



## DEPARTMENT OF JUSTICE

Antitrust Division

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Assistant Attorney General

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April 3, 2002

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Dear Mr. Johnson:

This letter responds to your request, on behalf of Michigan Hospital Group, Inc. ("MHG"), for a business review letter pursuant to the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6. You requested a statement of the Department's present enforcement intentions regarding MHG's proposal to operate as a Michigan nonprofit corporation to negotiate contracts on behalf of its members, seven small, geographically dispersed community hospitals in Michigan, with insurance companies, employers, and managed care plans for the provision of primary care hospital services.

Based on information provided, we understand that MHG's current members are the following seven hospitals: Charlevoix Area Hospital, Charlevoix, MI; Community Health Center of Branch County, Coldwater, MI; Gratiot Community Hospital, Alma, MI; Marlette Community Hospital, Marlette, MI; Memorial Medical Center of West Michigan, Ludington, MI; Pennock Hospital, Hastings, MI; and West Branch Regional Medical Center, West Branch, MI.<sup>1</sup> These hospitals range in size from 33 beds to 127 beds, and in average daily census range from 15 to 70; six of the seven hospitals have fewer than 100 beds and have an average daily census under 60. MHG's member hospitals are geographically dispersed across the entire lower peninsula of Michigan. The closest two MHG hospitals, Community Health Center of Branch County in Coldwater and Pennock Hospital in Hastings, are 52 miles apart. For the other MHG hospitals, their next nearest MHG neighbors range from 61 miles to more than 100 miles away. In addition,

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<sup>1</sup>Although your initial letter listed nine hospitals as members of MHG, in subsequent correspondence you informed us that MHG had elected to narrow its membership and that two hospitals had withdrawn from MHG: Gerber Memorial Health Services, Fremont, MI, and Port Huron Hospital, Port Huron, MI.

numerous additional hospitals, including multiple, large tertiary care hospitals in metropolitan areas, lie closer to each MHG hospital than that member's nearest MHG neighbor.

You have stated that MHG's fundamental purpose will be to facilitate managed care contracting between MHG member hospitals, which do not compete with one another, and any large third-party payers who wish to contract with MHG hospitals on a collective basis. As the joint venture develops, MHG will collect and analyze data from each member hospital, create databases, prepare statistical analyses, compare actual utilization and cost management against relevant benchmarks, and furnish recommendations to enable participating hospitals to better manage input costs. MHG will also use this data as it evaluates and negotiates managed care contracts on behalf of its members with interested payers. You have indicated, however, that all proprietary data collected from participating hospitals would be treated in strict confidence, that sensitive financial information would be aggregated, and that no individual member would have access to any other member's costs or prices.<sup>2</sup>

You represent that MHG would be a non-exclusive network and that its members would remain free to contract directly with health plans and other payers or to join other provider networks. You also state that MHG would accommodate payers willing to negotiate a base contract collectively and negotiate specific pricing parameters directly with individual members.

Based upon the representations made in your submissions, the documents and information submitted in support of MHG's request, and on the information obtained during our own investigation, we conclude that MHG, if operated as described above, is not likely to produce anticompetitive effects. It appears that each of the hospital members of MHG serves a different geographic area and that no MHG hospital competes with any other MHG hospital, either to attract patients or to become a member of the local hospital panel for any health plan. It also appears that MHG is a *bona fide* joint venture designed to facilitate health care contracting between community hospitals and those managed care organizations or other large third-party payers who wish to negotiate or contract with MHG hospitals on a collective basis. Under such circumstances, the joint negotiation and contracting activities proposed by MHG are not likely to have an adverse impact on competition. In addition, MHG member hospitals and the health plans with which they contract may benefit from less costly financial and legal review of managed care contracts and more efficient contract negotiations.

In reaching this conclusion, the Department considered the views of health plans serving the lower peninsula of Michigan. Although the plans recognized that MHG's hospital members serve distinctly different local geographic areas and thus are not substitutes to provide hospital services for those areas, a small number of plan representatives expressed the concern that the MHG hospitals might be able to increase their bargaining leverage with health plans by refusing to

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<sup>2</sup>You also state that, although MHG may be called upon to evaluate or negotiate risk-based contracts, MHG's member hospitals do not intend to share significant financial risk through MHG in the near term.

contract except through MHG.<sup>3</sup> Whether the hospitals' bargaining leverage could in fact be expanded by negotiating exclusively through MHG is by no means clear and to make that determination would require additional investigation and analysis. However, as explained above, the proposed business conduct for which MHG seeks business review advice specifically excludes contract negotiations on an exclusive basis. The business review advice in this letter, therefore, covers only MHG operations conducted on a non-exclusive basis and does not extend, for example, to situations in which MHG or its hospital members operate as a de facto exclusive network. Consequently, the concern raised does not change our conclusion that MHG, if operated as proposed and described above, is not likely to cause anticompetitive effects.

For these reasons, the Department has no present intention of challenging the formation and proposed operations of MHG. This letter expresses only the Department's current enforcement intention and is issued in reliance on the information and representations contained in MHG's submissions. In accordance with our normal practices, the Department remains free to bring an enforcement action in the future should the actual operations of MHG prove to be anticompetitive in purpose or effect.

Please note that the scope of this business review letter extends only to MHG's seven current members. Although your request proposes a test MHG would use to admit additional members -- i.e., MHG would refuse membership to any hospital for which 10% of its inpatient discharges fall into zip code areas that, in the aggregate, also represent at least 10% of the total inpatient discharges of any MHG hospital -- this letter does not extend to the proposed test or to any additional members added pursuant to this test. Your proposed test may not in all cases result in the exclusion of hospitals which compete with existing MHG members. Moreover, given the range of factors to be considered in evaluating proposals like MHG's, it is not clear that any test could be established in advance that could successfully predict which hospitals could be added to MHG without harm to competition. Consequently, this letter does not extend to any hospitals other than MHG's seven current members.<sup>4</sup>

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<sup>3</sup>They explained, for example, that a health plan seeking a hospital network to satisfy customers desiring state-wide or otherwise broad geographic coverage might be able to make do without one or two of the MHG hospitals in its network but, as a matter of commercial viability, could not make do without all seven MHG hospitals.

<sup>4</sup>Since MHG has deferred the preparation of corporate bylaws and participating hospital agreements in order to conserve costs, the Department has not reviewed the potential competitive impact, if any, that may arise from the terms of these documents. You note that MHG and its members "recognize that these documents will need to incorporate certain safeguards to alleviate antitrust concerns." Obviously, this business review letter does not extend to these or other operating materials not submitted to or available for review by the Department.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to this procedure, your business review request and this letter will be made available to the public immediately. Your supporting documents will be made publicly available 30 days from the date of this letter, except for any part of the materials for which you have requested and justified confidential treatment in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

/s/

Charles A. James