

**FILED**

Loren Jackson  
District Clerk

JAN 26 2009

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CAUSE NO. 2009-04609

THE STATE OF TEXAS

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IN THE DISTRICT COURT OF

Time \_\_\_\_\_  
By *cd* Harris County, Texas  
Deputy

Plaintiff,

v.

HARRIS COUNTY, TEXAS

*cd P20*

MEMORIAL HERMANN  
HEALTHCARE SYSTEM,

Defendant.

281st JUDICIAL DISTRICT

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*dc*  
*2-1*  
*1*  
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**AGREED FINAL JUDGMENT AND STIPULATED INJUNCTION  
BETWEEN THE STATE OF TEXAS AND  
MEMORIAL HERMANN HEALTHCARE SYSTEM**

The State of Texas (the "State"), through its Attorney General Greg Abbott ("Attorney General") has filed suit against Memorial Hermann Healthcare System ("Memorial Hermann") alleging violation of state antitrust statutes. Specifically, the Attorney General has alleged that Memorial Hermann has engaged in practices that discouraged health insurers ("Health Plans") from entering contracts with certain of its competitors. The Attorney General has alleged that these practices unreasonably restrain competition among acute care in-patient hospitals in violation of state antitrust laws. Memorial Hermann denies that it has engaged in practices that unreasonably restrain competition. To avoid the time, uncertainty and expense of protracted litigation, the Attorney General and Memorial Hermann have entered into a Settlement Agreement (attached hereto as Appendix A) (the "Settlement Agreement") and agreed to entry of this Agreed Final Judgment and Stipulated Injunction.

The Court finds that the joint request of the Attorney General and Memorial Hermann for approval and entry of this Agreed Final Judgment and Stipulated Injunction (hereinafter “this Order”) should be and hereby is GRANTED.

### **I. PARTIES**

A. The Attorney General is the chief legal officer of the State of Texas. The Attorney General is authorized to bring this action for violations of state antitrust laws.

B. Memorial Hermann is a Texas not for profit corporation that, among other things, provides acute care in-patient hospital services to patients who live in Harris, Chambers, Brazoria, Fort Bend, Galveston, Jefferson, Liberty, Montgomery and Waller counties as well as other locations. Its principal place of business is in Houston, Harris County, Texas.

### **II. JURISDICTION**

The Court finds that pursuant to Tex. Bus. & Comm. Code § 15.20(b), it has subject matter jurisdiction and may exercise personal jurisdiction over Memorial Hermann and that venue in this Court is proper.

### **III. DEFINITIONS**

As used herein and for purposes of this Order only:

A. “Memorial Hermann” means Memorial Hermann Healthcare System, a Texas not for profit corporation, its past and present members, officers, directors, employees, agents and representatives, parents and predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures (together with the members, officers, directors, employees, agents and representatives, and parents and predecessors of any of its

divisions, subsidiaries (direct or indirect), affiliates, partnerships and joint ventures). The terms “subsidiary,” “affiliate,” and “joint venture” refer to any organization (including, but not limited to Memorial Hermann Hospital System) in which there is (1) total or partial (25 percent or more) direct or indirect ownership, and (2) direct or indirect control by Memorial Hermann;

B. “Expiration Date” means (1) a stated or deemed termination or ending date in a contract or any renewal or extension thereof, and (2) in the case of a contract or renewal or extension thereof that does not have a stated or deemed termination date (such as a contract providing that it is for a term of two years and continuing thereafter until terminated by written notice from either party), each successive annual anniversary of (a) the last day of the initial, stated term, or (b) if there is no initial, stated term, the effective date of the contract;

C. “Health Plan” means any health maintenance organization, preferred provider arrangement or organization, managed health care plan of any kind, self-insured health benefit plan, or other health care plan or health insurance of any kind other than (1) the Medicare Program, (2) the Medicaid Program, (3) other governmental health programs, or (4) the self-insured health benefit plans Memorial Hermann offers to its employees; and

D. “Material Change in Volume” means an actual or reasonably predicted material reduction in the volume of business brought to Memorial Hermann as a result of a Health Plan’s adding one or more competing hospitals, additional hospital beds, or inpatient or outpatient services to its provider network(s) that were not accounted for in

the network(s) by Memorial Hermann when the original contract or the most recent renewal or extension thereof was entered into. For purposes of this provision, if the contract is silent as to what beds and services are accounted for, it will be presumed that all beds and services in the Health Plan's network plus any additional beds and services that had been publicly-announced at the time the relevant contract was entered into were accounted for in the network(s) by Memorial Hermann.

#### **IV. TERMS**

IT IS ORDERED that in connection with contracting with Health Plans for the provision of hospital services, Memorial Hermann is hereby permanently enjoined for five (5) years from the date this Order becomes final, whether acting alone or in concert with another hospital, whether acting directly or indirectly through any affiliate, subsidiary, division, or other entity, from:

A. Requiring, requesting, entering into, continuing, or maintaining any agreement with any Health Plan that the Health Plan will, alone or with other Health Plans, boycott or refuse to deal with one or more specifically identified competing hospitals or category of competing hospitals;

B. Requiring or requesting any Health Plan to furnish information to Memorial Hermann relating to the rates the Health Plan pays any competing hospital;

C. Facilitating or attempting to facilitate agreements or understandings between or among Health Plans to boycott or refuse to deal with any competing hospital by, among other things, transmitting or conveying from one Health Plan to another Health Plan information relating to Health Plan network configuration(s), contracting status, or

pricing, including, but not limited to complaints, intentions, plans, or actions; or

D. Advising in writing, declaring, announcing, providing notice, or otherwise intentionally communicating a message to any Health Plan that Memorial Hermann will or may

(i) refuse to enter into contracts (or renewals or extensions thereof) with,

(ii) increase its rates to, or

(iii) terminate a contract with

any Health Plan because the Health Plan contracts with or offers to contract with one or more specifically identified competing hospitals or category of competing hospitals; or

E. Terminating or giving notice of termination of a then-existing contract with a Health Plan (in a manner not prohibited by the contract's terms) prior to the Expiration Date because the Health Plan has added one or more competing hospitals, additional hospital beds, or inpatient or outpatient services to its provider network(s) (i) if such actions by the Health Plan do not result in a Material Change in Volume, or (ii) even if such actions result in a Material Change in Volume, if Memorial Hermann's final rate increase offer for the shorter of the period remaining before the Expiration Date or 365 days from the date of the notice of termination is not reasonably proportionate to the financial effect of the volume reduction. At the Health Plan's option, Memorial Hermann's final rate increase offer will be in the form of (i) a systemwide rate increase, and/or (ii) a rate increase for the services provided by the specific Memorial Hermann inpatient, acute care facility or facilities most directly affected by the volume reduction (i.e., not systemwide) ("Facility-Specific Option"). The Facility-Specific Option must be

projected to have the same revenue impact as the systemwide rate increase offer required by this paragraph. Memorial Hermann may negotiate its rates with the Health Plan on a product-by-product basis (*i.e.*, Memorial Hermann may negotiate different prices for different products offered by the Health Plan).

Subject to item IV(C) above, the following actions, without limitation, if taken by Memorial Hermann, shall not violate this Order:

1. Seeking or entering into contracts with Health Plans in which Memorial Hermann is designated as the exclusive provider or one of a limited number of providers of services for such Health Plans;
2. Subject to item IV(A) above, declining for any reason to enter into a new contract with a Health Plan or renew or extend an existing contract with a Health Plan;
3. Subject to item IV(E) above, exercising or enforcing its rights under a contract with a Health Plan;
4. Seeking or entering into a contract with a Health Plan in which the rates charged by Memorial Hermann vary according to the actual volume of business brought to Memorial Hermann by that Health Plan; and
5. Subject to item IV(A) above, negotiating and agreeing upon rates and other terms on whatever basis it wishes when (i) negotiating a new contract with a Health Plan, or (b) negotiating the rates and other terms to take effect upon the renewal or extension of an existing contract with a Health Plan.

## V. FURTHER TERMS

IT IS FURTHER ORDERED that Memorial Hermann shall:

A. Within thirty (30) days after the date on which this Order becomes final, distribute by first-class mail a copy of this Order and the Petition, with a cover letter from CEO Dan Wolterman (or his successor) to the following:

1. Each Health Plan with which Memorial Hermann has a contract;
2. Each member of the Memorial Hermann Healthcare System board of directors;
3. Each officer, and member of the Executive Council of Memorial Hermann;  
and
4. Each employee of Memorial Hermann who has responsibility for negotiating contracts with any Health Plan.

B. For a period of five (5) years after the date this Order becomes final:

1. Distribute a copy of this Order and the Petition to:
  - a. Each Health Plan that begins contract negotiations with Memorial Hermann and did not previously receive a copy of this Order and the Petition from Memorial Hermann, within ten (10) days of the time that such negotiation begins; and
  - b. Each person who becomes a member of the board of directors of Memorial Hermann Healthcare System, and who did not previously receive a copy of this Order and the Petition from Memorial Hermann, within thirty (30) days of the time that he or she becomes a member of

the board; and

- c. Each person who becomes an officer, or member of the Executive Council of Memorial Hermann, and who did not previously receive a copy of this Order and the Petition from Memorial Hermann, within thirty (30) days of the time that he or she assumes such responsibility with Memorial Hermann; and
- d. Each person who becomes an employee of Memorial Hermann who has responsibility for negotiating contracts with any Health Plan, and who did not previously receive a copy of this Order and the Petition from Memorial Hermann, within thirty (30) days of the time that he or she assumes such responsibility with Memorial Hermann.

C. For a period of five (5) years after the date this Order becomes final, Memorial Hermann shall provide the Attorney General with written annual confirmation that its managed care contracting employees who were responsible for negotiating with Health Plans during the preceding year were each provided with copies of this Order and were advised that failure to obey any of the provisions of Article IV may result in adverse consequences to Memorial Hermann and themselves, including a possible finding of contempt of court.

## **VI. MISCELLANEOUS**

1. *Cost Reimbursement.* Memorial Hermann shall pay the Attorney General \$700,000.00 in partial reimbursement of the reasonable and necessary costs and fees associated with his investigation of Memorial Hermann's business practices.



2. *Enforcement.* If the Attorney General believes Memorial Hermann has violated or is violating this Order, he shall promptly notify Memorial Hermann in writing and provide a reasonably detailed description of the alleged or suspected violation. The Attorney General shall thereafter permit Memorial Hermann a reasonable opportunity either to demonstrate that there is no violation or to cure any alleged violation without instituting legal action. If Memorial Hermann has not cured the alleged violation or otherwise resolved the issue within sixty (60) days of the notification, the Attorney General may thereafter seek to undertake any remedial action deemed appropriate and consistent with this Order. This time period may be extended by mutual written agreement in circumstances where the sixty-day (60-day) period does not allow sufficient time to cure the alleged violation. With respect to a rate increase negotiated and accepted by a Health Plan in alleged violation of this Order, this Order shall not be enforced unless the Attorney General notifies Memorial Hermann of a potential violation in writing within 90 days after the agreed rate increase is implemented.

3. *Legal Exposure and Effect.* This Order is not intended to and does not give any legal rights or remedies of any nature to any third party.

4. *Notices.* All notices required by this Order shall be sent by certified or registered mail, return receipt requested, postage prepaid or by hand delivery to:

As to the State:

Mark Tobey  
Chief, Antitrust Division  
Office of the Attorney General  
P. O. Box 12548  
300 W. 15th St., 9th Floor  
Austin, TX 78701  
Fax: (512) 320-0975

As to Memorial Hermann:

Bernard A. Duco, Jr.  
Chief Legal Officer  
Memorial Hermann Healthcare System  
7737 Southwest Freeway, Suite 200  
Houston, TX 77074  
Fax: (713) 456-5011

With a copy to:

William R. Pakalka  
Fulbright & Jaworski L.L.P.  
1301 McKinney, Suite 5100  
Houston, Texas 77010  
Fax: (713) 651-5246

5. *Governing Law.* This Order shall be governed by and interpreted according to the laws of the State of Texas, excluding its conflict of laws provisions.

6. *Extinguished Claims.* All of the Released Claims (as defined in the Settlement Agreement) are hereby extinguished as to all of the Released Parties (as defined in the Settlement Agreement).

7. *Modification.* If the Attorney General or Memorial Hermann believes that modification of this Order would be in the public interest, that party shall give notice to the other and the parties shall attempt to agree on a modification. If the parties agree on a

modification, they shall jointly petition the Court to modify the Order, and such modification shall be granted unless the Court determines that the modification is contrary to the public interest. Nothing herein prohibits a party from petitioning this Court for a modification in the absence of agreement of the other party. Likewise, nothing herein prohibits a party from opposing such a petition for modification.

8. *Retention of Jurisdiction.* The Court retains jurisdiction for five (5) years following the date this Order becomes final to enable any party to apply to this Court for such further orders and directions as may be necessary and appropriate for the interpretation, modification, and enforcement of this Order.

9. *No Admission or Finding of Liability.* Neither the Settlement Agreement nor Memorial Hermann's agreement to entry of this Order is an admission of liability. This Order does not constitute a finding or conclusion that Memorial Hermann or any other Released Party as defined in the Settlement Agreement has violated any law. Neither this Order nor the Settlement Agreement nor Memorial Hermann's agreement to entry of this Order may be offered or received into evidence in any action as evidence of or as an admission of liability, whether arising before or after the entry of this Order.

IT IS SO ORDERED, this 26<sup>th</sup> day of January, 2009,

  
JUDGE PRESIDING

APPROVED AND ENTRY REQUESTED:

OFFICE OF THE ATTORNEY GENERAL



Mark B. Tobey  
State Bar No. 20082960  
Chief, Antitrust Division  
P.O. Box 12548  
Austin, Texas 78711-2548  
(512) 463-1262  
(512) 320-0975

ATTORNEYS FOR PLAINTIFF  
STATE OF TEXAS

FULBRIGHT & JAWORSKI L.L.P.



William R. Pakalka  
State Bar No. 15420800  
Fulbright Tower  
1301 McKinney, Suite 5100  
Houston, TX 77010-3095  
Telephone: (713) 651-5151  
Facsimile: (713) 651-5246

ATTORNEYS FOR DEFENDANT  
MEMORIAL HERMANN  
HEALTHCARE SYSTEM

**SETTLEMENT AGREEMENT BETWEEN THE STATE OF TEXAS  
AND MEMORIAL HERMANN HEALTHCARE SYSTEM**

This Settlement Agreement memorializes the terms of settlement between the Texas Attorney General (“Attorney General”) and Memorial Hermann Healthcare System (“Memorial Hermann”).

WHEREAS, the Attorney General has been investigating possible anticompetitive conduct in the markets for acute care in-patient hospital services in Texas; and

WHEREAS, the Attorney General believes that Memorial Hermann has directly and indirectly entered agreements that unreasonably restrained competition in the market for acute care in-patient hospital services in the greater Houston, Texas metropolitan area; and

WHEREAS, Memorial Hermann disagrees and denies that it has directly or indirectly entered any such agreements; and

WHEREAS, the Attorney General and Memorial Hermann desire to resolve this matter without resort to the time, expense and uncertainty of litigation;

NOW THEREFORE, the Attorney General and Memorial Hermann hereby agree as follows:

**I. PARTIES BOUND**

1.1. This Agreement shall apply to and be binding upon the State of Texas and upon Memorial Hermann and its successors and assigns. Any change in ownership or corporate or other legal status of Memorial Hermann, including but not limited to, any transfer of all or substantially all of its assets or real or personal property, shall in no way

alter Memorial Hermann's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to execute and bind legally the party he or she represents.

## **II. DEFINITIONS**

2.1. Whenever the terms listed below are used in this Agreement, the following definitions shall apply:

“Agreement” means this Settlement Agreement.

“Investigation” means the State’s inquiry into Memorial Hermann’s business practices to determine if such practices constituted possible restraints of trade in the market for acute care in-patient hospital services, including but not limited to its requests for information, through the use of civil investigative demands, document requests, informal interviews, sworn statements, and all other methods of gathering information, but excluding occurrences or other matters at issue in Interrogatory No. 5 and Document Request Nos. 15-26 in the Civil Investigative demand dated November 8, 2006, issued by the Attorney General to Memorial Hermann.

“Lawsuit” means the civil action by the State against Memorial Hermann that is to be filed in the District Court of Harris County, Texas pursuant to the provisions of paragraph 13.1 of this Agreement.

“Memorial Hermann” means Memorial Hermann Healthcare System, a Texas not for profit corporation, its past and present members, officers, directors, employees, agents and representatives, parents and predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures (together with the members, officers, directors,

employees, agents and representatives, and parents and predecessors of any of its divisions, subsidiaries (direct or indirect), affiliates, partnerships and joint ventures). The terms “subsidiary,” “affiliate,” and “joint venture” refer to any organization, (including, but not limited to Memorial Hermann Hospital System) in which there is total or partial (25 percent or more) direct or indirect ownership or control by Memorial Hermann.

“Party” or “Parties” means the parties to this Agreement and includes the State and Memorial Hermann.

“Person” means any individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, limited liability company, association, or any other legal entity.

“Released Claims” means all claims, including any claims as *parens patriae*, demands, actions, suits, causes of action, remedies, damages, and liabilities, of any nature, arising out of the transactions or occurrences at issue in the Investigation or the Lawsuit.

“Released Parties” means all persons or organizations included in the term “Memorial Hermann” as defined above, and the attorneys and insurers of all or any of such persons or organizations.

“State” means the State of Texas, and any of its agents and representatives, including the Attorney General, and includes the State of Texas acting in any direct or indirect capacity, including in its status as *parens patriae*.

### **III. STATEMENT OF PURPOSE**

3.1 By entering into this Agreement, the Parties' objectives are:

a. To resolve all claims the State could assert against the Released Parties arising from its Investigation or the Lawsuit;

b. To reach final agreement between the State and Memorial Hermann with respect to how Memorial Hermann will in the future conduct certain of its business practices relating to its communications and dealings with Health Plans; and

c. To provide for partial reimbursement to the State for its Investigation costs.

### **IV. COST REIMBURSEMENT**

4.1. Memorial Hermann shall pay the Attorney General \$700,000 in partial reimbursement of the reasonable and necessary costs and fees associated with his investigation of Memorial Hermann's business practices. Memorial Hermann shall make this payment by wire transfer, pursuant to instructions to be provided by the Attorney General, within thirty (30) days of this Agreement's execution.

### **V. RELEASE BY STATE OF TEXAS**

5.1. The State RELEASES, ACQUITS AND FOREVER discharges the Released Parties from the Released Claims.

5.2 Nothing herein shall be deemed to release any individual or entity other than the Released Parties.

5.3 Nothing herein shall be deemed to release claims accruing after execution



of this Agreement.

## **VI. EFFECT OF THIS SETTLEMENT**

6.1 Nothing in this Agreement shall be construed as an admission of wrongdoing or violation of law by Memorial Hermann. Memorial Hermann specifically denies any wrongdoing or violation of law.

6.2. Nothing in this Agreement shall be construed to create any rights in any third party (other than the Released Parties), or grant any cause of action to any third party. The State and Memorial Hermann each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have against any third party with respect to any matter, transaction, or occurrence relating in any way to the Texas acute care in-patient hospital industry.

## **VII. MERGER AND INTEGRATION, INTERPRETATION**

7.1. This Agreement embodies the entire understanding between the State and Memorial Hermann with respect to the settlement described in this Agreement. The State and Memorial Hermann acknowledge that there are no promises, representations, orders, agreements, or understandings relating to this Agreement other than those expressly contained herein.

7.2. The Parties have jointly negotiated and drafted this Agreement, and when interpreting this Agreement, neither should be considered to be the primary author. The fact that the Parties may have discussed and included or excluded additional terms in drafts of the Agreement that are or are not contained in this Agreement is of no moment and shall be given no weight in interpreting this Agreement.

## VIII. NOTICES

8.1. Whenever, under the terms of this Agreement or the Agreed Final Judgment and Stipulated Injunction to be entered pursuant to the provisions of paragraph 13.2 of this Agreement, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided.

### As to the State:

Mark Tobey  
Chief, Antitrust Division  
Office of the Attorney General  
P.O. Box 12548  
300 W. 15th Street, 9th Floor  
Austin, TX 78701  
Fax: (512) 320-0975

### As to Memorial Hermann:

Bernard A. Duco, Jr.  
Chief Legal Officer  
Memorial Hermann Healthcare System  
7737 Southwest Freeway, Suite 200  
Houston, TX 77074  
Fax: (713) 456-5889

### With a copy to:

William R. Pakalka  
Fulbright & Jaworski L.L.P.  
1301 McKinney, Suite 5100  
Houston, Texas 77010  
Fax: (713) 651-5246

Any Party may change the person designated for notices by giving notice in accordance with this paragraph.

**IX. MODIFICATION**

9.1. No term or provision of this Agreement may be varied, changed, or modified, except by an instrument in writing signed by the Party against whom the enforcement of the variation, change, or modification is sought.

**X. SURVIVAL**

10.1. The covenants, releases and other obligations contained herein shall survive the execution and performance of this Agreement.

**XI. EXECUTION IN COUNTERPARTS**

11.1 This Agreement may be executed in counterparts, which together shall constitute a single original instrument. Any executed signature page to this Agreement may be transmitted by facsimile or electronic transmission to the other Parties, which shall constitute an original signature for all purposes.

**XII. EFFECTIVE DATE**

12.1 The Effective Date of this Agreement is the date it is executed by all the Parties.

**XIII. PETITION, ANSWER AND AGREED JUDGMENT**

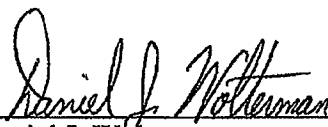
13.1. To effectuate this Agreement, the Attorney General will file a Petition in the Harris County District Court, and Memorial Hermann will file an Answer.

13.2. The Attorney General and Memorial Hermann agree to entry of an Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Memorial

Hermann Healthcare System, in a form that has heretofore been agreed to between the Parties.

THE UNDERSIGNED PARTIES enter into this Settlement Agreement and Release relating to Memorial Hermann Healthcare System.

Dated: January 15, 2009

  
\_\_\_\_\_  
Daniel J. Wolterman

President and Chief Executive Officer  
Memorial Hermann Healthcare System

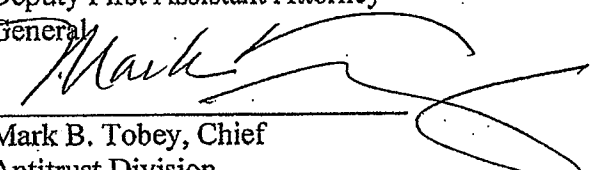
Dated: January 16, 2009

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

C. ANDREW WEBER  
First Assistant Attorney General

JEFF L. ROSE  
Deputy First Assistant Attorney  
General

  
\_\_\_\_\_  
Mark B. Tobey, Chief  
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KIM VAN WINKLE  
Assistant Attorney General

JOHN T. PRUD'HOMME  
Assistant Attorney General

PLAINTIFF STATE OF TEXAS