the Department of Justice issue a statement of its present intention not to seek enforcement action to enjoin the proposed activities.

Very truly yours,

BENESCH, FRIEDLANDER,  
COPLAN & ARONOFF

  
Gregory G. Binford

cc: Robert Bloch, Esq.