

§ 801.2(d)(1)(ii); § 801.2(d)(ii); § 803.2(c)



PRE


OCT



October 4, 1996

Richard Smith, Esq.  
Office of Premerger Notification  
Bureau of Competition  
Federal Trade Commission  
6th and Pennsylvania Avenues, N.W.  
Room 323  
Washington, D.C. 20580

Dear Mr. Smith:

This letter is to confirm your telephone conversation of yesterday with  of our firm concerning the reporting requirements under the Hart-Scott-Rodino Premerger Notification Act of the following transaction:

A merger agreement provides that Y will be merged into X with X as the surviving corporation. Each shareholder of Y will receive shares of X stock so that after the merger the Y shareholders will own 91% of X's voting stock. Y has an ultimate parent, B. B will also control, and thus include, X after the merger. A now owns 66% of the X shares and will own about 9% after the merger. A's divestiture of X is the purpose of the merger.

Both in substance and under the rules the transaction would be treated as the acquisition of voting securities of X by B. B, now the controller of Y, will wind up controlling X. Under 16 C.F.R. § 801.2(d)(1)(ii), B will be the person within which surviving corporation X is included after consummation and hence is the acquiring person. Since voting securities of A will be held by B after the transaction, A is the acquired person under 16 C.F.R. § 801.2(d)(2)(ii). We have confirmed that no other person, including any current shareholder of Y, will hold 50% or more, or more than \$15 million worth, of X voting securities as a result of the transaction. Accordingly, the only reporting persons are B as the acquiring person and A as



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the acquired person (but only with respect to X as to Items 5-9 of the form as provided by 803.2(c)).

Please contact me at your earliest convenience if this letter in some way does not reflect your office's understanding. We very much appreciate your assistance.

Sincerely yours,

[Redacted signature block]

[Redacted text]

10/8/96 - Called writer and advised that filing should be made as noted in the letter. (The PMA Office has given this advice in similar fact situations in the past per P. Sharpe.) At top of pg 2, the acquired person should limit its response to the activities of X for items 5-8 (and not 9) of the Form.

RS Smith

[Redacted text]

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Agreement"). (A redacted copy of the latest draft of the JOC Agreement is enclosed.) Hospital A and Hospital B would be the co-corporate members of the JOC. The JOC would be governed by a board of directors; each of Hospital A and Hospital B would appoint less than half of the JOC board.

Under Section 2 of the JOC Agreement, the JOC would manage and direct the operations of Hospital A and Hospital B. The JOC would provide management services to Hospital A and Hospital B, and the JOC would assume the planning functions of Hospital A and Hospital B. In addition, under Section 6 of the JOC Agreement certain operating powers would be reserved to the JOC. Under Section 6(e), the JOC would establish an operating budget and a capital budget for each hospital, and under Section 6(a) through (c), the JOC would contract with third party payers on behalf of Hospital A and Hospital B and would establish a schedule of rates and fees for goods and services provided by each hospital.

Hospital A and Hospital B would, however, retain ownership of all of their existing assets. Dissolution of the JOC would have no effect on the ownership of the assets. Although the JOC would approve any capital expenditure or disposition of assets greater than \$1,000,000, any newly acquired assets would become the property of the acquiring hospital.

To complete as fully as practicable the financial integration and operation of the two hospitals, the parties have also proposed the sharing of net revenue and net losses. Under Section 9 of the JOC Agreement, Hospital A and Hospital B would share evenly all net revenues. This would be accomplished by having the hospital with the greater net revenues pay, at the end of every year, one-half of the difference between the two hospitals' net revenues to the other hospital.

## II. Analysis

The parties believe that the formation of the JOC between Hospital A and Hospital B would not be reportable under the HSR Act because it would constitute the formation of a not-for-profit joint venture. The JOC would not constitute a consolidation because Hospital A and Hospital B would maintain

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their corporate existence and would retain ownership of their assets. In addition, neither Hospital A or Hospital B would control the JOC.

It is the parties' understanding that the Premerger Notification Office of the Bureau of Competition of the FTC views the formation of not-for-profit joint ventures as non-reportable transactions through the relationship between 16 C.F.R. § 801.40 and 16 C.F.R. § 802.40. Therefore, the parties do not believe that the formation of the JOC in the context of the JOC Agreement, will result in a reportable event under the HSR Act. After you have had an opportunity to review this letter and the attachment, I would appreciate your confirming our conclusions.

Very truly yours,



Enclosure

cc: Richard B. Smith, Esquire

10/9/96 Writer advises that Parent A and the Religious Order (acting through members), would each appoint 2 directors to JOC. These four would appoint three more. While Parent A + Religious Order can remove the directors they each appoint, the additional three cannot be removed by them (except for cause). The JOC will have no power to appoint any ~~new~~ directors of Hospital A's or Hospital B's respective boards. These powers will remain with the Religious Order and Parent of the respective hospitals and will not be changed by the formation of JOC. Advised that J/S and I agreed that no ~~consent~~ was required for the formation of JOC (although restraint of trade ~~issue~~ could be raised by this arrangement).  
RBS/Smith



JOINT OPERATING AGREEMENT

This Agreement is made this \_\_\_\_\_ day of \_\_\_\_\_, 1996, by and among:

\_\_\_\_\_, a nonprofit corporation (the "Joint Operating Company").

WHEREAS, \_\_\_\_\_ and \_\_\_\_\_ each own and operate licensed acute care hospitals; and

WHEREAS, for the reasons stated therein, entered into a certain agreement dated \_\_\_\_\_, 1996 (the "Transaction Agreement"); and

WHEREAS, the Joint Operating Company has been organized to oversee and direct the operation of services of \_\_\_\_\_ in accordance with the terms of the Transaction Agreement; and

WHEREAS, \_\_\_\_\_ and the Joint Operating Company wish to set forth the terms upon which they shall each participate in the delivery of healthcare services to the communities which they serve;

NOW, THEREFORE, in consideration of the mutual promises and undertakings set forth herein,

IT IS AGREED THAT:

1. Definitions. For purposes of this Agreement, the following terms shall have the meanings ascribed to them in this Section:

"Approved Capital Budget" means, with respect to a Hospital, the capital budget for such Hospital established from time to time by the Joint Operating Company pursuant to Section 6(e) of this Agreement, as the same may be supplemented, amended or modified by the Joint Operating Company.

"Approved Operating Budget" means, with respect to a Hospital, the operating budget for such Hospital established from time to time by the Joint Operating Company pursuant to Section 6(e) of this Agreement, as the same may be supplemented, amended or modified by the Joint Operating Company.

"Board of Directors" means the board of directors of the Joint Operating Company.

"Bonds" means, with respect to a Hospital, bonds of the Healthcare Facilities Financing Authority issued and outstanding with respect to and for the benefit of such Hospital.

"Bylaws" means the bylaws of the Joint Operating Company, as adopted by the Board of Directors and approved by its members, as such bylaws may be amended in accordance with their terms.

"Canons" means the 1983 Code of Canon Law of the Catholic Church, as amended, together with the Ethical and Religious Directives for Catholic Health Care Services (November 1994), as revised from time to time.

"CEO" means the President and Chief Executive Officer of the Joint Operating Company.

"COO" means the Executive Vice President and Chief Operating Officer of the Joint Operating Company.

"Effective Date" means that date established as such in accordance with the terms of the Transaction Agreement.

"Excluded Revenues" means any and all revenues, income, gains, earnings or consideration derived for, or in respect of, the provision of goods or services which are prohibited of Catholic institutions under the Canons, including specifically, but without limitation, the services listed on Exhibit A to this Agreement.

"Hospital" means and "Hospitals" means and

"JOC Budget" means the operating budget of the Joint Operating Company adopted from time to time in accordance with Section 8(b) of this Agreement, as the same may be supplemented, amended or modified.

"JOC Capital Budget" means the capital budget of the Joint Operating Company adopted from time to time in accordance with Section 8(c) of this Agreement, as the same may be supplemented, amended or modified.

"Joint Operating Company" shall have the meaning set forth in the Preamble to this Agreement.

"Major Clinical Service" means, with respect to a Hospital, a clinical service (whether organized as a department, division or other operating unit) (i) which has involved the expenditure of more than \$1,000,000 of operating expense, or the generation of more than \$1,000,000 in patient revenues, by such Hospital in any of the three (3) preceding years, (ii) which is projected or anticipated to involve expenditures in such amount, or to generate patient revenues in such amount, in any of the next three (3) succeeding years, or (iii) the initiation of which, or the closure of which, would require a Certificate of Need under law.

"Net Revenues" means Revenues minus Excluded Revenues.

"Party" means \_\_\_\_\_ or the Joint Operating Company.

"Permissible Election" shall have the meaning given such term in Section 14 of this Agreement.

"Permitted Liens" means the liens, encumbrances, charges, restrictions and other matters identified on Exhibit B to this Agreement.

"Revenues" means all revenues or income, determined in accordance with generally accepted accounting principles, other than interest, non-operating gains and losses, extraordinary items and settlements related to pre-Effective Date accounts and transactions.

\_\_\_\_\_ means ;  
nonprofit corporation.

\_\_\_\_\_ shall have the meaning set forth in the Preamble to this Agreement.

\_\_\_\_\_ shall have the meaning set forth in the Preamble to this Agreement.

"Termination Event" shall have the meaning given such term in Section 14 of this Agreement.

"Transaction Agreement" shall have the meaning set forth in the second Recital of this Agreement.

2. Provision of Management Services.

(a) The Joint Operating Company, through its CEO, shall provide the services typically furnished by a chief executive officer to each of the Hospitals. Each Hospital shall ~~name the CEO as its president and chief executive officer,~~ and, as such, he or she shall perform the duties incident to that office.

(b) The Joint Operating Company, through its COO, shall provide senior executive management services, reporting to and as directed by the CEO, to each of the Hospitals. Each Hospital shall name the ~~COO~~ as such Hospital's chief operating officer, and, as such, he or she shall perform the duties incident to this office.

(c) The Joint Operating Company shall assume the planning functions of the Hospitals and shall provide, or arrange for the provision of, all ~~strategic and other~~ planning services for the Hospitals. Without limiting the generality of the foregoing, such services shall include . . .

(d) The Joint Operating Company shall assume the ~~treasury~~ functions of the Hospitals and shall provide, or arrange for the provision of all treasury and related services for the Hospitals. Without limiting the generality of the foregoing, such services shall include budgeting, reimbursement matters, establishment of charge structures, and functions pertaining to general ledger, accounts payable, purchasing, payroll, cash disbursements, billing, collection, credit, financial reporting and financial planning.

(e) The Joint Operating Company shall provide such ~~other management and administrative~~ services to the Hospital as it may, from time to time, deem appropriate. Subject to the provisions of Section 7 of this Agreement, the Hospitals hereby grant to the Joint Operating Company the authority to perform any such services, and shall cooperate with the Joint Operating Company in the orderly transfer of operations relating to such services.

3. Reallocation of Certain Clinical Services. The Hospitals agree that clinical services offered by them shall be allocated initially as set forth in Exhibit C to this Agreement. To the extent that such allocation reflects a closure of a service at a Hospital, or a transfer of a service from a Hospital, such Hospital shall promptly initiate and diligently proceed with, in cooperation with the other Hospital and with the



Joint Operating Company, all necessary and appropriate action (including, without limitation, seeking all necessary regulatory approvals) efficiently and economically to effectuate such closure or transfer. To the extent that such allocation reflects an opening of a service at a Hospital, or a transfer of a service to a Hospital, such Hospital shall promptly initiate, and diligently proceed with, in cooperation with the Joint Operating Company, all necessary and appropriate action (including, without limitation, seeking all necessary regulatory approvals) efficiently and economically to effectuate such opening or transfer.

4. Future Allocations of Clinical Services. The Hospitals agree that the Joint Operating Company, in accordance with the Bylaws, may, at any time and from time to time, direct the allocation or reallocation of clinical services in addition to, or in a manner different from, the allocation described in Section 3 of this Agreement. To the extent that such allocation reflects a closure of a service at a Hospital, or a transfer of a service from a Hospital, such Hospital shall promptly initiate and diligently proceed with, in cooperation with the other Hospital and with the Joint Operating Company, all necessary and appropriate action (including, without limitation, seeking all necessary regulatory approvals) efficiently and economically to effectuate such closure or transfer. To the extent that such allocation reflects an opening of a service at a Hospital, or a transfer of a service to a Hospital, such Hospital shall promptly initiate, and diligently proceed with, in cooperation with the Joint Operating Company, all necessary and appropriate action (including, without limitation, seeking all necessary regulatory approvals) efficiently and economically to effectuate such opening or transfer.

5. Restrictions on Hospital Actions. Except to the extent approved by the Joint Operating Company, neither Hospital shall:

(a) Initiate or implement any new Major Clinical Service.

(b) Close or terminate any Major Clinical Service existing on the date of this Agreement.

(c) Expand any clinical service if such expansion would:

(i) involve the incurrence of capital expenditures in excess of \$1,000,000 in the aggregate over the next ensuing three-year period; or

(ii) involve an anticipated or projected increase in operating expenses attributable to such service of more than \_\_\_\_\_% per year in any year over the next ensuing three-year period.

(d) Except as reflected in the Approved Capital Budget, incur any capital expenditure, or make any commitment to incur a capital expenditure, (including any related set or series of capital expenditures) in excess of \$1,000,000.

(e) Incur or assume, whether directly or by way of guarantee or otherwise, any debt or obligation, including (without limitation) indebtedness for money borrowed or purchase money indebtedness, in an amount in excess of \$1,000,000.

(f) Sell, or otherwise transfer or dispose of, any of its properties or assets having a fair market value, recorded value on its books and records or selling price in excess of \$1,000,000.

(g) Permit or allow any of its properties or assets to be subject to any mortgage, pledge, lien, security interest or encumbrance other than a Permitted Lien.

(h) Make or incur, or commit to the making or incurring of, any expense not provided for in the Approved Operating Budget.

(i) Terminate its affiliation with \_\_\_\_\_ for the training of physicians and surgeons; or enter into or establish any program for the teaching or training of physicians or surgeons with an institution or organization other than \_\_\_\_\_

(j) Enter into or establish any programmatic or clinical affiliation with any institution (including any hospital, university or research or educational institution) not affiliated with or approved by \_\_\_\_\_

(k) Merge with or into, or consolidate with, any corporation or other entity.

(l) Contribute or transfer, without adequate consideration, funds to any corporation or other entity.

(m) Change the corporate membership of the Hospital; or amend its Certificate of Incorporation or Bylaws, or in any other manner, modify the governance structure of the Hospital; or grant any governance rights, including any right to participate in governance of the Hospital, to any person or entity.

(n) Establish any subsidiary corporation.

[Others? Charges other than as approved? Contracts exceeding stated amounts? Contracts exceeding stated duration? Hiring/firing key personnel?]

6. Certain Powers of the Joint Operating Company.

(a) The Joint Operating Company shall establish, from time to time, the schedule of rates and charges for goods and services, and use of facilities, furnished by the Hospital. Subject to the provisions of subsection (b) of this Section, and subject further to customary policies and procedures with regard to (i) healthcare services to the indigent, (ii) the write-off of uncollectible accounts, and (iii) other immaterial write-offs or discounts consistent with past practice, each Hospital shall charge in accordance with such established schedule.

(b) The Joint Operating Company from time to time may establish policies (including parameters or restrictions) concerning prices and other terms of contracts with third-party payors. Each Hospital shall adhere to such policies.

(c) Each Hospital hereby authorizes the Joint Operating Company to execute and deliver, as its agent, and on its behalf, contracts with third-party payors for the delivery of healthcare services by the Hospital in accordance with the provisions of such contracts. Each Hospital shall execute and deliver to the Joint Operating Committee such further instruments and documents as the Joint Operating Company may request to confirm, or otherwise, with respect to the authority granted by this subsection.

(d) The Joint Operating Company at any time, or from time to time, incur indebtedness on its behalf and on behalf of the Hospitals, or either of them. It may, in its discretion, pledge the revenues of the Hospitals and grant a security interest in accounts receivable of the Hospitals and the proceeds thereof for the purpose of securing any such indebtedness. Each Hospital shall, upon request of the Joint Operating Company, execute and deliver, such instruments or documents, and take such other actions, as the Joint Operating Company may deem necessary or appropriate to carry out the provisions of this subsection.

(e) The Joint Operating Company shall annually establish the Approved Operating Budget and the Approved Capital Budget for each of the Hospitals. [Approve budgets proposed by Hosps?]

7. Ethical Matters. The Joint Operating Company and each understand and acknowledge that \_\_\_\_\_ is a Catholic institution and that \_\_\_\_\_ and its personnel are bound by the Canons. Notwithstanding any other term or provision of this Agreement:

(a) Neither the Joint Operating Company nor \_\_\_\_\_ shall require, or seek to require \_\_\_\_\_ to perform any act, or to refrain from performing any act, which would cause \_\_\_\_\_ to be in violation of the Canons.

(b) The Joint Operating Company and \_\_\_\_\_ shall each (i) refrain from conducting any activities or performing any act which, by virtue of their relationship with \_\_\_\_\_, would cause \_\_\_\_\_ to be in violation of the Canons, or (ii) promptly adopt, and proceed with all practicable diligence to implement, a plan to restructure the conduct of such activities or acts in such a manner that \_\_\_\_\_ upon such implementation, shall not be in violation of the Canons.

(c) For the purpose of better avoiding any potential violation of the Canons, and supplementing the provisions of Section 12 of this Agreement, (i) the Joint Operating Company and \_\_\_\_\_ shall each use their best efforts to advise \_\_\_\_\_ of matters which they believe, in their good faith exercise of judgment, may raise issues or concerns under the Canons, and (ii) \_\_\_\_\_ shall use its best efforts to keep the Joint Operating Company and \_\_\_\_\_ apprised of the requirements of the Canons and shall consult with them regarding such requirements.

8. Funding of the Joint Operating Company.

(a) \_\_\_\_\_ shall each, within thirty (30) days of the execution and delivery of this Agreement, transfer to the Joint Operating Company, in the form of a long-term interest free loan or a capital contribution (as directed by the Board of Directors), the sum of \$\_\_\_\_\_.

(b) The Joint Operating Company shall adopt periodically the JOC Budget and may, from time to time amend or supplement the JOC Budget. The JOC Budget shall include the amount of reserves deemed necessary or appropriate by the Joint Operating Company and, reflecting such reserves, the amount (if any) required to be contributed by the Hospitals. Within thirty (30) days (or at such other time as the Joint Operating Company may specify) after the adoption of the JOC Budget, or any amendment or supplement, each Hospital shall transfer to the Joint Operating Company one half (1/2) of such amount.

(c) The Joint Operating Company shall adopt periodically the JOC Capital Budget and may, from time to time

amend or supplement the JOC Capital Budget. The JOC Capital Budget shall include the Joint Operating Company's proposed method of financing capital expenditures and the amount (if any) required to be contributed therefor by the Hospitals. Each Hospital shall contribute one half (1/2) of such amount at the time and in the manner directed by the Joint Operating Company.

9. Sharing and Allocation of Net Revenues.

believe that each Hospital brings equal strengths and advantages to the combination established hereunder notwithstanding existing differences in asset values or revenues or any other particular factors. Therefore, the Hospitals agree to an equal sharing of Net Revenues between them in the following manner:

(a) Each Hospital shall charge for its services, etc., in accordance with the provisions of this Agreement and shall separately collect its own Revenues.

(b) Each Hospital shall separately pay its own expenses in accordance with the terms of this Agreement.

(c) As soon as practicable after the end of each year during the term hereof (including any renewal term) each Hospital shall determine, in accordance with generally accepted accounting principles, its Net Revenues for such year. [Or, the JOC shall determine??] Within thirty (30) days after such determination (or at such other time and in such manner as the Joint Operating Company may direct) the Hospital having the greater Net Revenues for such year shall pay to the other Hospital one half (1/2) of the difference between their respective Net Revenues for such year.

10. Participation in shall each participate in the hospital network established by Each Hospital shall execute an agreement encaptioned "Hospital Sponsor Agreement," substantially in the form attached hereto as Exhibit D, with such management services organization or organizations as the Joint Operating Company may direct.

11. Bond Obligations. Each Hospital is the beneficiary of outstanding Bonds. To the extent determined by the Joint Operating Company to be necessary or desirable:

(a) Each Hospital shall guarantee the indebtedness of the other Hospital in connection with outstanding Bonds.

(b) Each Hospital shall pledge its Revenues as security for payment of Bonds issued with respect to the other Hospital.

12. Sharing of Information. Each Hospital shall furnish to the other and to the Joint Operating Company such reports and information with respect to the activities and operations of such Hospital, its finances and any other matters relevant to the subject matter of this Agreement in such manner and form, and at such times, as the Joint Operating Company may direct.

13. Cooperation; Further Assurances. Each Hospital agrees to execute and deliver such additional instruments and documents, and to take such other actions, as may be necessary or appropriate to better carry out the purposes of this Agreement. Each Hospital further agrees to cooperate with the other, and with the Joint Operating Company, in all relevant respects to better carry out the purposes of this Agreement.

14. Term; Termination; Default.

For the reasons set forth in Exhibit \_\_\_\_\_ attached hereto, this Agreement may not be terminated or modified except in accordance with the provisions of such Exhibit.

15. Amendment. This Agreement may not be amended except by an instrument in writing executed and delivered by the Parties.

16. Notices. Any notice or other communication required or permitted hereunder or otherwise in connection herewith shall be in writing and shall be deemed to have been delivered and received when delivered in person or transmitted by facsimile transmission (with telephone confirmation of receipt) or five (5) days after dispatch by registered or certified mail, postage prepaid, or one (1) day after dispatch by courier which guarantees overnight delivery and provides a signature for receipt by the addressee, addressed as follows:

If to

Attention: Chairperson of the Board

If to

Attention: Chairperson of the Board

If to the Joint Operating Company:

Attention: President and Chief Executive Officer

or such other address as shall be furnished in writing by any Party in accordance with the provisions of this Section.

17. Waiver. Any Party may (a) extend the time for the performance of any of the obligations or other acts of the other Parties, (b) waive any inaccuracies in the representations and warranties contained herein or in any certificate or other document delivered pursuant hereto, or (c) waive compliance with any of the agreements or conditions contained herein. Any agreement on the part of a Party to any such extension or waiver shall be valid if set forth in an instrument in writing signed on behalf of such Party.

18. Headings. The descriptive headings of the several Sections hereof are inserted for convenience only and do not constitute a part hereof.

19. Applicable Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of

20. Assignment. This Agreement and all the provisions hereof shall be binding upon, and inure to the benefit of, the Parties and their respective successors and permitted assigns. Neither this Agreement nor any of their rights hereunder shall be assigned by any Party without the prior written consent of the other Parties.

21. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

22. Entire Agreement. This Agreement (including the Exhibits hereto) and the documents and instruments referred to herein (including, without limitation, the Transaction Agreement) (a) constitutes the entire agreement among the Parties, or any of them, with respect to the subject matter hereof, (b) supersedes all other agreements and understandings, both written and oral, among the Parties, or any of them, with respect thereto, and (c) except to the extent otherwise expressly provided herein, is not intended to confer upon any other person or entity any right or remedy hereunder.

IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed in its name and on its behalf by its duly authorized officers, all as of the day and year first above written.

By: \_\_\_\_\_  
Chairperson of the Board

By: \_\_\_\_\_  
President and Chief  
Executive Officer

By: \_\_\_\_\_  
[Name]  
Chairperson of the Board

By: \_\_\_\_\_  
President and Chief  
Executive Officer

By: \_\_\_\_\_  
[Name]  
Chairperson of the Board

By: \_\_\_\_\_  
President and Chief  
Executive Officer



EXHIBIT A

EXCLUDED REVENUES:  
GOODS, SERVICES AND PROCEDURES

[List]

EXHIBIT B

PERMITTED LIENS

- I. With respect to \_\_\_\_\_  
[Identify liens of Bonds and other matters]
- II. With respect to \_\_\_\_\_  
[Identify liens of Bonds and other matters]

EXHIBIT C

CLINIC SERVICE ALLOCATION PLAN

EXHIBIT D

FORM OF HOSPITAL SPONSOR AGREEMENT