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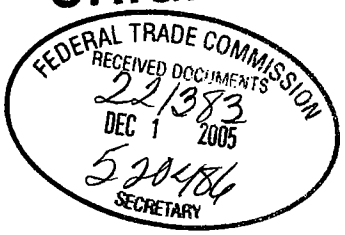

November 30, 2005

Mr. Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW
Room H-159
Washington DC 20580

Re: In the Matter of North Texas Specialty Physicians
Docket No. 9312

Dear Mr. Clark:

Respondent North Texas Specialty Physicians ("NTSP") wishes to bring to the attention of the Commission a recent arbitration decision involving many of the same legal issues as in this present proceeding and involving UnitedHealth Networks, Inc., one of the primary complaining witnesses in this proceeding. The arbitration decision rules that there was no antitrust violation by the independent physician association (Advocate Health Care Network *et al.*), relying on many of the same legal principles as are presented by NTSP in this proceeding.

NTSP requests leave to submit a supplemental brief on this subject, if the Commission allows such.[1] A copy of the arbitration award is attached.

Yours very truly,

Gregory S. C. Huffman

GSH:mc
Enclosure

[1] The Commission's rules appear to have no parallel to Federal Rule of Appellate Procedure 28(j) concerning the citation of supplemental authorities.

cc w/enc.: Michael Bloom (via Federal Express)
Barbara Anthony (via certified mail)
Hon. D. Michael Chappell (via Federal Express)
Jonathan Platt (via email)
Theodore Zang (via email)

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Re: 51 193 Y 01990 03
United Healthcare of Illinois, Inc., an Illinois corporation, and UnitedHealth Networks, Inc., a Delaware corporation
And
Advocate Health Care Network, Advocate Health Partners, Advocate Health and Hospitals Corporation, and Advocate Northside Health Network, each an Illinois not for profit corporation
- Cook County, Illinois

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated February 1, 2000 and November 1, 2001, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, AWARD, as follows:

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I. Introduction.

A. The Parties.

The Claimants are United Healthcare of Illinois, Inc. and United Health Networks Inc. (collectively "United"). The Respondents are Advocate Healthcare Network ("AHCN"), Advocate Health Partners ("AHP"), Advocate Health and Hospitals Corporation ("AHHC") and Advocate Northside Health Network (collectively "Advocate"). United is one of the largest health insurers in the United States and one of the largest in the Chicago market. Advocate is a large Chicago area health care system which owns eight hospitals and either employs or is affiliated with over 2,500 physicians. These parties engaged in a contractual relationship until the events in question, as more fully described in this Award. Each of these parties bargained for their best economic advantage in a complex market for health care insurance and services of health care providers. The questions posed to the Panel involve issues of whether these actions complied with state and federal law, primarily as to antitrust, but also as to state law peripheral issues as well.

B. Filing of Claim.

On November 26, 2003, United filed its Demand for Arbitration under the Commercial Arbitration Rules of the American Arbitration Association against Advocate. Arbitration emanated from two agreements between the parties: (1) a Physician Agreement between United Healthcare of Illinois, Inc. and Advocate Health Partner Members (the "Physician Agreement"), which was effective February 1, 2000, and amended from time to time; and (2) a Hospital Participation Agreement between United Healthcare of Illinois, Inc., Advocate Health and Hospitals Corporation and Advocate Northside Health Network (the "Hospital Agreement"), which was effective November 1, 2001, and amended from time to time.

C. Reasoned Award.

By agreement of the parties, the Panel is obliged to issue a Reasoned Award.

D. Summary Description of Materials Submitted.

This is a complex matter with numerous substantive issues of law and fact. There were twenty-one (21) days of testimony (comprising 5,512 pages of hearing transcript), voluminous documents and exhibits, one full day of closing arguments, over 1,000 pages of post trial documentation, and over the entire proceedings, the Arbitrators issued approximately twenty-seven (27) Orders to the parties.

II. Summary of Claims and Counterclaims.

A. United's Claims.

United's Demand for Arbitration contained eleven (11) counts alleging that the Advocate entities named as Respondents engaged in:

(Count I) – unlawful price fixing;

(Count II) – market allocation;

(Count III) – refusal to deal and group boycott;

(Count IV) – tying

all in violation of the Sherman Act;

(Count V) –violations of the Illinois Antitrust Act;

(Count VI) – interference with contract;

(Counts VII and VIII) – interference with prospective economic advantage;

(Count IX) – defamation;

(Count X) – consumer fraud; and

(Count XI) – deceptive business practices.

B. Advocate Defenses.

The Advocate entities denied United's claims and filed nine (9) affirmative defenses:

1. no duty of Advocate Healthcare Network to arbitrate because it is not a signatory on any agreement;
2. failure to state a claim;
3. no injuries suffered;
4. no anti-competitive conduct;
5. justification;
6. waiver and estoppel;
7. privilege;
8. failure of United to mitigate damages; and
9. the Illinois Antitrust Act does not apply to not-for-profit corporations.

C. Counterclaims.

Advocate also filed three counterclaims (1) a declaratory judgment that the Physician Agreement was terminated as of January 1, 2004, (2) defamation, and (3) violations of the Illinois Consumer Fraud and Deceptive Practices Act).

D. Damages.

United claimed damages in the amount of Eighty-Five Million Six Hundred Forty-One Thousand Nine Hundred Seventy-Four Dollars ($85,641,974) which trebled amounts to Two Hundred Fifty-Six Million Nine Hundred Twenty-Five Thousand Nine Hundred and Twenty-Two Dollars ($256,925,922). United also requested equitable relief and injunctions enjoining Advocate from continuing its alleged unlawful conduct and monitoring Advocate's

conduct in the future. Further, United requests that the costs of arbitration, expert witness fees and reasonable attorneys' fees and expenses be allocated 100% against Advocate. Advocate claimed no specific monetary damages with respect to its counterclaims.

III. The Arbitration Agreements.

The arbitration provisions in the agreements are as follows:

A. The Physician Agreement.

"Section 8, Resolution of Disputes: Plan and/or Payor and Company and/or any Associate Provider will work together in good faith to resolve any disputes about their business relationship. If the dispute pertains to a matter which is generally administered by certain Plan procedures or defined in the Provider Manual, best efforts shall be used to see that the procedures set forth in that plan are to be fully exhausted by Company or Associate Provider before any right to arbitration under this section may be invoked. If the parties are unable to resolve the dispute within 30 days following the date one party sent written notice of the dispute to the other party, and if Plan, Company, or any Associate Provider or Payor wishes to pursue the dispute, it may be submitted to binding arbitration in accordance with the rules of the American Arbitration Association. Any arbitration proceeding under this Agreement shall be conducted in Cook County, Illinois. The Arbitrators may construe or interpret but shall not vary or ignore the terms of this Agreement, shall have no authority to award any punitive or exemplary damages, and shall be bound by controlling law."

B. The Hospital Agreement.

"Section 8, Resolution of Disputes: The parties will work together in good faith to resolve any disputes about their business relationship. If the parties are unable to resolve the dispute within 30 days following the date one party sent written notice of the dispute to the other party, and if either party wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association. In no event may arbitration be initiated more than one year following the sending of written notice of the dispute. Any arbitration proceeding under this Agreement shall be conducted in Cook County, IL. The Arbitrators may construe or interpret but shall not vary or ignore the terms of this Agreement, shall have no

> authority to award extra-contractual damages of any kind, including punitive or exemplary damages, and shall be bound by controlling law. If the dispute pertains to a matter which is generally administered by certain Plan procedures, such as a credentialing or quality improvement plan, the procedures set forth in that plan must be fully exhausted by Hospital before Hospital may invoke its right to arbitration under this section. The parties acknowledge that because this Agreement affects interstate commerce the Federal Arbitration Act applies."

Under both agreements, therefore, the Panel is bound by "controlling law".

IV. AHCN is Obligated to Arbitrate.

Advocate claims that AHCN is not a proper party to the arbitration in that it did not sign either of the Physician or Hospital Agreements. The Panel finds that AHCN is a proper party to the arbitration since it is the parent of each of the Advocate entities that signed the agreements with United. Judge Donnersberger of the Circuit Court of Cook County, Illinois, on March 18, 2004, ruled that all of the Advocate Respondents can and would be compelled to arbitrate United's claims pursuant to the agreements, and AHCN is one of the Advocate Respondents. In addition, the Panel reaffirmed Judge Donnersberger's ruling in its Order to the parties dated May 17, 2004.

When the charges against the parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement. See J. J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988); see also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993); Frynetics (Hong Kong) Ltd. v. Quantum Group, Inc., 2001 WL 40900, at *3, (N.D. Ill. 2001). The issues raised against AHCN are inextricably intertwined with the facts and issues raised against all of

the Respondents. See Grigson v. Creative Artists LLC, 210 F.3d 524, 527-28 (5th Cir. 2000). In this circumstance, AHCN is a proper party to the arbitration.

V. Claims and Counterclaims of Parties.

A. United's Claims.

1. United's Price Fixing Claim (Count I).

United has alleged that under the Physician Agreement Advocate engaged in unlawful price fixing by contracting with United for fee for service (FFS) reimbursement on a joint basis on behalf of both physicians employed by Advocate and independent Affiliated Physicians[1] between 2000-2003. Since the employed physicians and Affiliated Physicians are competitors, and the Affiliated Physicians are competitors of each other, United claims that the Physician Agreement which sets price schedules is an unlawful price fixing arrangement. United asserts this to be a per se violation of the Sherman Act.

Initially, we must separate the respective time periods. The original Physician Agreement was negotiated in 1999 and early 2000 and entered into between United and Advocate to be effective February 1, 2000, and amended in 2001. This agreement was a joint contract covering all of the Affiliated Physicians and also all physicians employed by Advocate. It was a non-exclusive contract as to the Affiliated Physicians – in other words, the Affiliated Physicians and United were both free to contract with each other or with others independently of the Physician Agreement. The Physician Agreement contains no set term and automatically renews for one year successive terms unless terminated by one of the parties. Advocate terminated the Physician Agreement in 2003 as to its employed physicians. United

[1] "Affiliated Physicians" are physicians who are not employed by Advocate but are members of an Advocate PHO or affiliated medical group, most of whom have staff privileges at one or more Advocate hospitals.

alleges that in connection with the negotiations for a new Physician Agreement in July-August, 2003, United advised Advocate that it wished to negotiate direct individual contracts with the Affiliated Physicians but that Advocate insisted upon negotiating a joint contract containing pricing schedules, a structure akin to the existing Physician Agreement, which Advocate characterized as a "clinically integrated" contract. United alleges that such conduct also amounts to per se unlawful price fixing. In considering these claims we must separate the Physician Agreement entered into in 2000, as amended in 2001, and the events occurring in July and August, 2003, that did not result in a contract.

a. The 2000-2002 Physician Agreement.

United alleges that this joint agreement amounts to a per se price fixing violation. United bears the burden of establishing that a per se violation exists. Northwest Wholesale Stationers v Pacific Stationers, 472 U.S. 284, 298 (1985). Advocate claims that this agreement should be judged under the Rule of Reason. Advocate also asserts that under the doctrine of "equal responsibility," United was equally responsible for the Physician Agreement, which Advocate asserts is a complete defense to its claim.

The Panel must first consider the equal responsibility defense, because if that defense is applicable, it is not necessary to reach the issue of whether there was either a per se violation or a violation as determined under the Rule of Reason. Blackburn v Sweeney, 53 F.3d 825 (7th Cir. 1995). The equal responsibility doctrine was first enunciated in the United States Court of Appeals for the Seventh Circuit in Premier Electric Construction Co. v Miller-Davis Co., 422 F.2d 1132 (7th Cir. 1970), based on the Supreme Court's ruling in Perma Life Mufflers v, Int'l. Parts Corp., 392 U.S. 134, 140 (1998). It is controlling law in the Seventh Circuit and provides a defense to either a per se or Rule of Reason antitrust claim. Blackburn,

Id. at 829. Importantly, the Blackburn decision applied the equal responsibility defense to what it found to be a per se violation.

United argues that it is a customer of Advocate and that the defense cannot be applied to a customer subject to a price fixing agreement. United urges that neither in Premier nor Blackburn was the defense applied to a customer or vendor, but rather to a participant who benefited from the arrangement. The Panel disagrees with this distinction. In the Panel's judgment, the defense can reasonably be applied to a customer or vendor that intends to benefit from the arrangement. The Panel believes that the standards expressed in Premier and Blackburn can apply equally to a customer or vendor as well as to a subcontractor, such as the case in Premier, or a competitor, as in Blackburn, which intended to benefit from the arrangement.

As stated in Premier, Id at 1138, in determining whether the equal responsibility defense applies, the factors to be considered are the relative bargaining power of each party, whether there was economic coercion, whether there was arms-length negotiation and the circumstances regarding the formation of the agreement, including facts pertaining to which party initiated each of the provisions of the alleged offending agreement.

The evidence in this case reflects that the entry into the 2000 Physician Agreement and the 2001 amendment was jointly initiated by both United and Advocate. There is considerable evidence that United first approached Advocate in 1999 regarding a contract. This was during a period when insurers and providers were transitioning away from health maintenance organization (HMO) capitation agreements to fee for service reimbursement. This change was partially responsive to consumer demand for more flexibility and choice. United desired the benefits of joint contracting in order to establish and stabilize its

network of physicians, many of whom it had recently acquired as part of its network through its acquisition of other health care insurers and while it was restructuring its business model. Some of the acquired insurers had endured difficult relationships with Affiliated Physicians and with Advocate. A joint physician agreement with Advocate covering a large number of physicians was attractive to United in establishing and stabilizing its network. A joint contract also provided United with substantial administrative efficiencies and made it more attractive to employers. This was confirmed by experts from both parties and by witness Dennis Matheis, a former Advocate employee, who now is employed by a competitive health insurer. As further evidence of this, United entered into approximately 50 joint agreements containing price terms with other independent physician associations (IPAs) and physician-hospital organizations (PHOs) and their associated physicians in the Chicago metropolitan market during the 1999-2002 timeframe and even today jointly contracts with the PHO groups at Northwestern and Condell Hospitals. It was not until 2003 that United embarked upon its policy to seek direct individual contracts with physicians rather than joint contracts. Consistent with this, United asserts that the Physician Agreement has not been terminated and is currently in effect as to certain AHP physicians who have not entered into direct contracts with it. United continues to assert the benefits of the terms of the Physician Agreement as to those physicians.

There were substantial back and forth negotiations between United and Advocate and, even though the parties negotiated at length seeking terms they thought to benefit themselves, the weight of the evidence is that United was not coerced to enter into the Physician Agreement. The parties are relative equals in terms of bargaining power. Furthermore, the Physician Agreement was non-exclusive and United, had it sought to do so, could have entered into direct contracts with Affiliated Physicians. In fact, following the

collapse of the 2003 negotiations, United was able, in a relatively short time, to enter into direct physician contracts with about 90% of the Affiliated Physicians, who were not Advocate employees.[2]

Like Blackburn, "this was not an agreement ... where there is a clear asymmetry in bargaining power ... [United] had no reason to enter the Agreement at all unless [it] found that on balance the terms were to [its] benefit." Id at 829.[3]

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[2] United argues that it sought direct contracts with Affiliated Physicians as early as late 1999, but that Advocate insisted that United sign a joint contract. The relevant evidence is that during the negotiation of the Physician Agreement in late 1999, United requested that each participating physician sign an Addendum to the joint Physician Agreement which was to be effective February 1, 2000. By letter dated December 14, 1999 (AHP032737), Advocate advised United of the following:

> "UHC has held firm to the need for Associate Provider Participation Addendum signed by each participating physician. It is anticipated that obtaining these signatures could take many months for individual physicians to either perform their own review or call in outside counsel for this and their existing agreements thus extending the entire process well past 2/1/99. This may serve to reduce the number of physicians participating under this agreement. AHP shall inform UHC of the products accepted by each physician through the delegated credentialing process. Therefore, AHP asks that this requirement be withdrawn by UHC in the interest of having a larger panel available on 2/1/99." [Note: The Panel believes the two referenced dates were intended to be 2/1/00.]

United apparently did not follow up on its request in light of the desirability of having a contract in place on February 1, 2000, and, in fact, executed the Physician Agreement effective that date. It would be reasonable for United to execute the joint Physician Agreement for business reasons of its own to avoid the potential for delay and not because it was coerced to do so.

[3] As stated in Premier:

> "...Mr. Justice Black found that plaintiffs' participation in the illegal agreement with Midas was 'not voluntary in any meaningful sense' and that they 'accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity.' *Perma Life Mufflers v. International Parts Corp.*, supra at 139. Thus we believe that *Perma Life* holds only that plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants.

(continued on next page)

Accordingly, the Panel concludes that the equal responsibility defense as enunciated in Premier Electric Construction Co. and Blackburn applies to the claim that the Physician Agreement amounted to a per se price fixing violation of the Sherman Act and therefore, that claim is denied.

Due to our finding that the equal responsibility defense applies, it is not necessary for the Panel to reach the question of whether the Physician Agreement should be evaluated under the per se or Rule of Reason standards. However, the parties devoted substantial hearing testimony and argument to this issue, and the issue was intensely contraverted in the parties' pre and post hearing briefs. The issue raises a host of disputed questions of law and fact. In light of the evolution of the Supreme Court's treatment of per se liability under Section 1 of the Sherman Act, it is appropriate to address the issue under the "controlling law" standard which is applicable. However, the resolution of this issue in this case is difficult and complex because the health care industry has been and is a rapidly evolving one.

> Many factors are, therefore, relevant in determining whether participation by the plaintiff in an illegal agreement constitutes a defense to his treble damage action. Difficult factual questions are involved in making such a determination. This is especially true where, as here, the plaintiff and defendant are not competitors but instead are dealing at arm's length in a vertical relationship in the purchase and sale of goods and services. In such cases the relative bargaining power of each party to the agreement is relevant in ascertaining whether the plaintiff was forced by economic pressures to enter into the agreement. Similarly, evidence concerning the formation of the agreement including facts pertaining to which party initiated each of its provisions may control the availability of the defense in particular situations." Premier, Id, at 1138.

In other words, factual issues are very significant in determining the applicability of the equal responsibility defense. As noted in footnote 2 above, given the choice, United chose not to delay entering into a new Physician Agreement on February 1, 2000.

After extensive and careful consideration of the issue, the Panel concludes the Rule of Reason applies. United argues that under Arizona v Maricopa County Med. Soc'y, 457 U.S. 332 (1982) and FTC v Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990), the Physician Agreement and Advocate's joint contracting conduct amounts to a naked price fixing scheme that is per se illegal.

The Panel believes that the Physician Agreement is distinguishable from the conduct condemned in Maricopa and Superior Court Trial Lawyers, both of which involved efforts by the competitor defendants to set joint price terms. There were no offsetting potential benefits or efficiencies from the price setting conduct in those cases, unlike the present case, as described above.[4]

In Polygram v F.T.C., 416 F.3d 29, 34 (D.C. Cir. 2005), the Court noted that the "Supreme Court's approach to evaluating a § 1 claim has gone through a transition over the last twenty-five years, from a dichotomous categorical approach to a more nuanced and case specific inquiry":

> "Since Professional Engineers, the Supreme Court has steadily moved away from the dichotomous approach – under which every restraint of trade is either unlawful per se, and hence not susceptible to a pro-competitive justification, or subject to full blown rule-of-reason analysis – toward one in which the extent of the inquiry is tailored to the subject conduct in each particular case".

The Court went on to describe the appropriate analysis :

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[4] The Panel does not conclude, as United asserts, that Maricopa requires proof of a fully integrated joint venture to justify a joint contract, that the joint contracting be ancillary to the venture's legitimate pro competitive purposes and is necessary to achieve those efficiencies. Likewise, the Panel disagrees with Advocate that the facts of this case bring it within the exception to per se treatment recognized in Broadcast Music Inc. v Columbia Broadcasting, 441 U.S. 1 (1979).

> "At bottom, the Sherman Act requires the court to ascertain whether the challenged restraint hinders competition .... If based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offset the apparent or anticipated harm." Id. at 36.

See also Wilk v. AMA, 895 F.2d 352, 359 (7th Cir. 1990) and Polk Bros Inc. v. Forest City Enterprises, 776 F.2d 185, 188-89 (7th Cir. 1985).

United argues that the joint price contracting in the Physician Agreement has harmed consumers by raising the prices paid for health services, and relies upon its expert Dr. Langenfeld to support this conclusion. The Panel has certain questions about the applicability of the methodology of Dr. Langenfeld's regression analysis to the facts of this case, which suggests higher prices occurred as a result of the joint contracting. The Panel believes Advocate has provided sufficient evidence that the joint contracting provided United and other payors competitive benefit sufficient to offset any potential harm to consumers. AHP offered these joint contracts to fee for service payors in response to their needs in the evolution to fee for service contracts from joint HMO capitation contracts, as described above. The joint contracts provided United and other payors benefits and efficiencies in quickly assembling a stable preferred provider organization (PPO) network without the need to seek individual contracts with thousands of physicians – even though United was free to individually contract and in some cases did so. That United entered into 50 other joint contracts in the Chicago area is evidence of United's active desire for such joint contracts for the presumed competitive benefits they provided United.

These joint contracts originated at a time when HMO capitation was the principal business model in the Chicago market and Advocate attempted to justify its joint contracting conduct by claiming that it operated under a "messenger model". The concept of a so-called "messenger model", though not the actual term itself, is addressed and discussed in the 1996 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care (the "Health Care Statements"). However the Panel believes the concept of a "messenger model" is not specifically recognized in any controlling case law of which the Panel is aware as a defense to a Section 1 price fixing claim. Furthermore, both parties have taken the position in this arbitration that the Health Care Statements do not constitute "controlling law". Thus, the Panel cannot judge Advocate's conduct by determining if it complies with the "safety zone" suggested in the Health Care Statements for a true "messenger model". Were we to do so, we believe that Advocate did not satisfy the Health Care Statements requirements for a valid "messenger model" in connection with negotiating the Physician Agreement, as amended. This is because there was substantial evidence that Advocate's contracting staff and its Consolidated Finance Committee ("CFC") directly negotiated the terms of the Physician Agreement and its amendments, including its price terms, on behalf of the Advocate PHO's and Affiliated Physicians, and on behalf of Advocate employed physicians. The procedures used by Advocate involved the sharing of pricing information between competing Advocate PHO's and their Affiliated Physician members and staff representing employed physicians. Advocate's role was not limited to simply serving as a messenger to provide collected information to its PHO's and their members to allow the PHO's and their members to directly negotiate pricing and other terms, but went beyond that by actually negotiating pricing and other contractual terms.

However, both health insurance payors and providers in Chicago widely believed these arrangements served their interests and freely entered into joint contracts under PPO products for fee for service arrangements as well as for HMO contracts.

For these reasons and because of the evolution of the Supreme Court's analysis of per se restraints, the Panel does not agree with United's argument that Advocate's joint contracting amounted to a per se price fixing violation. This conclusion is particularly valid because of the dynamic and complex nature of the health care insurance contracting market which evolved quickly in the late 1990's and early 2000 period from a primarily HMO capitation based model to a model involving far more fee for service contracts.

While United has asserted in its post-hearing briefs and in oral argument[5] that Advocate's joint contracting with respect to the Physician Agreement is violative of Section 1 under a Rule of Reason analysis, that claim cannot be sustained without a showing that Advocate or AHP had market power. Ball Mem. Hosp. Inc. v. Mutual Hosp. Insur., 784 F.2d 1325, 1334 (7th Cir. 1985); Digital Equip. Corp. v Uniq. Digital Tech Inc., 73 F.3d 756, 761 (7th Cir. 1996). The Panel concludes that Advocate, with roughly an uncontroverted 15% share of the hospital and physician markets (though prominent in the Chicago area), does not have market power. See Digital Equip., Id. at 761 (30% share insufficient to confer market power); Valley Liquors Inc. v. Renfeld Importers Ltd., 822 F.2d 656 666 (7th Cir. 1987) (20-25% share insufficient to constitute market power). In light of Advocate's market share, the Panel does not agree with Dr. Langenfeld's conclusion that Advocate's supposed ability to raise physician prices is direct evidence of market power. See R. J. Reynolds Tobacco Co. v. Philip Morris,

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5 United's Demand for Arbitration alleges per se violations.

Inc., 199 F.Supp 2d 362, 382 (M.D. N.C. 2002). Accordingly, United would not prevail under a Rule of Reason analysis, even in the absence of the equal responsibility defense.

b. The 2003 Physician Agreement Negotiations.

The evidence established that no new physician agreement was entered into in 2003 between the parties. While United sought direct contracts with the AHP Affiliated Physicians, Advocate insisted on a joint agreement covering its employed and Affiliated Physicians, which it characterized as a "clinically integrated" agreement. The parties were unable to reach agreement. Following this impasse, in August, 2003, Advocate terminated the Hospital Agreement with United effective January 1, 2004, and also terminated the Physician Agreement as to its employed physicians. United claims that this conduct amounted to a per se price fixing violation. However, since no joint agreement was ever signed, at most these events could be alleged only to amount to an attempt by Advocate to enter into a joint agreement and thereby amount to a per se price fixing violation. However, there is no cause of action available under Section 1 of the Sherman Act for attempted price fixing. U.S. v American Airlines, 570 F.Supp. 654, 657 (N.D. Tex 1983), rev'd on other grounds 743 F.2d 1114, 1119 (5th Cir. 1984).

Accordingly, the Panel concludes there was no per se price fixing violation in connection with the 2003 negotiations. The Panel heard days of testimony regarding details of Advocate's development of a "clinically integrated program" for 2004, which was asserted as a defense to the alleged price fixing violation. However, it is not necessary for the Panel to decide whether Advocate adopted a clinically integrated program sufficient to be utilized as a defense to a challenge to an unlawful joint physician agreement or whether Advocate's attempt to jointly contract with United was ancillary to Advocate's purported clinical integration program.

Even if, however, there was an agreement between AHP's Affiliated Physicians and Advocate through its employed physicians to attempt to enter into a joint agreement with United, the Panel would judge Advocate's conduct under a Rule of Reason analysis. Advocate attempted to justify its conduct by claiming that it was offering United a "clinically integrated" product for fee for service contracts to be effective January 1, 2004 and submitted substantial evidence of what that product contained. United argues that the clinical integration defense is a mere pretext, that Advocate did not have a clinical integration program in effect in August, 2003 during negotiations, or as of January 1, 2004, and that Advocate offered this justification merely to defend a pending FTC investigation. Advocate's defense in this regard is apparently premised upon language in the Health Care Statements which suggest that physician integration, which creates significant efficiencies and is not anticompetitive, may be justified. As we have noted, the Health Care Statements are not controlling law, as agreed by the parties. There also appears to be a paucity of case law in which the concept of "clinical integration" has been discussed or relied upon as a defense to alleged antitrust violations.[6] The Panel is not aware of a controlling definition of when a program is "integrated" or "fully integrated".

The standard the Panel applies here is the one cited above in Polygram. The Panel believes the evidence established that Advocate was prepared as of January 1, 2004, the date a new contract with United would purportedly begin, to proceed with a

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[6] While there have been a number of Federal Trade Commission enforcement actions and consent decrees entered which have dealt with joint contracting by health care providers, these are not litigated decisions and are also not "controlling law". The only FTC advisory opinion concerning clinical integration, of which the Panel is aware, is the Med South Inc. FTC letter dated February 19, 2002. (United Exh. 58) While Med South offers insights and opinions of the FTC, it, as well, does not constitute "controlling law".

"clinically integrated" product. A number of other health care insurers entered into joint contracts with Advocate between 2003 and 2005, providing for certain clinically integrated services, including Blue Cross-Blue Shield of Illinois ("BCBS"), Cigna, Unicare, HFN, Aetna and Humana. Advocate utilized a number of protocols from its HMO capitated program together with a number of new protocols to be included within the 18 separate protocols it specified to be part of its new "clinically integrated" product for fee for service contracts. As of January 1, 2004, this program was clearly a developing work in progress, and the Panel heard evidence regarding implementation of the clinical integration program thereafter and additions to it in 2004 and 2005. As of the date of the hearing, Advocate was continuing to actively develop and implement its clinical integration program and represented that it planned to continue to do so. The proposed benefits from such a program, as apparently recognized by other health insurers, sufficiently justify Advocate's conduct in attempting to reach a joint contract with United on what Advocate characterized as a "clinically integrated" basis, though the ingredients appear to be the mid-level development of a fully integrated program.

In addition, as noted above, we do not believe United presented sufficient evidence that Advocate had market power, as required in a Rule of Reason analysis. The Panel believes it is a close question as to whether the joint pricing component of a clinically integrated contract which Advocate intended to propose to United, would have been reasonably necessary to that program. In fact, BCBS, the largest insurer in the Illinois health insurance market, has direct contracts with all of the physicians in its network, including Advocate's Affiliated Physicians. United asserts that this demonstrates that Advocate did not absolutely need a joint contract. However, Advocate's explanation is that with BCBS' substantial market power, BCBS had the ability to demand direct contracts and that all physicians and health care

institutions in the Chicago market needed to be a part of the BCBS network for competitive reasons. Advocate, with only a 15% share of the market argued that it could not, for competitive reasons, reject BCBS's demand that its Affiliated Physicians enter into direct contracts without risking a significant economic loss to its system.

While, as noted above, we need not reach the question of whether Advocate's "clinically integrated" program is a sufficient defense to United's claims, were we required to answer that question, our conclusion would be that United did not demonstrate a Section 1 violation under a Rule of Reason analysis.

2. Refusal to Deal and Group Boycott (Count III).

United alleges that Advocate engaged in a per se refusal to deal violation by terminating the Hospital Agreement effective January 1, 2004. United also alleges that such conduct constitutes a group boycott, also amounting to a per se violation. The Panel does not believe the termination of the Hospital Agreement constitutes either an unlawful refusal to deal or a group boycott. The decision to terminate the Hospital Agreement was a unilateral decision by Advocate. Advocate asserts that it had the right to terminate the Hospital Agreement pursuant to its terms, which appears to be in accordance with Section 9.2 of the Hospital Agreement. Advocate also argues that it had independent reasons for terminating the Hospital Agreement because United refused to negotiate a joint physician contract and because United's proposal for a new agreement contained lower reimbursement pricing and complicated coding provisions which were inconsistent with Advocate's systems. In order for there to be a Section 1 violation amounting to a refusal to deal, there must be a horizontal agreement, combination or conspiracy. Since the decision to terminate the Hospital Agreement was a unilateral decision by Advocate, the Panel finds that the requisite agreement was not present.

United has argued that the termination of the Hospital Agreement was in furtherance of Advocate's alleged price fixing scheme. As we understand United's argument, the required horizontal element is supplied by the fact that the AHP Affiliated Physicians are governed by the Physician Agreement, that the Affiliated Physicians were part of an illegal price fixing scheme, and that this supplies a basis for concluding that the termination was not unilateral. The Panel disagrees that United has supplied sufficient evidence of the required horizontal agreement. Neither AHP nor the Affiliated Physicians are parties to the Hospital Agreement. While the Seventh Circuit has held refusals to deal can be per se illegal when used to enforce an otherwise per se illegal price fixing agreement (Denny's Marina v Renfro, 8 F.3d 1217 (7th Cir. 1993), that argument does not apply in this instance because the Panel has held there is not an illegal price fixing agreement in this case.

Furthermore, to the extent United alleges that the termination of the Hospital Agreement or the failed negotiations for a new Physician Agreement amounts to a group boycott, the evidence does not support such a claim. Advocate may have preferred a joint contract. However, the fact that in late 2003 United was able rather quickly to enter into new direct contracts with about 90% of the Affiliated Physicians effective for 2004 refutes a group boycott claim.

To the extent United is alleging that Advocate coordinated the termination of the Hospital Agreement to support Advocate's attempt to negotiate a new joint Physician Agreement, the claim fails because there is no evidence of a horizontal boycott agreement such as existed in FTC v Superior Court Trial Lawyers' Assn., 493 U.S. 411 (1990). The Panel believes this claim by United in fact amounts to a tying claim whereby the Hospital Agreement would have been the tying product and the proposed Physician Agreement would have been the

tied service agreement. In the hearings, United did not pursue its tying claim which was asserted in Count IV. This may be because to succeed on a tying claim, the tying product must have market power. Indeed, to prove an illegal group boycott, United also must prove that Advocate had market power, Northwest Wholesale Stationers v Pacific Stationery, 472 U.S. 284, 298 (1985); F.T.C. v Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986). The Panel does not believe United has proven that Advocate had market power in connection with the Hospital Agreement since the evidence seems uncontroverted that Advocate had at most about 15% of the hospital admissions in the metropolitan Chicago area.[7] Nevertheless, because United did not continue to assert its tying claim, the Panel need not make a decision with respect thereto.

Finally, United argues that Advocate followed a pattern of terminating agreements with other health insurers in addition to United in order to negotiate illegal higher priced physician agreements. However, Advocate contractually had the right to terminate, and did terminate agreements with other payors under the terms of the agreements. Contracts between health insurers and providers often require many months of notice of termination prior to the effective termination date, otherwise the contract would automatically renew. The Panel concludes that United's argument which relies on such contractual relationships does not support its refusal to deal/group boycott claim. Accordingly, the Panel denies United's claim that Advocate refused to deal or committed a group boycott in violation of the Sherman Act.

The Panel feels constrained to note that Advocate's negotiation strategy and its communications to its physicians regarding those negotiations, while not ultimately illegal under the facts presented in this arbitration, or laudable, could have been avoided in the interest of

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[7] Advocate also had relationships with approximately the same percentage of physicians in the area.

seeking accommodation with United, for the benefit of employers and employees in United's network who wished to utilize Advocate's physicians and hospitals.[8]

3. Market and Customer Allocation (Count II).

United claims that AHP's Participating Physician Agreements amount to an unlawful per se market allocation. United argues that these agreements require the Affiliated Physicians and the employed physicians to channel specialist referrals to other physicians in their Advocate PHO and to admit patients to the affiliated hospitals associated with that PHO. They also argue that these restrictions were not disclosed to or approved by United. United argues that these restrictions foreclose Affiliated Physicians and employed physicians from using non-Advocate hospitals and specialists at those hospitals and that such restrictions have harmed United. United argues that these provisions allocate markets along geographic lines and allocate PPO patients to Advocate hospitals and AHP physicians.

There is no dispute that the elements of a per se market allocation claim require proof of (1) a horizontal agreement and (2) the terms of which call for the division of, and withdrawal from competition with respect to, particular geographic territories, customers or products. Palmer v BRG of Georgia Inc., 498 U.S. 46 (1990); Hammes v AAMCO Transmissions, Inc., 33 F.3d 774 (7th Cir. 1994); Garot Anderson Agencies Inc. v Blue Cross and Blue Shield, 1993 WL 787756 (N.D. Ill. 1993). Advocate's position is that these provisions are standard referral provisions which are common in HMO and PPO contracts and that there was no evidence submitted to show that these provisions were intended to apply or were enforced with

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[8] When United announced to Advocate it would seek only individual direct contracts, Advocate terminated the negotiations and did not attempt to persuade United of the benefits of a clinically integrated program nor disclose to United the details of its developing program.

regard to PPO patients. Advocate also argues that there is no evidence of an agreement between physicians not to compete for patients. The agreements themselves are between the physicians and AHP and are not agreements between the physicians. Advocate also asserts that these provisions are consistent with and valuable to Advocate's efforts to provide quality clinically integrated services to its patients and their insurers. Finally, Advocate argues United has adduced no evidence of antitrust injury or damage.

It appears that the challenged provisions were included in the Participating Physician Agreements primarily to be utilized in connection with AHP's HMO and capitated contracts. The agreements provide that primary care physicians should refer patients to participating AHP specialists "when appropriate" and to admit patients only to the Advocate hospitals of which they are on staff, and require authorization from the AHP Medical Director prior to referral to a non-participating specialist or other hospital.[9]

The Panel agrees with Advocate that United has not presented material evidence to show that it has been harmed by these provisions, or that Advocate or AHP have enforced

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[9] "2.5 Referral to Specialty Care Physicians. Participating Primary Care Physicians agree to refer Members, when appropriate, to Participating Specialty Care Physicians (provided a Participating Specialty Care Physician possesses the required expertise) for specialty care Covered Services.

* * *

2.7 Referral to Non-Participating Physicians. If a Participating Primary Care Physician determines that a Member requires Covered Services which are not available from Participating Specialty Care Physicians, Participating Primary Care Physicians shall obtain the express authorization of the Medical Director prior to referring such Member to a Non-Participating Physician (unless the MCO's arrangement with AHP (or PHO) requires or provides otherwise). Physician shall only refer such Member to an approved Non-Participating Physician who is a member of the Hospital's medical staff unless the Medical Director expressly approves a referral to a non-staff Physician." (AHP-E138378)

The Panel notes that there are no express damage provisions for breach of these provisions -- the remedy for default is termination of the agreement.

them in connection with PPO patients or that there has been any agreement by the Affiliated Physicians or Employed Physicians not to compete. The Panel notes its belief that the terms of the referral provisions are somewhat internally inconsistent, and are more geared to the interests of Advocate than to the interests of its patients. However, this consideration alone, does not make them unlawful. Accordingly, the Panel denies United's claim that these provisions amount to a unlawful market allocation scheme.

4. United's State Law Claims.

a. Defamation (Count IX).

United alleges that in the fall of 2003, Advocate defamed United by misrepresenting that United did not care about the quality of health care services to its members, that United was not willing to work with Advocate on quality improvement programs, and that the Physician Agreement would terminate as to the Affiliated Physicians on January 1, 2004. Furthermore, United alleges Advocate accused it of lying for stating United was seeking to negotiate with Advocate. Defamation per se is alleged.

In order to recover for defamation under Illinois law, United must prove (i) Advocate made a defamatory statement of fact about United, (ii) Advocate published the statement to a third party, and (iii) United suffered injury to its reputation. Chisholm vs. Foothill Capital Corp. 3 F.Supp. 2d 925, 938 (N.D. Ill. 1998). Defamation without proof of actual damages is considered defamation per se and is actionable if the statements so falsely impeach United's "integrity, virtue, human decency or respect for others" that injury to its reputation is presumed – i.e., United was unfit for business. Van Horne vs. Muller, 185 Ill. 2d 299, 307 (1998).

Advocate responded that United failed to satisfy its burden that Advocate defamed United.

As to the allegation that United did not care about the quality of health care services to its members and was not willing to work with Advocate on quality improvement programs, the record does not support United's charge. United has cited a series of emails between Dr. Sacks, Jill Foucre of United and Cindy Bik of LaSalle Bank Corporation in support, but the email from Dr. Sacks to Ms. Bik, a United customer, does not say what United claims. (UHC 036412-416) The email simply states that United's desire to contract individually with AHP physicians is "diametrically opposed to the design of our model" and that "we seriously doubt the sincerity of United's interest in our clinical integration program". These are not defamatory statements.

As to Advocate's statement that the Physician Agreement would terminate January 1, 2004, Advocate has taken the consistent position in this litigation that United gave notice of termination in a letter which stated that it would seek direct contracts with Affiliated Physicians (note that in Section B.1 below, the Panel disagrees with Advocate's contention) and Advocate did in fact terminate the agreement as to its employed physicians effective January 1, 2004. These statements made by Advocate tend to be supported by the underlying facts or were opinions of Advocate and not actionable.

In an October 23, 2003 letter to AHP Physicians, Dr. Sacks stated:

> "Advocate hospitals and medical groups will not participate in the United Healthcare provider network in 2004. United is guilty of outright lies as it continues to claim that negotiations are under way and a 2004 agreement is nearly at hand. In fact, negotiations broke off in early August due to deep philosophical differences and they will not resume. There will be no relationship between Advocate Healthcare and United Healthcare in 2004." (United Hearing Ex. 30)

In fact, negotiations did break off no later than August or early September, 2003. Thus, as of October 23, 2003, negotiations were not "under way" and a 2004 agreement was not "nearly at hand". If in fact, United was so stating to AHP physicians and other third parties as Dr. Sacks had been advised, his statements may have been accurate, if intemperate, or a bit of hyperbole, while expressing his frustration at the state of their relationship.[10]

There was no evidence submitted that United's reputation was injured or that Advocate's statements were facts, not opinions or implications, or that Advocate's statements were of such intensity that damage to its reputation is to be presumed. Accordingly, United's defamation claim is denied.

b. Interference with Contract and Prospective Economic Advantage (Counts VI, VII and VIII).

United alleges that Advocate's joint contracting conduct interfered with its actual and prospective contractual relationships with customers, members, Affiliated Physicians, and other hospitals in its network. United claims it lost business from existing customers and members due to Advocate's termination of the Hospital Agreement and the services of the employed physicians, it suffered lost profits, and was forced to pay higher prices under direct contracts with Affiliated Physicians from 2004 and thereafter and under certain contracts with other hospitals in its network from 2004 and thereafter.

For its interference with contract claim (Count VI), United alleges that Advocate tortiously interfered with United's contractual relationships with Affiliated Physicians by threatening termination of the Hospital and Physician Agreements in order to prompt the

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[10] The word "lies" indicates the intent to state a falsehood. Lawyers will often use euphemisms such as "wrong", "inaccurate" or "untrue" to better preserve the potential for reestablishing cooperative relationships.

Affiliated Physicians to terminate their contracts with United, in hopes that United would agree to joint contracts. United also alleges that in 2003 some physicians who had staff privileges only at Advocate hospitals were forced to withdraw from United's network when Advocate terminated the Hospital Agreement.

To prove tortious interference with contract, United must prove (1) existence of a valid contract, (2) Advocate's awareness of the contract, (3) Advocate's intentional and unjustified inducement of breach of the contract, and (4) subsequent breach caused by Advocate's conduct and damages. Fitzpatrick v Catholic Bishops of Chicago, 916 F.2d 1257 (7th Cir. 1990); Kehoe v Saltarelli, 337 Ill. App. 3d 669, 676-77 (1st Dist. 2003).

To prove interference with prospective economic advantages as alleged in Counts VII and VIII, United must prove (1) that it had a reasonable expectation of entering into a valid business relationship with Affiliated Physicians and with United's prospective members, (2) that Advocate knew of United's expectancy, and (3) Advocate's purposeful interference prevented United's legitimate expectancy from ripening into a valid business relationship, with damages resulting from such interference. Dowd & Dowd v Gleason, 352 Ill. App. 3d 365 (1st Dist. 2004); Fellhauver vs. City of Geneva, 142 Ill. 2d 495, 511 (1991).

The Panel heard many days of evidence with respect to the business relationships of the parties, and in particular, about the Summer and Fall of 2003 when United informed Advocate that it wanted to contract directly with the Affiliated Physicians and Advocate terminated the Hospital Agreement pursuant to its terms. To the extent United alleges interference with either the Hospital Agreement or the Physician Agreement, these were contracts between United and AHHC and United and AHP respectively, not with the Affiliated Physicians. As set forth above, the Panel does not believe that the termination of the Hospital

Agreement was unlawful so that this action which allegedly caused damage to United was not an unjustified interference with physicians, members or employees in United's network.

As to the Physician Agreement, Advocate terminated it as to the employed physicians and United indicated it would seek direct contracts with the Affiliated Physicians. In fact, United entered into direct agreements with approximately 90% of the Affiliated Physicians. Finally, United contends that the Physician Agreement has not been terminated and is still in effect as to those Affiliated Physicians who did not sign direct contracts. As indicated in Section B.1 below, the Panel agrees. Accordingly, the Panel finds that United's claim of interference with its actual and prospective contractual relationships with customers, members, Affiliated Physicians, and other hospitals in its network is not sustainable, and the Panel denies such claim.

c. Consumer Fraud (Counts X and XI).

In Count X, United alleges that Advocate violated the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS Sec. 505/1 et seq.) and in Count XI, alleges a violation of the Illinois Uniform Deceptive Trade Practices Act (815 ILCS Sec. 510/1 et seq.).

i. Consumer Fraud and Deceptive Business Practices Act: Under the CFDBP, United must show that Advocate committed a deceptive act or practice with the intent of making United rely on the deception which occurred in the course of business. United claims that Advocate made deceptive statements to the Affiliated Physicians to induce them to participate in Advocate's allegedly unlawful conduct, including assurances that Advocate's contracting conduct was lawful and did not create antitrust exposure for the physicians, as well as alleged misstatements about United's commitment to quality. Advocate responds that it did not engage in any unfair conduct that affected competition or committed any

unfair or deceptive acts. In addition, Advocate claims that United is not a "consumer" to be protected under the Act. The Panel believes that United knew at all times of Advocate's joint pricing conduct, that Advocate believed it to be lawful, and any alleged deception did not amount to actionable fraud or unfair methods of competition or unfair or deceptive business practices. Accordingly, this claim is denied.

ii. Uniform Deceptive Trade Practices Act: Under this Act, United must show that Advocate engaged in an act or conduct misrepresenting or disparaging United's products, services or business. Richard Wolf Medical Instruments Corp v Dory, 723 F.Supp 37 (N.D. Ill 1989). United relies on the same alleged deceptive misstatements cited above for violation of the CFDBP and which allegedly constituted defamation, to sustain its claim under this statute. The Panel believes that no evidence was introduced by United to substantiate a claim under this Act, that statements made by Advocate did not touch upon United's goods, services or business, but rather, if at all, to United's honesty or lack thereof. The Act does not apply to statements suggesting a lack of integrity. Fedders Corp. vs. Elite Classics, 268 F. Supp. 2d 1051 (S.D. Ill. 2003). Accordingly, the Panel denies this claim.

d. Illinois Antitrust Act (Count V).

Because the Panel has ruled that Advocate did not violate the Sherman Act, there is no violation of the Illinois Antitrust Act (740 ILCS Sec. 3).

B. Advocate's Counterclaims.

1. Declaratory Judgment That United Terminated the Physician Agreement.

Advocate requests the Panel to issue a declaratory judgment that United's August 5, 2003 letter to Advocate (United Exhibit 38) amounted to a Notice of Termination under the Physician Agreement, which was confirmed by United's direct contracting

immediately thereafter with AHP's Affiliated Physicians. United's Exhibit 38 states that United intends to contract directly with physicians and medical groups, but does not state that United is terminating its agreement with AHP. Section 9.2 of the Physician Agreement, as amended, requires written notice of at least 120 days to terminate, but there may be no termination without cause prior to December 31, 2003. Furthermore, Exhibit 38 indicates that United will shortly send rate proposals to Advocate for Advocate's employed physicians and contract proposals for the Affiliated Physicians and "look(s) forward to working on ... successfully concluding the hospital and medical group negotiations".

The Panel denies Advocate's request for a declaratory judgment that the Physician Agreement was terminated by United in Exhibit 38 or by its subsequent direct contracting with affiliated physicians. This is because there was no intent to terminate, no written notice terminating the Agreement, and the evidence indicates that the Agreement continued and still continues with respect to certain of those Affiliated Physicians who did not sign direct contracts with United.

2. Defamation.

Advocate contends that United committed per se defamation by making statements to third parties, including AHP physicians and United members, that Advocate hospitals and Advocate employed and Affiliated Physicians do not offer the services they claim to and that they provide lower quality care. Advocate also alleges that United made statements to physicians that it wished to directly contract with them and avoid a joint contract so as to "meet the requirements of Federal law". (Advocate Exhibit 29 at UHC 023829.) Advocate seeks no damages.

The Panel believes that United's statements regarding its desire to enter into lawful contracts, and its views on Advocate's negotiating behavior (UHC 027506) are statements of opinion, not misstatements of fact, which is a required element of a per se defamation claim. The Panel does not believe they impute a lack of ability in Advocate's trade, profession or business.

There was also no evidence submitted or cited in Advocate's Proposed Findings of Fact (¶ 987) to support the claim that United made false and misleading statements about AHP's quality improvement programs or that its physicians provide lower quality care.

The Panel denies Advocate's defamation counterclaim.

3. Consumer Fraud.

Advocate alleges that United violated the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS § 505/1, et. seq.), by falsely claiming that Advocate intended to renew the Hospital Agreement and enter into a new contract for physician services on January 1, 2004. Advocate claims that patients and providers were deceived by these statements which harmed Advocate's reputation. Advocate seeks no damages. Advocate submitted no direct evidence of any of the alleged false claims by United – the only evidence of record is testimony by Advocate personnel of supposed statements being made by United of its intent to negotiate new agreements with Advocate and that negotiations were ongoing.

The Panel concludes that these statements do not meet the standard of "unfair competition or unfair or deceptive acts" required for a violation of the CFDBA Act. Accordingly, the Panel denies Advocate's counterclaim.

VI. Summary Of Decision And Allocation Of Expenses.

For the reasons set forth above, the Panel denies the claims set forth by United in Counts I through XI of its Demand and the three counterclaims set forth by Advocate. Accordingly, the Panel denies United's claim for damages and injunctive relief and denies Advocate's damage claims and claim for declaratory relief as to its counterclaims. The Panel does note that both United and Advocate presented substantial evidence on United's damage claims, primarily through expert testimony. The experts used diametrically opposing methodologies in supporting and opposing United's claims, each advocating the strengths of their respective methodology and the weakness or inapplicability of the other's methodology. It should also be noted that Advocate offered no evidence as to its alleged damages.

The Panel orders that the United parties collectively, on the one hand, and the Advocate parties collectively, on the other hand, shall each bear one half of the fees and expenses of the American Arbitration Association and of the Arbitrators. Each side shall bear its own attorneys' fees, costs and expenses. Though the Panel is advised that United has paid more than half of the American Arbitration Association administrative fees to date, the Panel believes an equal division of these fees is a fair result to the parties.

The administrative fees and expenses of the American Arbitration Association totaling $49,210.00 and the compensation and expenses of the arbitrators totaling $702,263.96 shall be borne equally. Therefore, Advocate shall reimburse United the sum of $18,605.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by United.

Finally, the Panel notes, however, that this ruling is limited to the specific factual and legal issues raised by United regarding conduct by Advocate up to and through the dates of the hearing in this matter. The Panel's ruling is not intended to relate to or rule upon any future

business relationship between United and Advocate or any future conduct by Advocate, including the utilization of its developing clinical integration business model in contracting with United or other health insurers for fee for service business.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

NOV. 18, 2005
Date

Anthony M. DiLeo

November 18, 2005
Date

Jerald P. Estrick

Date

Ronald Case Sharp

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Date	Anthony M. DiLeo
November 18, 2005 Date	Jerald P. Esrick
Date	Ronald Case Sharp

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This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Date	Anthony M. DiLeo
Date	Jerald P. Esrick
11/18/05 Date	Ronald Case Sharp

11/16/2005

United Healthcare of Illinois, Inc., an Illinois corporation, and UnitedHealth Networks, Inc., a Delaware corporation

and

Advocate Health Care Network, Advocate Health Partners, Advocate Health and Hospitals Corporation, and Advocate Northside Health Network, each an Illinois not for profit corporation

Case Manager:	MATTHEW HALTEMAN
Case Number:	51 193 Y 01990 03
Close Type:	Awarded

Total Administrative Fees and Expenses	$	49,210.00
Total Neutral Compensation and Expenses	$	702,263.96

*Note that the financial reconciliation reflects costs as they were incurred during the course of the proceeding. Any apportionment of these costs by the arbitrator, per section R-43 of the rules, will be addressed in the award and will be stated as one party's obligation to reimburse the other party for costs incurred. Any outstanding balances the parties may have with the AAA for the costs incurred during the arbitration proceedings remain due and payable to the AAA even after the award is issued, and regardless of the arbitrator's apportionment of these costs between the parties in the award.

UNITED HEALTHCARE OF ILLINOIS, INC., AN ILLINOIS CORPORATION, AND UNITEDHEALTH NETWORKS, INC., A DELAWARE CORPORATION

Administrative Fees and Expenses:

Filing Fees: $	37,210.00	
Case Service Fees: $	6,000.00	
Hearing Room Expenses: $	0.00	
AAA Hearing Room Rental: $	0.00	
Your Share of Administrative Fees and Expenses: $		43,210.00
Amounts Paid for Administrative Fees and Expenses: $		43,210.00
Balance Administrative Fees and Expenses: $		0.00

Neutral Compensation and Expenses:

Ronald Case Sharp: $	205,413.00	
Jerald P. Esrick: $	357,743.75	
Anthony M. DiLeo: $	139,107.21	
Your Share of Neutral Compensation and Expenses: $		351,131.98
Amounts Paid for Neutral Compensation and Expenses: $		360,785.00
Balance Neutral Compensation and Expenses: $		(9,653.02)
Party Balance: $		**(9,653.02)**

ADVOCATE HEALTH CARE NETWORK, ADVOCATE HEALTH PARTNERS, ADVOCATE HEALTH AND HOSPITALS CORPORATION, AND ADVOCATE NORTHSIDE HEALTH NETWORK, EACH AN ILLINOIS NOT FOR PROFIT CORPORATION

Administrative Fees and Expenses:

Filing Fees:	$	4,250.00
Case Service Fees:	$	1,750.00
Hearing Room Expenses:	$	0.00
AAA Hearing Room Rental:	$	0.00

Your Share of Administrative Fees and Expenses:	$	6,000.00
Amounts Paid for Administrative Fees and Expenses:	$	6,000.00
Balance Administrative Fees and Expenses:	$	0.00

Neutral Compensation and Expenses:

Ronald Case Sharp:	$	205,413.00
Jerald P. Esrick:	$	357,743.75
Anthony M. DiLeo:	$	139,107.21

Your Share of Neutral Compensation and Expenses:	$	351,131.98
Amounts Paid for Neutral Compensation and Expenses:	$	360,785.00
Balance Neutral Compensation and Expenses:	$	(9,653.02)

Party Balance:	$	**(9,653.02)**