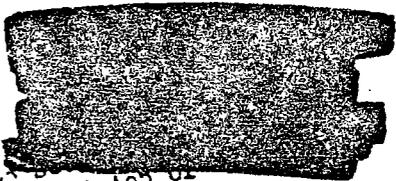


LH



June 19, 1986  
This material may be disclosed or  
the confidentiality of information  
Section 5 of the Freedom of Information Act  
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Freedom of Information Act

Linda Heban, Esq.  
Room 301  
Federal Trade Commission  
6th Street and Pennsylvania Avenue, N. W.  
Washington, D. C. 20580

VIA FEDERAL EXPRESS

Re: Interpretation of Size-of-the-Transaction  
Test Under the Antitrust Improvements Act of 1976

JUN 20 2 45 PM '86

Dear Ms. Heban:

I am writing in response to our telephone conversation on Tuesday. As we discussed, my client, a psychiatric hospital holding company (the "Company"), is negotiating an acquisition of a hospital in California (the "Hospital"). The Company plans to acquire the assets of the Hospital as a going concern. The assets include land, buildings, fixtures, equipment and certain contracts. The acquisition price is approximately \$13.5 million.

The Hospital recently has begun construction of a building to be used in part for office space but primarily as a laboratory to be leased to a third party. The Company plans to reimburse the Hospital for the laboratory's construction costs incurred through the closing of the acquisition. At closing, the Company will assume the contracts and subcontracts relating to completion of the construction of the laboratory. The Company and the Hospital have agreed that the total construction costs for which the Company will be liable, including the above-indicated reimbursement, is not anticipated to exceed \$5.5 million.

For purposes of the Premerger Notification and Report Form under the Antitrust Improvements Act of 1976, as amended (the "Act"), the Company and the owners of the Hospital meet the Act's size-of-the-parties test, so the issue presented is whether the Act's size-of-the transaction test is met. The acquisition price itself is under the \$15 million reporting threshold. However, the construction costs of the laboratory of \$5.5 million, if aggregated with the acquisition price, would cause the transaction to exceed the threshold so that a filing would be re-

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quired. For the reasons set forth below, we believe it is inappropriate to aggregate the two figures.

I hope that you will concur with our belief and our conclusion that no filing is required. To assist you in your consideration, I offer the following reasons for our conclusion:

1. An acquisition price normally will not be deemed to include the value of an employment contract with an officer of the acquired company, because the value of the contract is not consideration being paid to the seller. Analogously, the construction costs being paid for the building will be for the benefit of the builders, not the seller.
2. A frequent point of discussion is that in an asset acquisition, the purchase price includes the value of any liabilities assumed. In this case, we would submit that only executory (construction) contracts are being assumed to the extent not reimbursed. Accordingly, assumption of the executory contracts would have a zero net effect on the value of the acquisition for purposes of the reporting threshold.
3. The Company is assuming construction contracts which constitute obligations with respect to the construction of the building. These obligations are similar to the obligations which are specifically excluded from the valuation of assets by Section 7A(c)(2) of the Act. On the basis that assuming an obligation to pay for construction of a building is akin to assuming a mortgage, we believe there is no anticompetitive effect and the value of the contracts should be exempt.

In the event you are unable to concur that the value of the contracts is excludable and that the reporting threshold is therefore not met, we ask that you nevertheless consider a waiver of the reporting requirement under the Act for this acquisition. The psychiatric healthcare industry is highly competitive and fractionalized, and we understand from the Company that the acquisition of this hospital in California is of minimal impact in the market, since the Company's primary locations are in the Southeast. Further, since the Company is a holding company in the business of acquiring and operating hospitals, this acquisition may be seen as one in the ordinary course of the Company's business.

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I hope that this letter will be of help to you. Please do not hesitate to call me at [REDACTED] if you have any questions. I will call you on Monday to determine the status of your review.

Thank you for your prompt assistance.

Cordially,

[REDACTED]

[REDACTED]

Spoke w/ [REDACTED] 6/23/86

Size-of-transaction must include \$13.5 million acquisition price plus costs reimbursed up to closing. Does not include remainder of contract price because is executory - services yet to be performed.