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February 4, 2000

Jaye L. Martin, Esquire
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3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402-3796

Dear Ms. Martin:

This letter responds to your request on behalf of Midwest Behavioral Healthcare LLC ("MBH"), as contained in submissions of July 30, 1997, March 11, 1998, April 7, 1998, June 4, 1998, February 17, 1999, March 31, 1999, and June 1, 1999, for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. For the reasons set forth below, the Department has no present intention of challenging the proposed operations of MBH. Our understanding of the facts is based on the representations made in your request, the information you submitted in support of it, and some additional information obtained during our independent investigation.

MBH is a North Dakota limited liability company owned by three psychiatrists and one psychologist, which was formed in response to rising consumer demand for improved access to and quality of behavioral health care services in the North Dakota and Northwestern Minnesota areas. MBH proposes to form a multispecialty network of behavioral health care providers that will offer a full continuum of behavioral health care services for children, adolescents, and adults. This multispecialty network will include providers of the following types of behavioral health care: inpatient and outpatient psychiatry and psychology, chemical dependency services, and foster and respite care. MBH will start operations as a messenger arrangement whose

network will be of limited size,[1] and will progress, within two years of starting operations, to a financially integrated, risk-sharing joint venture among its participating providers of behavioral health care services. Moreover, MBH's network will be non-exclusive, leaving its participating providers free to join any other network that includes providers of behavioral health care services.

You have represented that MBH proposes to include in its network the following ten types of providers of behavioral health care services: general psychiatrists, child and adolescent psychiatrists, psychologists, nurses, social workers, counselors, foster parents, therapists, technicians, and case managers. You have also stated that many of the various behavioral health care services offered by certain types of providers are adequate substitutes for certain services offered by other types of providers. For example, you have stated that some of the services provided by child and adolescent psychiatrists can be, and in fact to some extent currently are, provided by general psychiatrists in the North Dakota and Northwestern Minnesota areas.

Third-party payers whom we have interviewed acknowledged that some services provided by various behavioral health care providers are to a certain extent substitutable with services provided by other types of providers. Nevertheless, those payers do not consider services provided by non-psychiatrists to be adequate substitutes for many services provided by psychiatrists. Moreover, the payers do not consider services provided by general psychiatrists adequate substitutes for specialized services provided by child and adolescent psychiatrists. Therefore, the payers indicated they might be concerned if MBH were to include in its network a large portion of either the general psychiatrists or the child and adolescent psychiatrists in any geographic area.[2]

As regards non-psychiatric behavioral health care services, third-party payers told us that the extent to which these services would be adequate substitutes for services provided by different types of providers would be very difficult to determine exactly or even to estimate with a reasonable degree of confidence. Therefore, for the purposes of this business review, we have conservatively assumed what appear to be the narrowest reasonable product markets — i.e., that

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[1]As discussed further below, MBH will in most cases limit the number of participating providers of each type of behavioral health care service to no more than 30% of the pre-existing providers of that type of behavioral health care service, in each of the geographic areas where MBH will provide these services.

[2]The six geographic areas where MBH proposes to offer behavioral health care services are identified and discussed further below.

each of the ten types of behavioral health care services listed above constitutes a separate product market.[3]

You have stated that MBH will commence operations by establishing its network of behavioral health care providers in two geographic areas: Fargo (ND)-Moorhead (MN), and Grand Forks (ND)-East Grand Forks (MN). MBH intends eventually to expand its network to serve the following additional four geographic areas: Bismarck (ND), Minot (ND), Alexandria (MN), and Bemidji (MN). Based upon your representations, and after interviewing a number of payers knowledgeable about the areas involved, we have assumed for purposes of this business review what appear to be appropriately limited geographic markets — i.e., that each of the six areas listed above constitutes a separate geographic market.[4]

You have represented that initially MBH intends to form a network of providers of all ten types of behavioral health care services, in each of the six identified geographic areas, such that the providers of each type of service are selected from only one pre-existing economically integrated entity. In the event this does not provide MBH a sufficient number of providers of each type of service in any geographic area, MBH will attempt to train or recruit, from outside that area, sufficient additional providers to enable MBH to form a viable network of providers. In the event this proves impossible or impracticable, MBH will include in its network, as needed, additional providers currently employed at other pre-existing economically integrated entities. However, in the event such additional providers must be included, MBH's network will comprise no more than 30% of the total providers of each type of behavioral health care service who are currently employed in each of the six identified geographic areas. Thus, it appears MBH's operations will not substantially alter the pre-existing market structure of behavioral health care services in any of the six identified geographic areas.

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[3]Third-party payers we interviewed indicated that it is generally not difficult to find, train, or recruit providers of the various types of non-psychiatric behavioral health care services MBH proposes to offer. Thus, payers expressed no substantial concerns regarding MBH's proposed operations insofar as MBH's network of providers includes providers of non-psychiatric behavioral health care services.

[4]Third-party payers told us that few, if any, patients in these areas would be willing to travel to a different geographic area for behavioral health care services because these areas are substantial distances from each other. For example, the two closest areas, Grand Forks and Fargo, are approximately 80 miles apart; the two most distant areas, Minot and Alexandria, are approximately 350 miles apart. Conversely, patients are generally willing to travel to different locations within each of the identified geographic areas to obtain behavioral health care services.

You have stated that MBH will initially offer the services of its network providers to third-party payers on a fee-for-service basis. Third-party payers will reimburse MBH providers according to fee schedules that are agreed to individually by each provider. MBH will hire or employ an independent third party to act as a "messenger" to convey contracting information between individual MBH providers and third-party payers. The messenger will gather information from each MBH provider regarding the minimum fees that are acceptable to that particular provider. The information on the fees for each MBH provider will be used to develop a matrix of fees that MBH's messenger will present to third-party payers that will show which MBH providers have authorized contracts at various price levels. The matrix, as well as the information received from each MBH provider, will be kept confidential and will not be shared with any other MBH providers, including those providers who are also owners of MBH.

The messenger will be authorized to contract on behalf of an individual MBH provider whenever a third-party payer offers a fee at or above the minimum fee level acceptable to that particular provider. The messenger will not, however, be permitted to negotiate prices or discuss other competitively sensitive information on behalf of MBH providers except as described below. In the event third-party payers offer fees that are below the minimum level acceptable to certain MBH providers, the messenger will communicate all terms of those offers directly to each of those providers but will provide no other information or opinion about the proposed contract terms or the views or contracting decisions of other MBH providers. Those providers will be free individually to accept or reject each such offer, without any influence by or pressure from MBH, MBH's messenger, or MBH's other providers.

At the request of a participating provider, the messenger may communicate objective information to that provider about a proposed payer contract or its terms, including objective comparisons with terms offered to that participating provider by other payers. "Objective information" or "objective comparison" constitutes empirical data that is capable of being verified or a comparison of such data. It does not, however, encompass any data or information regarding contract terms, positions, opinions, views, or decisions of any other MBH provider, or the views or opinions of the messenger.

MBH will also provide various management and administrative services to its network providers for a fixed fee. Such services will include: marketing, pre-authorization and benefits checking, accounting and bookkeeping, and medical records management. In addition, but only at the specific written request of a third-party payer, MBH's messenger will negotiate with that payer, on behalf of its member providers, non-price issues such as utilization review, credentialing, quality assurance standards, indemnity and hold harmless provisions, payment and

billing arrangements, and termination procedures.[5] Such terms will be subject to ratification or acceptance individually by each network provider. These non-price negotiations will be conducted strictly on a non-exclusive basis, and any third-party payer unable to reach a mutually acceptable agreement on these terms through MBH's messenger will be free to negotiate directly with any individual MBH provider. Under no circumstances would MBH providers be permitted to boycott, threaten to boycott, or otherwise coerce any purchaser to accept collectively-determined contract terms.

Messenger arrangements that are designed to minimize costs associated with the contracting process between competing providers and third-party payers and do not facilitate or result in a collective determination by the competing network providers on prices or competitively significant non-price issues are not *per se* illegal under federal antitrust law. Such arrangements are evaluated under the rule of reason.[6] Similarly, price and other agreements of economically integrated joint ventures that are reasonably necessary to accomplish significant procompetitive benefits of the integration are evaluated under the rule of reason. Thus, in this business review we have evaluated both the messenger arrangement and the financially integrated joint venture proposed by MBH under the rule of reason.

We have concluded that the messenger arrangement proposed by MBH, which is intended to help in the development of an integrated joint venture, is not likely to facilitate or result in an unlawful agreement. Under the proposal, there will be no agreement among competing MBH providers on price. Each provider will make an independent, unilateral decision about what contract prices he or she will accept, and the arrangement is structured so that price information the messenger receives from a provider will not be disclosed to any other provider. Providers will be free at any time to negotiate and enter into contracts with payers without using the messenger.

In addition, although an arrangement for a messenger to negotiate non-price issues on behalf of providers could have significant competitive implications, in this case it will be permitted only at the specific written request of a payer, and providers will not be permitted to coerce or otherwise influence payers to request such negotiation. As contemplated here, such

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[5]Neither MBH nor any of its participating providers, employees, or agents will be permitted, jointly or individually, to coerce or otherwise influence any purchaser to negotiate collectively any non-price issue.

[6]Whether the negotiation of utilization review and other non-price terms is competitively significant warranting *per se* treatment is a fact-specific matter and must be determined on a case-by-case basis. The facts here do not require *per se* condemnation.

negotiations could be efficiency enhancing since they will be undertaken only at the option of a third-party payer and could assist the payer to develop effective standards of care or cost controls. Furthermore, any payer unable to reach an acceptable agreement on non-price terms through the messenger may negotiate directly with individual providers, and under no circumstances may the providers boycott, threaten to boycott, or otherwise coerce any purchaser to agree to collectively-determined contract provisions. Moreover, since the size of each of the types of providers in the MBH network will be limited (in most cases to no more than 30% of the providers of that type in the market), and the duration of the messenger arrangement will be limited (within two years of starting operations), it is particularly unlikely that the messenger arrangement proposed here will result in any substantial competitive harm.

We also have concluded that MBH's proposal to form a non-exclusive joint venture network of providers who will, as a group, share substantial financial risk is not likely to cause competitive harm. You stated that, utilizing experience from its initial operations, MBH will develop a payment methodology that will provide financial incentives to its network providers to provide high-quality behavioral health care services in a more cost-efficient manner. MBH will then engage in joint negotiations on behalf of its providers to enter into per diem and/or capitated fee arrangements in contracts with third-party payers.

Participation by providers in MBH will be on a non-exclusive basis. Providers will be free to negotiate and contract with third-party payers independently and to participate in provider arrangements that compete with MBH. As described above, the size of MBH's provider network will be limited in each of the geographic areas where MBH will operate and, for the most part, will not exceed 30% of each type of provider in each of those areas. It thus appears that payers will have adequate competitive alternatives to the providers in MBH's network. This was confirmed by various payers in the affected areas we interviewed.

For these reasons, the Department has no present intention of challenging MBH's proposed messenger or joint venture operations. In accordance with our normal practice, however, the Department remains free to bring an enforcement action in the future, should the operations of MBH prove anticompetitive in purpose or effect.

The statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made available to the public immediately. Your supporting documents will be publicly available within 30 days of the date of this letter unless you request that any part of the material be withheld, in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely yours,

_____/s/_____
Joel I. Klein