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MEMORANDUM

ATTORNEY CLIENT PRIVILEGE
CONFIDENTIAL

Date: April 27, 2017

To: Members of the Board of Director of Evergreen Health, Inc.

From: Michael F. Brockmeyer

Re: Antitrust Analysis of Proposed Acquisition of Evergreen Health, Inc.

I. Introduction

You have requested that I provide you with an opinion containing an antitrust analysis of a proposed acquisition of Evergreen Health, Inc. ("Evergreen"), by three investors, as described below (the "Acquisition"). We understand the three investors are Anne Arundel Health System, Inc. ("AAHS"); LBH Evergreen Holdings, LLC ("LifeBridge"); and JARS Health Investments, LLC ("JARS") (collectively, the "Acquirers").

I understand that Evergreen may include my opinion as part of an application required by Maryland law in connection with the acquisition of a non-profit health entity, such as Evergreen, and conversion of the non-profit health entity to for-profit status.[1] Based upon my antitrust analysis, it is my opinion that the Acquisition should not raise issues under, or violate, federal or State of Maryland antitrust laws because the Acquisition will not eliminate or cause any impairment of competition in any relevant market.

The basic goal of applying antitrust laws to mergers and acquisitions is to prevent anticompetitive effects flowing from the elimination of a competitor and the resulting increase in market concentration caused by the transaction. As discussed below, I have no evidence that any of the Acquirers competes with Evergreen in the provision of health insurance in Maryland. Accordingly, this transaction will not eliminate competition between the parties and will not provide any of the Acquirers, after closing of the Acquisition and conversion of Evergreen to a for-profit entity, with an undue measure of concentration in any relevant market in Maryland for the provision of health insurance. In effect, the Acquirers will simply step into Evergreen's shoes as a provider of these services, with competition in Maryland being unaffected.

We understand from the information that Evergreen has provided that the Acquirers will not be acquiring Your Health Network Inc., which runs a primary care physician services business that is separate from Evergreen's health insurance business. We also understand from the information that Evergreen has provided that the Acquirers will have no involvement with the primary care physician services business of Your Health Network, Inc. Because the primary care physician services

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[1] The application requirement and necessary contents are set forth at Md. Code Ann., State Gov't § 6.5-201 (2016). Subsection (b)(8) requires that the application contain "an antitrust analysis prepared by an appropriate expert."

component will not be a part of the transaction, the Acquisition does not implicate the primary care physicians services market. Accordingly, we see no reason to include any analysis relating to that market for purposes of this opinion.

My analysis and opinion are based on information publicly available to me and information provided to me by Evergreen as of April 26, 2017. I reserve the right to undertake further analysis and potentially amend my opinion if I learn of facts that are significantly inconsistent with the facts set forth below.

II. Background

A. Factual

1. The Acquisition

As previously mentioned, Evergreen will convert from a non-profit entity to a for-profit entity. Pursuant to a proposed Stock Purchase Agreement to be entered into between three entities and Evergreen, the Acquirers are acquiring Evergreen. The Acquirers will acquire at closing 100% of the issued and outstanding stock of Evergreen. As part of the agreement, Evergreen will convert from a non-profit entity to a for-profit entity. As previously mentioned, the Acquirers will only be acquiring Evergreen. The primary care physician services business of Your Health Network, Inc. will continue to run as a stand-alone business separate and independent from Evergreen.

2. Description of Evergreen

Evergreen is a non-profit health maintenance organization that sells health insurance policies to small groups on the Maryland Health Benefit Exchange and to small groups and large groups through brokers. Evergreen sells policies only in Maryland and in all Maryland counties. In 2015, Evergreen provided health insurance coverage to 29,680 members, generating premium revenue of $85,781,847.

Prior to December 2016, Evergreen sold health insurance policies to individuals on the Maryland Health Benefit Exchange and through brokers. On December 6, 2016, the Maryland Insurance Commissioner determined that Evergreen was in a "financially hazardous condition" and ordered Evergreen to immediately "cease from offering or issuing any new individual policies and renewing any existing individual policies without prior approval of the Commissioner." Order, Maryland Insurance Commissioner (Dec. 6, 2016). In compliance with the order, Evergreen ceased offering individual health insurance policies. Although Evergreen does not currently offer individual health insurance policies, for purposes of this opinion, we will analyze the antitrust effects of this transaction on the relevant individual insurance policy markets because of the possibility that Evergreen might meet the Maryland Insurance Commissioner's financial solvency requirements in the future and will resume offering individual policies.

3. Description of the Acquirers

As noted previously, we understand that the three Acquirers are AAHS, LifeBridge, and JARS. AAHS is a regional health system headquartered in Annapolis, Maryland. It includes a not-for-profit hospital, medical group, imaging services, a substance use treatment center, and other health enterprises. LifeBridge is a subsidiary of LifeBridge Health, Inc ("LifeBridge Health"). LifeBridge Health consists of Sinai Hospital of Baltimore, Northwest Hospital, Carroll Hospital, Levindale Hebrew Geriatric Center and Hospital, and its subsidiaries and affiliated units including LifeBridge Health & Fitness and LifeBridge Medical Care Centers in Eldersburg, Mays Chapel, and Reisterstown. JARS is a consortium of investors.

None of the Acquirers offers health insurance policies through the Maryland Health Benefit Exchange or brokers to individuals, small or large groups in Maryland. Additionally, none of the investors in JARS offers health insurance policies through the Maryland Health Benefit Exchange or brokers to individuals, small or large groups in Maryland. Further, no member of JARS has investments in companies providing those health insurance services in Maryland.

III. Analysis

A. Applicable Standard

To evaluate the transaction, it is necessary to identify the appropriate legal standard governing it. In this context, the statute requiring the antitrust analysis does not define the term "antitrust." *See* Md. Code Ann., State Govt. § 6.5-201 (2016). For antitrust law purposes, the Acquisition is subject to both the relevant federal antitrust laws, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1, and the Maryland Antitrust Act, Md. Code Ann., Com. Law §§ 11-201 to -213 (2016). As discussed below, the standards applicable under these federal and Maryland statutes for assessing a merger's or acquisition's impact upon competition are congruent.

The principal federal statutory provision governing mergers and acquisitions is Section 7 of the Clayton Act. ABA Sec. of Antitrust Law, *Antitrust Law Developments* 331 (7th ed. 2012); *see Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 313 (1962). Section 7 prohibits an acquisition when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (2016). Section 1 of the Sherman Act, which prohibits unreasonable restraints of interstate trade or commerce, is also applicable to an antitrust analysis of a transaction. Federal courts have concluded, however, that the standards of Section 1 of the Sherman Act and Section 7 of the Clayton Act as applied to mergers and acquisitions have no substantive differences. *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1281 (7th Cir. 1990) ("We doubt whether there is a substantive difference today between the standard for judging the lawfulness of a merger challenged under section 1 of the Sherman Act and the standard for judging the same merger challenged under section 7 of the Clayton Act.").

The Maryland Antitrust Act does not have an analogue to Section 7 of the Clayton Act. The Maryland Antitrust Act can, nonetheless, reach mergers and acquisitions through the Act's analogue to Section 1 of the Sherman Act, Section 11-204(a)(1). William L. Reynolds II & James D. Wright,

A Practitioner's Guide to the Maryland Antitrust Act, 36 Maryland L. Rev. 323, 332-33 (1976); *Krause Marine Towing Corp. v. Ass'n of Md. Pilots*, 205 Md. App. 194, 209 (2012). In construing the Maryland Antitrust Act's provisions, the Act directs courts to "be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters." Md. Code Ann., Com. Law § 11-202(a)(2) (2016). Thus, the decisions of federal courts interpreting Section 1 of the Sherman Act are applicable here. *Natural Design, Inc., v. Rouse Co.*, 302 Md. 47, 53 (1984). As noted above, antitrust analysis of a transaction under Section 1 of the Sherman Act and Section 7 of the Clayton Act are identical. Accordingly, for purposes of my analysis under the Maryland Antitrust Act, I will apply Section 7 of the Clayton Act to the Acquisition.

B. Analysis

The purpose of Section 7 is to prevent a merger "which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963). Under antitrust law, market share and concentration are considered indicia of a firm's ability to act anti-competitively unilaterally or in actual or tacit collusion with other firms in a marketplace. If a transaction results in no change in market share and market concentration in a properly defined relevant market, then the transaction does not facilitate unilateral or coordinated anticompetitive effects and does not violate Section 7 of the Clayton Act. *Id*; *see also* 4 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 928, at 138 (2006) ("[M]ergers occurring below a certain concentration threshold should bear a strong presumption of lawfulness.").

The purposes of Section 7, when paired with the U.S. Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines, provide the framework for applying Section 7 to a particular transaction. The U.S. Department of Justice and the Federal Trade Commission are the principal agencies charged with the duty to enforce the federal antitrust laws. These agencies jointly issued the Horizontal Merger Guidelines, which "outline the principal analytical techniques, practices, and the enforcement policy" of the agencies with respect to mergers and acquisitions under the federal antitrust laws. U.S. Dep't of Justice & FTC Horizontal Merger Guidelines, at 1 (2010) (hereinafter "Merger Guidelines"). The Merger Guidelines "are not binding, but the Court of Appeals and other courts have looked to them for guidance in previous merger cases." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 38 (D.D.C. 2015) (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 n.9 (D.C. Cir. 2001)). Accordingly, I will be using the framework set forth in the Merger Guidelines to analyze the Acquisition.

1. Relevant Market Definition

Merger analysis starts with defining the relevant market. *United States v. Marine Bancorp.*, 418 U.S. 602, 618 (1974) ("Determination of the relevant product and geographic markets is a 'necessary predicate' to deciding whether a merger contravenes the Clayton Act." (quoting *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593 (1957)). "Defining the relevant market is critical in an antitrust case because the legality of the proposed merger[] in question almost always depends upon the market power of the parties involved." *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000) (quoting *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998)). A relevant market has two components: (1) the relevant product market and (2) the relevant geographic market. *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009). The product market defines the products and services as to which the merging entities compete. Merger Guidelines § 4.1. "The relevant geographic market 'is that area in which a potential buyer may rationally look for the goods or services he seeks.'" *FTC v. Penn State Hershey Med. Ctr.*, No. 16-2365, 2016 U.S. App. LEXIS 17525, at *14 (3d Cir. Sept. 27, 2016) (quoting *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005)); *see* Merger Guidelines § 4.2.

"A 'relevant product market' is a term of art in antitrust analysis." *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 50 (D.D.C. 2011) (citations omitted). "When a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the [Antitrust] Agencies define a relevant product market around Product A to evaluate the importance of that competition." Merger Guidelines § 4.1. Thus, a relevant product market includes Product A and reasonable substitutes for Product A. *Sysco Corp.*, 113 F. Supp. 3d at 25 (citing *Cardinal Health.*, 12 F. Supp. 2d at 46); Merger Guidelines § 4.1.1. Because merging firms may compete on one or more products, the antitrust agencies may identify multiple relevant product markets implicated by a transaction and analyze each market separately. *See* Merger Guidelines § 4.1. In defining a relevant product market, courts and the antitrust agencies consider "such practical indicia as industry or public recognition of the [relevant market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1037-38 (D.C. Cir. 2008) (quoting *Brown Shoe*, 370 U.S. at 325).

In defining the relevant product markets for this transaction, we should first look to Evergreen's products and services and then determine if any of the Acquirers competes against Evergreen as to those products and services. *See* Merger Guidelines § 4.1.1. We believe that the only relevant product market that could be impacted by the Acquisition is health insurance.

a) Relevant Market: Health Insurance

We believe there are five possible relevant health insurance product markets in which to assess the effects of the Acquisition: (1) sale of health insurance on a public exchange to individuals; (2) sale of health insurance on a public exchange to small groups; (3) sale of health insurance through brokers to individuals; (4) sale of health insurance through brokers to small groups; and (5) sale of health insurance through brokers to large groups. *See United States v. Aetna Inc.*, No. 16-1494, 2017 U.S. Dist. LEXIS 8490, at *191-192 (D.D.C. Jan. 23, 2017) ("The market definition in this portion of

the case is undisputed: . . . on-exchange health plans is the relevant market."). These product market definitions are appropriate as sales through brokers and a public exchange are not interchangeable. *Id.* at *42 ("This makes intuitive sense: if two products have distinct characteristics, uses, customers, and prices, it is unlikely that a large number of customers would switch to one in response to a price increase in the other."). Further, customers who buy insurance on the public exchange are a different set of customers than customers who buy through brokers. Public exchange customers are more likely to need public assistance in purchasing insurance than the customers who buy from brokers. Compl. at 16-17, *United States v. Aetna, Inc.*, No. 16-01494, ECF No. 1 (D.D.C. July 21, 2016). Furthermore, it is important to further delineate the product market to account for the different customer groups. Individuals have different insurance needs than small groups and large groups. Similarly, small groups have different needs from large groups. Maryland defines small groups as employers who employ at least one employee and no more than 50 employees. Maryland Insurance Administration, Bulletin 15-27 (Oct. 8, 2015). A large group is an employer who employs more than 50 employees. Md. Code Ann., Ins. § 15-1411(a)(4) (2016).

As for the relevant geographic market, Maryland has established four geographic rating areas to be used by insurers to price premiums to individuals and small groups. Maryland Insurance Administration, Bulletin 13-08 (Mar. 7, 2013). In other words, a rating area refers to the geographic location that will be used when determining health insurance premiums. Individuals and small groups in the rating areas listed below may only enroll in insurance plans approved for that rating area. Therefore, each of the following rating areas is a relevant geographic market for insurance sold to individuals and small groups on the public exchange or through brokers: Baltimore Metropolitan Area; Eastern and Southern Maryland; Washington, D.C. Metropolitan Area; and Western Maryland. The relevant geographic market for health insurance sold to large groups is the State of Maryland. This is an appropriate geographic market because large groups may purchase from any insurer that is licensed to sell in the State.

2. Concentration

After the relevant market has been defined, it is necessary to consider the likely effects of the proposed acquisition upon competition within that market. That involves determining whether the merger would produce "'a firm controlling an undue percentage share of the relevant market, and [would] result[] in [a] significant increase in the concentration of firms in that market.'" *Heinz*, 246 F.3d at 715 (quoting *Phila. Nat'l Bank*, 374 U.S. at 363). Courts and the antitrust agencies calculate market concentration through using an econometrics method called the Herfindahl-Hirschman Index ("HHI"). Merger Guidelines § 5.3. The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. *Id.* To determine if the transaction causes a significant increase in concentration, courts and the agencies consider "both the post-merger level of market concentration and the change in concentration resulting from [the] merger." *Id.* Because none of the Acquirers offers any competing products or services, there will be no change in the HHI or increase in concentration resulting from the Acquisition. "Mergers involving an increase in the HHI of less

than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis." *Id.*[2]

IV. Conclusion

Accordingly, it is my opinion that the Acquisition should produce no adverse effects upon competition in any relevant line of commerce in Maryland and not raise any issues under, or violate, the federal or Maryland antitrust laws.

signature on original

Michael F. Brockmeyer

[2] Under antitrust laws, an acquisition that is anticompetitive may still be permitted if the acquired entity qualifies as a failing firm. This is known as the "failing firm defense." The requirements for establishing a failing firm defense are: "(1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose less severe danger to competition than does the proposed merger." Merger Guidelines at 43. I have not attempted to apply the failing firm defense here because I am not aware of the full extent of Evergreen's efforts to elicit reasonable alternative offers.