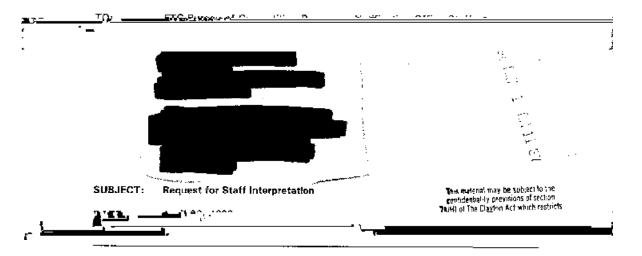
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## MEMORANDUM



## Introduction/Conclusion

If is the belief of counsel (listed above) for each party that a premerger notification

interpretation, pursuant to 16 C.F.R. \$803.30, by the FTC Premerger Notification Staff.

## DESCRIPTION OF TRANSACTION

grand.

health care entities, in each case including a nonprofit health care corporation, A Corporation (in which A is the sole corporate member) and B Corporation (in which B is the sole

respective ultimate parents) each have annual net sales or total assets of \$100 million or more. A and B intend to enter into an agreement ("Agreement") to create a Joint Operating Organization known as Newco. Newco will be a non-profit, nonstock, Delaware corporation with A and B as its two members. A (and A Corporation) and B (and B Corporation) will delegate to Newco the responsibilities, subject to certain exceptions, for the management of the operations of the health care activities of  $\Delta$  (and A corporation) and the healthcare activities of B (and B corporation) and the entities each controls in a specified service area.

 $<sup>^{1\</sup>prime}$  An application for Recognition of Exempt Status will also be filed with the Internal Revenue Service.

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THE TIME AND DESCRIPTION OF LATER ROSERS (STEERS THE WAR IN THE PARTY OF LATER PA transfer to Newco) which any person contributing to the formation of Newco has agreed to transfer or which agreements have been secured for Newco to obtain at any time, whether or not such person is subject to the requirements of the Hart-Scott-Rodino Act, and (2) any

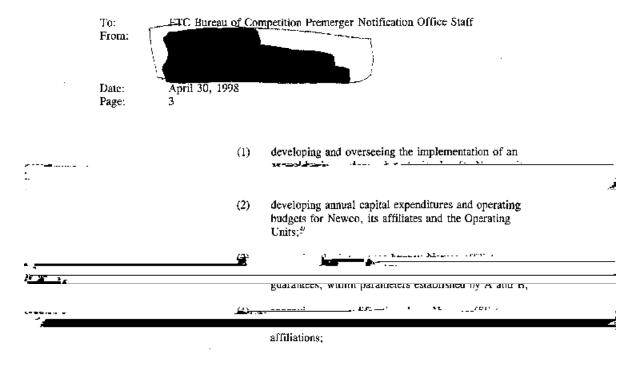
One hundred percent (100%) of the cash flow (the excess of revenue over expenses, plus depreciation, less debt repayment) of Newco and the combined operations of A and B subject to Newco management will be shared in the following manner. Fifteen

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Newco Additiority

Newco will have significant responsibility and authority to manage the health care activities of A and B within a designated geographic service area. Specifically, subject to certain rights and responsibilities reserved to A and B as the corporate members of Newco, Newco shall have the following powers and responsibilities:

<sup>2</sup>º "Operating units" refer to programs, facilities, services and other assets wholly owned by A (or A corporation) or B (or B corporation) and all existing and future programs, facilities, services and other assets wholly owned, directly or indirectly, by Newco and Newco affiliates in the service area, whose operations are managed by Newco, whether separately incorporated or not.



governing body of an entity, or the unilateral power to direct or cause the direction of all significant policies and the overall management of an entity, whether through contracts,

other arrangement; but the term excludes programs, facilities, services and other assets in the service area wholly owned by A, A Corporation or B, B Corporation or an entity for which any one of them has the power to elect through membership or ownership greater than fifty percent (50%) of the governing body of an entity, or the unilateral power to direct or cause the direction of all significant policies and the overall management of an entity, whether through contracts, membership interests, ownership of voting securities, a lease, a

 $^{gp}$  The initial three year strategic and financial plan together with financial performance targets, each "new" third year of the rolling three-year performance plan, as well as any

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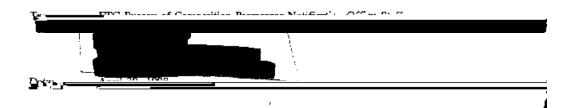
- (5) approving any sale, transfer, or other disposition of any material asset of a Newco affiliate or Operating Unit within parameters established by A and B;<sup>2/2</sup>
- negotiating third-party payor relationships for its affiliates and Operating Units;
- (7) appointing, through use of the Nominating Committee of
- (8) transferring assets, including cash, among the various Newco affiliates and Operating Units and/or from a Newco affiliate or Operating Unit to Newco within parameters established by A and B;<sup>6</sup>
- appointing, evaluating and removing the CEOs of the Newco affiliates;
- delivery of health care services, or the discominuance of any existing health care service, by a Newco affiliate or Operating Unit;
- developing uniform human resource policies for the Newco affiliates and Operating Units;
- (12) conducting marketing and promotional activities for the Newco affiliates and Operating Units;

 $<sup>^{57}</sup>$  Sec, e.g., reserve powers (#10) which requires the approval of both A and B for certain

the merger, dissolution, consolidation, or sale of all or substantially all of the assets of Newco or any Operating Unit outside parameters agreed to by A and B; Te: FTC Bureau of Competition Premerger Notification Office Staff From: Date: April 30, 1998 Page: the amendment, repeal, or restatement of the Corporate Documents of Newco: the appointment and removal of the jointly appointed /ne tabsolut members of the board of directors of Newco: the approval of capital and operating expenditures that are inconsistent with the three year financial targets, parameters and expectations approved by A and B; the approval of major affiliations of Newco, Newco affiliates and the Operating Units; the approval of the initial three year strategic and financial plan, as well as the annual update to such plan developed by the parties to create a rolling three-year financial performance plan, and the establishment of the parameters and expectations for the clinical quality, strategic, operating, mission, religious identity and financial performance of Newco; Potentially reportable the transfer of assets, including cash, among various Operating Unit to Newco or Newco affiliates other than other man transfers of cash as provided in the Risk Sharing provisions'u.

compensation, and termination of the CEO of Newco. However, if A and B are not able to reach a mutual agreement on A's or B's proposal to remove the CEO, the CEO of Newco will be automatically terminated.

The following actions of Newco will require the approval of either A (and A Corporation) or B (and B Corporation), as the case may be, before the action may be implemented.



(1) the sale, lease, transfer, encumbrance, or disposition of the tangible property or investment (of an Operating Unit whose assets are owned or controlled by either A or B Corporation) if the property or investment has a fair market value in excess of three million dollars (\$3,000,000);

(2) the merger, dissolution, consolidation, or sale of all or substantially all of the assets of an Operating Unit whose assets are owned or controlled by either the A or B Corporation; and

Neither Anor B has

documents of an entity controlled by either the ATot  $\kappa$  Corporation.

each (i.e., two by A; two by B) of the eight (8) members of the Board of Newco. After the terms of the initial Board of Directors expires, successors for the four members of the

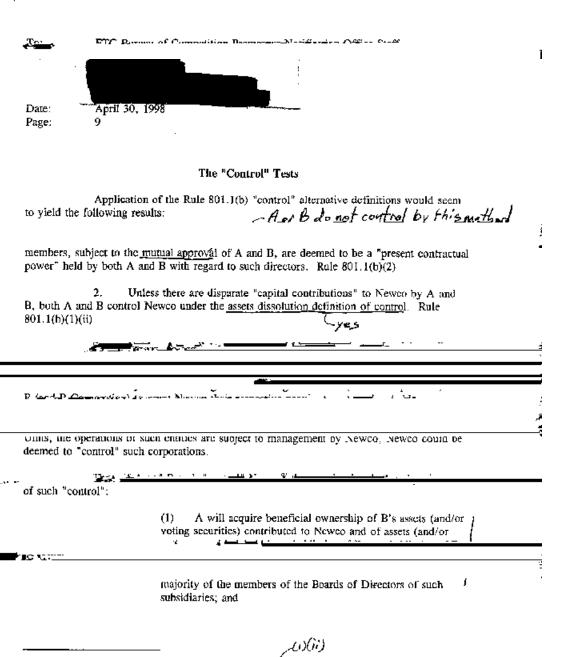
Newco Board, and appointed by the Newco Board upon joint approval of both A and B.

Proceeds of Sesat Sale

Any proceeds from the sale of an asset owned by the respective A or B Corporations, or entities each separately controls, will be retained by A or B Corporation, as the case may be. In the event of a dissolution of Newco, A (or A Corporation) and B (or B Corporation) will each retain the assets to which it holds title. The remaining assets of Newco and Newco affiliates will be distributed one-half to A and one-half to B, after being

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	To:	FTC Bureau of Competition Premerger Notification Office Staff	
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	Page:	8 / goz.40 does not apply	
		since there are no	
		HART-SCOTT-RODING ANALYSIS  Agoz. 40 does not apply  Since there are no voting securities. Howev  it is kicked over to 2014	
		Since incredie no vering	
		Formation of Newer Securities the formation of Newer 15 not reportable	
		1. As a threshold issue, the joint venture specific HSR rules (i.e., Rule	
240	p 13		
	contributor	18. — Ok, at long as no marger or consolidation is taking flace which does not seem to be the case hert.	
		The mere acquisitions of "membership interests" in a non-profit tay-	
		a create expanination much as Norman about d not constitute an acquisition of accord OK as	
		e., as non-reportable events.2	
	interests, 1	- 4	
		Nevertheless, there is an issue that by each of A and B having "control", over the f	
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	₹ See, Aπ	nerican Bar Association, Premerger Notification Practice Manual (2d Ed. 1991)	
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- 4 1 1 1 1 1 1 1.	reportable	пшеньном.	
		in this memorandum, the term "subsidiary" also refers to a non-stock membership	
	a corporate	e member.	



 $<sup>^{9}</sup>$  Using the "control" tests set froth in Rule 801.1(b), A and B each would appear to become an "ultimate parent entity" of Newco.

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(2) B will acquire beneficial ownership of A's assets (and/or voting securities) contributed to Newco and of assets (and/or voting securities) held by subsidiaries of A or subsidiaries of A Corporation for which the Newco Board has the power, through proxies granted by A or A Corporation, to appoint/remove the majority of the members of the Boards of Directors of such

a reportable acquisition(s), under the size of transaction test, would seem to exist:

- (1) For A as the acquiring person and B as the acquired person if A values, in excess of \$15,000,000, the combination of B's assets (and voting securities, if any) contributed to Newco and assets held by subsidiaries of B or B Corporation where the board members of such subsidiaries are subject to appointment/removal by Newco exercising its proxy vote; and
- (2) For B as the acquiring person and A as the acquired person if B values, in excess of \$15,000,000, the combination of A's assets (and voting securities\_if any) contributed to

See, e.g., American Bar Association, <u>Premerger Notification Practice Manual</u> (2d Ed. 1991), interpretation no. 54, at pages 49-50, wherein FTC staff apparently advised that shareholders who enter into voting agreements or voting trusts or grant or obtain proxies are not regarded as reportable transactions, "even if control of an issuer may be conferred or transferred as a result." Similarly, interpretation no. 74, at pgs. 64-65, reflects advice on-whether "a person who controls an issuer by reason of a contractual power to designate fifty percent or more of its directors holds the issuer's voting securities." The FTC staff apparently opined that "A person does not hold voting securities under §801.1(c)(1) unless that person has beneficial ownership of the securities. A contractual power to designate 50 percent or more of the

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being done in formation
of Newco (itself a non-report
event).

entity's board of directors does not necessarily mean that Newco holds beneficial ownership! Correct
of those entities or their assets.

facto, create beneficial ownership, the question is whether A acquires beneficial ownership of B's assets and B acquires beneficial ownership of A's assets by virtue of such "control"

separate A and B Corporations or their individual subsidiaries. (See description in "Newco Authority" section above).

At their respective benefit from increase in Va.

of their respective assets as well as softer decrease.

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However, there are limits imposed upon Newco by virtue of those reserve powers for actions that require the mutual approval of both A and B, and those reserve powers for actions which require approval of either A or B (See Reserve Powers Section above). On balance, the existence of these reserve powers, as well as A Corporation and B Corporation continuing to hold title to their respective assets and the right of A and B to the

Newco management, has not transferred to either Newco or B and (2) beneficial ownership of B's assets, subject to Newco management, has not transferred to Newco or A -- simply as a result of the management authority granted to Newco by A and B and related cash flow retained by Newco.

## QUESTION PRESENTED

The question presented is whether, under the facts and circumstances described, — i.e., the control held by each of A and B over Newco, Newco's "control" over the subsidiaries of A Corporation and B Corporation, and the parameters of Newco's planagement of A (or A Corporation's) and R's (or B Corporation's) operations — separately if

If there is no acquisition by A of beneficial ownership of B's assets and no acquisition by B of beneficial ownership of A's assets, no Hart-Scott-Rodino filing should be required in connection with the formation of Newco.

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