MCKENZIE-WILLAMETTE HOSPITAL v. PEACEHEALTH

NO. 02-6032-HA

FINAL INSTRUCTIONS

OCTOBER 28, 2003

MEMBERS OF THE JURY, NOW THAT YOU HAVE HEARD ALL THE EVIDENCE AND THE ARGUMENTS OF THE LAWYERS, IT IS MY DUTY TO INSTRUCT YOU ON THE LAW THAT APPLIES TO THIS CASE. YOU MAY REFER TO YOUR COPY OF THESE INSTRUCTIONS IN THE JURY ROOM.

IT IS YOUR DUTY TO FIND THE FACTS FROM ALL THE EVIDENCE IN THE CASE. TO THOSE FACTS YOU MUST APPLY THE LAW AS I GIVE IT TO YOU. YOU MUST FOLLOW THE LAW AS I GIVE IT TO YOU WHETHER YOU AGREE WITH IT OR NOT. YOU MUST NOT BE INFLUENCED BY ANY PERSONAL LIKES OR DISLIKES, OPINIONS, PREJUDICES OR SYMPATHY. THAT MEANS THAT YOU MUST DECIDE THIS CASE SOLELY ON THE EVIDENCE BEFORE YOU. YOU WILL RECALL THAT YOU TOOK AN OATH PROMISING TO DO SO AT THE BEGINNING OF THE CASE.

IN FOLLOWING MY INSTRUCTIONS, YOU MUST FOLLOW ALL OF THEM AND NOT SINGLE OUT SOME AND IGNORE OTHERS; THEY ARE ALL EQUALLY IMPORTANT. YOU MUST NOT READ INTO THESE INSTRUCTIONS OR INTO

ANYTHING I MAY HAVE SAID OR DONE ANY SUGGESTION AS TO WHAT VERDICT YOU SHOULD RETURN. THAT IS A MATTER ENTIRELY FOR YOU TO DECIDE.

UNLESS OTHERWISE STATED, THE INSTRUCTIONS APPLY TO BOTH PARTIES. AS I INSTRUCTED AT THE BEGINNING OF TRIAL, ALL PERSONS AND ALL CORPORATIONS ARE EQUAL BEFORE THE LAW. PUBLIC OR PRIVATE CORPORATIONS ARE ENTITLED TO THE SAME FAIR AND CONSCIENTIOUS CONSIDERATION BY YOU AS ANY OTHER PERSON OR ENTITY. THIS CASE SHOULD BE CONSIDERED AND DECIDED BY YOU AS AN ACTION BETWEEN CORPORATIONS OF EQUAL STANDING IN THE COMMUNITY, OF EQUAL WORTH, AND HOLDING THE SAME OR SIMILAR STATIONS IN LIFE. ALL PERSONS AND CORPORATIONS STAND EQUAL BEFORE THE LAW, AND ARE TO BE DEALT WITH AS EQUALS IN A COURT OF JUSTICE.

IN DECIDING WHAT THE FACTS ARE, YOU MUST CONSIDER ALL THE EVIDENCE. EVIDENCE MAY BE DIRECT OR CIRCUMSTANTIAL. DIRECT EVIDENCE IS DIRECT PROOF OF A FACT, SUCH AS THE TESTIMONY OF AN EYEWITNESS. CIRCUMSTANTIAL EVIDENCE IS PROOF OF ONE OR MORE FACTS FROM WHICH YOU COULD FIND ANOTHER FACT.

YOU SHOULD CONSIDER BOTH KINDS OF EVIDENCE. THE LAW MAKES NO DISTINCTION BETWEEN THE WEIGHT TO BE GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE. IT IS FOR YOU TO DECIDE WHETHER A FACT HAS BEEN PROVED.

THE EVIDENCE FROM WHICH YOU ARE TO DECIDE WHAT THE FACTS ARE CONSISTS OF:

(1) THE SWORN TESTIMONY OF WITNESSES, ON BOTH DIRECT AND CROSS-EXAMINATION, REGARDLESS OF WHO CALLED THE WITNESS;

(2) THE EXHIBITS WHICH HAVE BEEN RECEIVED INTO EVIDENCE; AND

(3) ANY FACTS TO WHICH ALL THE LAWYERS HAVE AGREED OR STIPULATED.

SOME OF YOU HAVE TAKEN NOTES DURING THE TRIAL. SUCH NOTES ARE ONLY FOR THE PERSONAL USE OF THE INDIVIDUAL WHO RECORDED THEM. YOU MAY USE NOTES TAKEN DURING TRIAL TO ASSIST YOUR MEMORY. NOTES, HOWEVER, SHOULD NOT BE SUBSTITUTED FOR YOUR MEMORY, AND YOU SHOULD NOT BE OVERLY INFLUENCED BY YOUR NOTES, OR OTHER JURORS' NOTES.

AS I ALSO INSTRUCTED YOU AT THE BEGINNING OF TRIAL, CERTAIN THINGS ARE NOT EVIDENCE, AND YOU MUST NOT CONSIDER THEM AS EVIDENCE IN DECIDING THE FACTS OF THIS CASE. I WILL LIST THEM FOR YOU AGAIN:

(1) ARGUMENTS AND STATEMENTS OF THE ATTORNEYS. THE LAWYERS ARE NOT WITNESSES. WHAT THEY HAVE SAID IN THEIR OPENING STATEMENTS, CLOSING ARGUMENTS AND AT OTHER TIMES HAS BEEN INTENDED TO HELP YOU INTERPRET THE EVIDENCE -- BUT IS NOT EVIDENCE. IF THE FACTS AS YOU REMEMBER THEM DIFFER FROM THE WAY THE LAWYERS HAVE STATED THEM, YOUR MEMORY OF THEM CONTROLS;

(2) QUESTIONS AND OBJECTIONS BY ATTORNEYS ARE NOT EVIDENCE. ATTORNEYS HAVE A DUTY TO THEIR CLIENTS TO OBJECT WHEN THEY BELIEVE THAT A QUESTION IS IMPROPER UNDER THE RULES OF EVIDENCE. YOU SHOULD NOT BE INFLUENCED BY ANY OBJECTION OR BY MY RULING ON IT, EVEN IF THE OBJECTION OR THE QUESTION TO WHICH IT PERTAINED SUGGESTED THE EXISTENCE OF ADDITIONAL FACTS OR EVIDENCE, UNLESS SUCH FACTS WERE ADOPTED BY THE WITNESS;

(3) TESTIMONY THAT HAS BEEN EXCLUDED OR STRICKEN, OR THAT I HAVE INSTRUCTED YOU TO DISREGARD, IS NOT EVIDENCE AND MUST NOT BE CONSIDERED;

(4) ANYTHING YOU MAY HAVE SEEN OR HEARD WHEN THE COURT WAS NOT IN SESSION, EVEN IF WHAT YOU SAW OR HEARD WAS DONE OR SAID BY ONE OF THE PARTIES OR BY ONE OF THE WITNESSES, IS NOT EVIDENCE. YOU ARE TO DECIDE THE CASE SOLELY ON THE EVIDENCE RECEIVED AT THE TRIAL.

CHARTS AND SUMMARIES THAT HAVE NOT BEEN RECEIVED IN EVIDENCE HAVE BEEN SHOWN TO YOU IN ORDER TO HELP EXPLAIN THE CONTENTS OF RECORDS, DOCUMENTS, OR OTHER EVIDENCE IN THE CASE. THE TESTIMONY RELATING TO THESE CHARTS AND SUMMARIES IS EVIDENCE, BUT THE CHARTS AND SUMMARIES THEMSELVES ARE NOT EVIDENCE OR PROOF OF ANY FACTS. IF THESE CHARTS AND SUMMARIES DO NOT CORRECTLY REFLECT THE FACTS OR

FIGURES SHOWN BY THE EVIDENCE IN THE CASE, YOU SHOULD DISREGARD THEM, AND DETERMINE THE FACTS FROM THE UNDERLYING EVIDENCE.

YOU HAVE HEARD TESTIMONY FROM PERSONS WHO, BECAUSE OF EDUCATION OR EXPERIENCE, WERE PERMITTED TO TESTIFY AS EXPERTS AND TO STATE EXPERT OPINIONS AND THE REASONS FOR THEIR OPINIONS. EXPERT OPINION TESTIMONY SHOULD BE JUDGED JUST LIKE ANY OTHER TESTIMONY. YOU MAY ACCEPT IT OR REJECT IT, AND GIVE IT AS MUCH WEIGHT AS YOU THINK IT DESERVES, CONSIDERING THE WITNESS'S EDUCATION AND EXPERIENCE, THE REASONS GIVEN FOR THE OPINIONS, AND ALL THE OTHER EVIDENCE IN THE CASE.

THE OPINIONS OF SUCH EXPERTS MAY BE CONSIDERED BY YOU ONLY IF THERE IS PROOF OF MATERIAL FACTS WHICH FORM THE BASIS OF THE OPINIONS. YOU SHOULD DISREGARD THE OPINION OF AN EXPERT IF YOU FIND THAT THE MATERIAL FACTS ARE OTHER THAN AS ASSUMED BY THE EXPERT.

HYPOTHETICAL QUESTIONS HAVE BEEN ASKED AT THIS TRIAL. A HYPOTHETICAL QUESTION ASKS A WITNESS TO ASSUME THAT CERTAIN FACTS ARE TRUE, AND THEN TO GIVE AN OPINION BASED UPON THOSE ASSUMED FACTS. IF YOU FIND THAT ANY OF THE FACTS ASSUMED AND RELIED UPON BY THE WITNESS WHEN FORMING THE OPINION WERE NOT ESTABLISHED BY THE EVIDENCE OR WERE UNTRUE, YOU MUST DISREGARD THAT OPINION.

STATEMENTS MADE BY REPRESENTATIVES OF THE PLAINTIFF OR THE DEFENDANT THAT ARE UNFAVORABLE TO THE SPEAKER ARE CALLED ORAL

ADMISSIONS. A WITNESS'S TESTIMONY ABOUT SUCH STATEMENTS IS TO BE VIEWED WITH CAUTION. IN EVALUATING TESTIMONY ABOUT AN ORAL ADMISSION, YOU SHOULD CONSIDER TWO THINGS:

(1) WHETHER THE STATEMENT WAS CLEARLY AND UNDERSTANDINGLY MADE BY THE PARTY; AND

(2) WHETHER THE STATEMENT IS CORRECTLY REMEMBERED AND ACCURATELY REPORTED BY THE WITNESS.

AS YOU DECIDE THE FACTS IN THIS CASE, YOU MAY HAVE TO DECIDE WHICH TESTIMONY TO BELIEVE AND WHICH TESTIMONY NOT TO BELIEVE. YOU MAY BELIEVE EVERYTHING A WITNESS SAYS, PART OF THE TESTIMONY, OR NONE OF THE TESTIMONY.

YOU ARE THE JUDGES OF WHETHER THE WITNESSES WERE TELLING THE TRUTH WHEN THEY TESTIFIED. YOU ARE FREE TO DECIDE THE WITNESS'S TRUTHFULNESS BASED ON THE WAY IN WHICH THE WITNESS TESTIFIED, THE WITNESS'S CHARACTER, MOTIVE OR BIAS, OR IF THERE WAS OTHER CONFLICTING EVIDENCE WHICH YOU BELIEVE AND WHICH IS OPPOSITE FROM THE TESTIMONY OF THE WITNESS. IF YOU FIND THAT A WITNESS INTENTIONALLY LIED IN ONE PART OF HIS OR HER TESTIMONY, YOU ARE FREE TO DISREGARD ANYTHING ELSE THAT WITNESS SAID.

EVIDENCE THAT AT SOME OTHER TIME A WITNESS EITHER SAID OR DID OR FAILED TO SAY OR DO SOMETHING, WHICH IS INCONSISTENT WITH THE WITNESS'S

TESTIMONY AT THE TRIAL, MAY BE CONSIDERED BY THE JURY FOR THE SOLE PURPOSE OF JUDGING THE CREDIBILITY OF THE WITNESS.

IN CONSIDERING THE TESTIMONY OF ANY WITNESS, YOU MAY TAKE INTO ACCOUNT:

(1) THE OPPORTUNITY AND ABILITY OF THE WITNESS TO SEE OR HEAR OR KNOW THE THINGS TESTIFIED TO;

(2) THE WITNESS'S MEMORY;

(3) THE WITNESS'S MANNER WHILE TESTIFYING;

(4) THE WITNESS'S INTEREST IN THE OUTCOME OF THE CASE AND ANY BIAS OR PREJUDICE;

(5) WHETHER OTHER EVIDENCE CONTRADICTED THE WITNESS'S TESTIMONY;

(6) THE REASONABLENESS OF THE WITNESS'S TESTIMONY IN LIGHT OF ALL THE EVIDENCE; AND

(7) ANY OTHER FACTORS THAT BEAR ON BELIEVABILITY.

IN DECIDING WHETHER OR NOT TO BELIEVE A WITNESS, KEEP IN MIND THAT PEOPLE SOMETIMES FORGET THINGS. YOU NEED TO CONSIDER, THEREFORE, WHETHER A CONTRADICTION IS AN INNOCENT LAPSE OF MEMORY OR AN INTENTIONAL FALSEHOOD, AND THAT MAY DEPEND ON WHETHER IT HAS TO DO WITH AN IMPORTANT FACT, OR WITH ONLY A SMALL DETAIL. YOU ARE NOT REQUIRED TO ACCEPT THE TRUTH OF TESTIMONY, EVEN THOUGH THE TESTIMONY IS UNCONTRADICTED AND THE WITNESS IS NOT IMPEACHED.

THE WEIGHT OF THE EVIDENCE PRESENTED BY EACH SIDE DOES NOT NECESSARILY DEPEND ON THE NUMBER OF WITNESSES TESTIFYING. YOU MUST CONSIDER ALL THE EVIDENCE IN THE CASE, AND YOU MAY DECIDE THAT THE TESTIMONY OF A SMALLER NUMBER OF WITNESSES ON ONE SIDE HAS GREATER WEIGHT THAN THAT OF A LARGER NUMBER ON THE OTHER.

AFTER MAKING YOUR OWN JUDGMENT, YOU WILL GIVE THE TESTIMONY OF EACH WITNESS SUCH WEIGHT AS YOU THINK IT DESERVES.

IN DECIDING WHAT THE FACTS ARE, YOU ARE NOT LIMITED TO THE STATEMENTS OF THE WITNESSES. YOU ARE PERMITTED TO FORM REASONABLE CONCLUSIONS, BY MEANS OF COMMON SENSE, FROM WHAT YOU SEE AND HEAR. CONSIDER THE WITNESS'S ABILITY TO OBSERVE THE MATTERS TO WHICH HE OR SHE HAS TESTIFIED, AND WHETHER HE OR SHE IMPRESSES YOU AS HAVING AN ACCURATE RECOLLECTION. ALSO, CONSIDER THE RELATION EACH WITNESS MAY BEAR TO EITHER SIDE OR PARTY IN THE CASE AND THE EXTENT TO WHICH EACH WITNESS IS SUPPORTED OR CONTRADICTED BY OTHER EVIDENCE.

YOU MAY ALSO CONSIDER BIAS, PREJUDICE OR HOSTILITY OF A WITNESS IN DETERMINING THE WEIGHT TO BE ACCORDED TO THAT TESTIMONY.

AS I INSTRUCTED AT THE BEGINNING OF TRIAL, IN A CIVIL ACTION, A PARTY HAS THE BURDEN OF PROVING ITS CLAIMS BY A PREPONDERANCE OF THE EVIDENCE. WHEN A PARTY HAS THE BURDEN OF PROOF ON ANY CLAIM OR AFFIRMATIVE DEFENSE BY A PREPONDERANCE OF THE EVIDENCE, IT MEANS YOU

MUST BE PERSUADED BY THE EVIDENCE THAT THE CLAIM OR AFFIRMATIVE DEFENSE IS MORE PROBABLY TRUE THAN NOT TRUE. IT IS SUCH EVIDENCE THAT, WHEN WEIGHED WITH THAT OPPOSED TO IT, HAS MORE CONVINCING FORCE AND IS MORE PROBABLY TRUE AND ACCURATE. IN THE ABSENCE OF SUCH PROOF, THE PARTY CANNOT PREVAIL AS TO THAT CLAIM. IF ON ANY QUESTION IN THE CASE THE EVIDENCE APPEARS TO BE EQUALLY BALANCED, OR IF YOU CANNOT SAY ON WHICH SIDE IT WEIGHS HEAVIER, YOU MUST RESOLVE THAT QUESTION AGAINST THE PARTY ON WHOM THE BURDEN OF PROOF RESTS.

DURING THE COURSE OF TRIAL, YOU HEARD EVIDENCE CONCERNING DEFENDANT'S ACQUISITION OF PEACE HARBOR HOSPITAL IN FLORENCE, OREGON, AND COTTAGE GROVE COMMUNITY HOSPITAL IN COTTAGE GROVE, OREGON. YOU MAY NOT CONSIDER THIS EVIDENCE WHEN DETERMINING WHETHER DEFENDANT VIOLATED THE ANTITRUST LAWS. HOWEVER, THIS EVIDENCE MAY BE CONSIDERED BY YOU WHEN EVALUATING THE ISSUE OF MARKET POWER, WHICH I WILL EXPLAIN TO YOU LATER. LIKEWISE, YOU ALSO MAY NOT CONSIDER ANY EVIDENCE REGARDING DEFENDANT'S ACTIVITIES OUTSIDE OF OREGON WHEN DETERMINING WHETHER DEFENDANT VIOLATED THE ANTITRUST LAWS.

WHEN YOU ARE CONSIDERING THESE CLAIMS, YOU SHOULD BE AWARE OF THE UNDERLYING PRINCIPLES GOVERNING THE ANTITRUST LAWS. THE ANTITRUST LAWS WERE ENACTED TO PROTECT COMPETITION, BUT THEY DO NOT GUARANTEE SUCCESS TO THOSE WHO ENTER INTO BUSINESS. THE LAWS

RECOGNIZE THAT IN THE NATURAL OPERATION OF OUR ECONOMIC SYSTEM, SOME COMPETITORS ARE GOING TO LOSE BUSINESS AND MAY FAIL, WHILE OTHERS GAIN AND PROSPER. THE ANTITRUST LAWS WERE ENACTED TO PROTECT COMPETITION, BUT NOT INDIVIDUAL COMPETITORS.

PLAINTIFF MACKENZIE-WILLAMETTE CONTENDS THAT DEFENDANT PEACEHEALTH ENGAGED IN CERTAIN ACTIVITIES THAT INJURED PLAINTIFF. PLAINTIFF ALLEGES THAT THESE ACTIVITIES VIOLATED CERTAIN ANTITRUST LAWS OF THE UNITED STATES, VIOLATED THE PRICE DISCRIMINATION STATUTE OF THE STATE OF OREGON, AND CONSTITUTE IMPROPER INTERFERENCE WITH PROSPECTIVE ADVANTAGE. PLAINTIFF ASSERTS THAT DEFENDANT'S ACTIVITIES RESULTED IN THE LESSENING OF THE VALUE OF ITS BUSINESS AND/OR PROPERTY.

DEFENDANT DENIES THESE CONTENTIONS, ASSERTS THAT ITS ACTIVITIES WERE LAWFUL AND PROPER, RESULTED IN LOWER PRICES, INCREASED CHOICES FOR CONSUMERS, LED TO HIGHER OUTPUT, AND, IN ANY EVENT, DID NOT CAUSE ANY DAMAGE TO PLAINTIFF. DEFENDANT ALSO CLAIMS THAT ANY HARM TO PLAINTIFF WAS CAUSED BY PLAINTIFF'S OWN MISMANAGEMENT AND POOR BUSINESS DECISIONS.

PLAINTIFF'S FIRST CLAIM IS BROUGHT UNDER SECTION 1 OF THE SHERMAN ACT. IT ALLEGES THAT DEFENDANT ENTERED INTO UNLAWFUL EXCLUSIVE DEALING AGREEMENTS WITH PROVIDENCE HEALTH PLAN, REGENCE BLUECROSS

BLUESHIELD, WEYERHAEUSER, AND MONACO. DEFENDANT DENIES THESE ALLEGATIONS.

SECTION 1 OF THE SHERMAN ACT PROHIBITS CONTRACTS, COMBINATIONS OR CONSPIRACIES WHICH UNREASONABLY RESTRAIN COMMERCE. SECTION 1 DOES NOT MAKE ILLEGAL ALL AGREEMENTS IN RESTRAINT OF TRADE, BUT ONLY THOSE AGREEMENTS THAT UNREASONABLY RESTRAIN TRADE. UNDER THE ANTITRUST LAWS, "UNREASONABLENESS" MEANS THAT THE ANTI-COMPETITIVE CONSEQUENCES OF A PARTICULAR ACTION OR ARRANGEMENT OUTWEIGH ITS LEGITIMATE BUSINESS PURPOSES.

TO SHOW THAT A RESTRAINT IS UNREASONABLE, PLAINTIFF MUST PROVE THAT THE RESTRAINT SUBSTANTIALLY HARMED COMPETITION IN A RELEVANT PRODUCT AND GEOGRAPHIC MARKET. PLAINTIFF MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE:

(1) WHAT THE RELEVANT MARKET IS;

(2) THAT DEFENDANT'S ACTIVITIES HAD A SUBSTANTIALLY HARMFUL EFFECT ON COMPETITION AS A WHOLE IN THAT RELEVANT MARKET; AND

(3) THAT THE HARMFUL EFFECT ON COMPETITION OUTWEIGHS ANY BENEFICIAL EFFECT ON COMPETITION.

THERE ARE TWO ASPECTS YOU MUST CONSIDER IN DETERMINING WHETHER PLAINTIFF HAS PROVEN THE RELEVANT MARKET. THE FIRST IS A RELEVANT SERVICE OR PRODUCT MARKET. THE SECOND IS A RELEVANT GEOGRAPHIC

MARKET. FOR EACH RELEVANT SERVICE OR PRODUCT MARKET, PLAINTIFF MUST ALSO PROPERLY DEFINE A CORRESPONDING RELEVANT GEOGRAPHIC MARKET.

IF YOU FIND THAT NO RELEVANT GEOGRAPHIC MARKET HAS BEEN PROVEN, YOU MUST FIND IN FAVOR OF DEFENDANT. IF YOU FIND THAT PLAINTIFF HAS PROVED A RELEVANT GEOGRAPHIC MARKET, YOU MUST THEN CONSIDER WHETHER PLAINTIFF HAS PROVED THAT DEFENDANT'S ALLEGED RESTRAINT HAD A HARMFUL EFFECT ON COMPETITION IN THAT MARKET.

THE RELEVANT SERVICE MARKET IS THAT AREA IN WHICH THERE IS COMPETITION IN THE SALE AND DISTRIBUTION OF VARIOUS TYPES OF SERVICES OR COMMODITIES. THE ITEMS THAT COMPRISE THE RELEVANT SERVICE MARKET MUST BE REASONABLY INTERCHANGEABLE IN TERMS OF PRICE, THE USE TO WHICH THE SERVICE IS PUT, AND OTHER QUALITIES. SERVICES ARE REASONABLY INTERCHANGEABLE IF THEY ARE SIMILAR, IF THEY COMPETE WITH ONE ANOTHER FOR SALES, IF THEY HAVE SIMILAR USES, AND IF THE PURCHASES OF ONE ITEM ARE AFFECTED BY PRICE CHANGES IN THE OTHER ITEM. THE RELEVANT SERVICE MARKET MAY INCLUDE ITEMS HAVING SUBSTANTIALLY DIFFERENT PHYSICAL CHARACTERISTICS, IF THEY HAVE A STRONG COMMON CHARACTERISTIC AND IN FACT COMPETE WITH ONE ANOTHER.

IN THIS CASE, PLAINTIFF ALLEGES THAT THERE IS A RELEVANT PRODUCT MARKET FOR PRIMARY AND SECONDARY ACUTE CARE HOSPITAL SERVICES.

DEFENDANT ALLEGES THAT THE RELEVANT PRODUCT MARKET IS TOTAL INPATIENT ACUTE CARE HOSPITAL SERVICES.

WHETHER THE CONDUCT OF DEFENDANT UNREASONABLY RESTRAINED TRADE IS A DETERMINATION MADE IN THE CONTEXT OF THE RELEVANT GEOGRAPHIC AND SERVICE MARKET. THE APPROPRIATE GEOGRAPHIC MARKET IN ANTITRUST CASES IS THE AREA OF EFFECTIVE COMPETITION. A RELEVANT GEOGRAPHIC MARKET IS DEFINED AS THE AREA IN WHICH PATIENTS CAN PRACTICABLY TURN TO OBTAIN SPECIFIC HOSPITAL SERVICES AND IN WHICH DEFENDANT FACES COMPETITION FROM SUPPLIERS OF SUCH SERVICES. THE GEOGRAPHIC MARKETS MAY BE NATIONAL, REGIONAL, OR LOCAL DEPENDING UPON THE EVIDENCE.

PLAINTIFF CONTENDS THAT THE RELEVANT GEOGRAPHIC MARKET FOR PRIMARY AND SECONDARY ACUTE CARE HOSPITAL SERVICES CONSISTS OF LANE COUNTY.

DEFENDANT CONTENDS THAT THE RELEVANT GEOGRAPHIC MARKET FOR PRIMARY AND SECONDARY ACUTE CARE HOSPITAL SERVICES CONSISTS OF BENTON, COOS, CURRY, DOUGLAS, LANE, LINCOLN, AND LINN COUNTIES.

YOU NEED NOT ACCEPT THE DEFINITION OF RELEVANT GEOGRAPHIC MARKET THAT IS PROPOSED BY EITHER SIDE. YOU SHOULD TAKE A PRAGMATIC, FACTUAL APPROACH TO THE DEFINITION OF THE RELEVANT MARKET. THE GEOGRAPHIC MARKET YOU DEFINE SHOULD CORRESPOND TO COMMERCIAL

REALTIES AND BE ECONOMICALLY SIGNIFICANT. IN OTHER WORDS, THE MARKET SHOULD INCLUDE ONLY AS MUCH GEOGRAPHIC AREA AS YOU FIND REFLECTS THE AREA IN WHICH THE PARTIES TO THIS CASE EFFECTIVELY COMPETE.

TO DETERMINE THE PROPERLY DEFINED GEOGRAPHIC MARKET IN WHICH DEFENDANT COMPETES, YOU MAY CONSIDER WHETHER THE PEOPLE WORKING IN THE HEALTHCARE FIELD VIEW THE PROVIDERS IN THE DIFFERENT LOCATIONS AS BEING IN COMPETITION WITH ONE ANOTHER, AND ALSO TAKE INTO CONSIDERATION THE VIEWS OF THE CONSUMERS AND THE PUBLIC, AND ANY EVIDENCE THAT SIGNIFICANT CHANGES IN PRICES AT ONE LOCATION WOULD HAVE A FAIRLY DIRECT OR SUBSTANTIAL EFFECT ON THE PRICE OR VOLUME OF SERVICES AT OTHER LOCATIONS.

YOU MAY ALSO CONSIDER THE GEOGRAPHIC AREA IN WHICH PATIENTS, AS A PRACTICAL MATTER, CAN AND DO RECEIVE THE PARTICULAR SERVICES. THAT IS, WHETHER PATIENTS RESIDING IN ONE AREA RECEIVE CARE FROM THE SAME SOURCES AS PATIENTS RESIDING IN ANOTHER AREA. YOU MUST CONSIDER WHETHER A SELLER ATTEMPTING TO CHARGE MONOPOLY PRICES IN ONE LOCATION WOULD CAUSE PATIENTS TO TRAVEL TO OTHER LOCATIONS TO OBTAIN THE SERVICES AT LOWER PRICES. YOU MUST CONSIDER NOT JUST WHERE PATIENTS OBTAIN THE SERVICES NOW, BUT ALSO WHERE THEY COULD PRACTICABLY GO FOR THE SERVICES IF THE SELLERS RAISED PRICES OR REDUCED QUALITY.

IN ADDITION, YOU MAY ALSO CONSIDER HOW READILY PROVIDERS OF PARTICULAR SERVICES CAN AND DO SHIFT FROM PROVIDING SERVICES IN ONE LOCATION TO PROVIDING SERVICES IN ANOTHER. EVIDENCE THAT PROVIDERS CAN READILY SERVE DIFFERENT LOCATIONS IN RESPONSE TO PRICE CHANGES WOULD TEND TO INDICATE THAT THE DIFFERENT LOCATIONS ARE IN THE SAME GEOGRAPHIC MARKET.

IF YOU FIND THAT PLAINTIFF HAS PROVEN A PROPERLY DEFINED RELEVANT MARKET FOR PRIMARY AND SECONDARY ACUTE CARE HOSPITAL SERVICES BY A PREPONDERANCE OF THE EVIDENCE, YOU MUST THEN DETERMINE WHETHER DEFENDANT HAS MARKET POWER IN THE DEFINED MARKET. MARKET POWER MEANS THE ABILITY UNILATERALLY TO RAISE PRICES ABOVE COMPETITIVE LEVELS OR TO EXCLUDE COMPETITION.

IF PLAINTIFF HAS PROVEN A PROPERLY DEFINED MARKET FOR PRIMARY AND SECONDARY ACUTE CARE HOSPITAL SERVICES, THERE ARE A NUMBER OF FACTORS YOU SHOULD CONSIDER IN DETERMINING WHETHER DEFENDANT HAS MARKET POWER IN THAT MARKET. YOU MAY CONSIDER WHETHER DEFENDANT HAS SUCH A HIGH SHARE OF THE MARKET THAT PATIENTS DO NOT HAVE ALTERNATIVE OR SUBSTITUTE SOURCES OF SUCH SERVICES READILY AVAILABLE.

MARKET SHARE IS A PROVIDER'S SHARE OF TOTAL SALES OR SERVICES RENDERED IN THE MARKET, EXPRESSED AS A PERCENTAGE OF THE WHOLE. ANY

MEASURE OF MARKET SHARE YOU USE MUST BE REASONABLE AND CONSISTENTLY APPLIED.

IN ADDITION TO MARKET SHARES, IT IS NECESSARY TO ASSESS THE MARKET STRUCTURE IN DETERMINING WHETHER OR NOT MARKET POWER EXISTS FOR PURPOSES OF SECTION 1 OF THE SHERMAN ACT. ANALYZING MARKET STRUCTURE REQUIRES YOU TO EXAMINE ALL COMPETITIVE FACTORS WHICH BEAR ON THE DEFENDANT'S POWER TO CONTROL PRICES OR EXCLUDE COMPETITION.

AMONG THE FACTORS YOU ARE TO CONSIDER ARE THE NUMBER OF PROVIDERS IN THE RELEVANT MARKET AND THE RELATIVE SIZE AND STRENGTH OF THE OTHER COMPETITORS. IF THE NUMBER OF COMPETITORS IS FEW, OR COMPETITORS ARE WEAK OR HAVE SMALL OR DECREASING MARKET SHARES SO THAT THEY DO NOT OFFER SUBSTANTIAL COMPETITION IN THE RELEVANT MARKET, THIS MAY INDICATE THAT DEFENDANT HAS MARKET POWER. IF, ON THE OTHER HAND, COMPETITORS ARE NUMEROUS, VIGOROUS, OR HAVE LARGE OR INCREASING SHARES IN THAT MARKET, THIS MAY BE EVIDENCE THAT DEFENDANT DOES NOT HAVE MARKET POWER.

WHEN DETERMINING WHETHER DEFENDANT HAS MARKET POWER, YOU MAY ALSO CONSIDER THE HISTORY OF ENTRY INTO AND EXIT FROM THE MARKET BY OTHER COMPANIES. ENTRY OF COMPANIES INTO THE MARKET MAY INDICATE THAT DEFENDANT LACKS MONOPOLY POWER. IN CONTRAST, DEPARTURE OF

COMPANIES FROM THE MARKET, OR THE FAILURE OF COMPANIES TO ENTER THE MARKET, MAY INDICATE THAT DEFENDANT HAS MARKET POWER.

A SHOWING THAT DEFENDANT HAD MARKET POWER WOULD BE INSUFFICIENT, ON ITS OWN, TO ESTABLISH MARKET-WIDE HARM TO COMPETITION. PLAINTIFF MUST PROVE ACTUAL, CONCRETE, AND SIGNIFICANT HARM TO MARKET-WIDE COMPETITION BY A PREPONDERANCE OF THE EVIDENCE. PLAINTIFF MUST SHOW THAT THE ALLEGED RESTRAINT HARMED OVERALL COMPETITION IN THE RELEVANT MARKET, FOR EXAMPLE, BY RAISING PRICES OR REDUCING OUTPUT, AND NOT JUST THAT IT HARMED PLAINTIFF OR ITS BUSINESS. PLAINTIFF CANNOT PREVAIL IF IT FAILS TO PROVE THAT DEFENDANT'S ACTIONS ADVERSELY AFFECTED SERVICE, QUALITY, OR PRICE MARKET-WIDE.

IN EVALUATING WHETHER PLAINTIFF HAS SHOWN ACTUAL HARM TO THE MARKET AS A WHOLE, YOU MUST CONSIDER WHETHER THERE HAS BEEN A NEGATIVE IMPACT ON THE MARKET'S TOTAL OUTPUT, SERVICE, QUALITY, OR PRICING. THE CRITICAL ISSUE IS NOT WHETHER A PARTICULAR COMPETITOR OR COMPETITORS HAVE BEEN HARMED, BUT WHETHER CONSUMERS AS A WHOLE HAVE SUFFERED INJURY. ACCORDINGLY, A COMPETITOR'S DIMINISHED MARKET SHARE OR INABILITY TO COMPETE EFFECTIVELY IN A GIVEN MARKET IS NOT ENOUGH TO SHOW MARKET-WIDE INJURY FOR ANTITRUST PURPOSES. SIMILARLY, THE FACT THAT SOME PRICES MAY HAVE INCREASED IS NOT SUFFICIENT TO SHOW ACTUAL HARM TO MARKET-WIDE COMPETITION. INSTEAD, MARKET-WIDE

HARM CAN BE SHOWN ONLY IF THE MARKET-WIDE PRICES HAVE INCREASED SIGNIFICANTLY ABOVE THOSE LEVELS CONSUMERS WOULD PAY IN A COMPETITIVE MARKET.

IF YOU FIND THAT PLAINTIFF HAS NOT PROVEN ACTUAL HARM AND MARKET-WIDE INJURY BY A PREPONDERANCE OF THE EVIDENCE, THEN YOU MUST FIND FOR DEFENDANT AND AGAINST PLAINTIFF ON THE ANTITRUST CLAIMS.

IF YOU FIND THAT DEFENDANT'S CONDUCT HARMED MARKET-WIDE COMPETITION IN A RELEVANT MARKET, YOU MUST THEN CONSIDER HOW MUCH COMPETITION WAS HARMED. A RESTRAINT IS UNREASONABLE ONLY IF IT SUBSTANTIALLY HARMS COMPETITION. A RESTRAINT THAT HAS ONLY A SLIGHT OR INSUBSTANTIAL IMPACT ON COMPETITION IS NOT UNREASONABLE OR UNLAWFUL. YOUR TASK IS TO BALANCE ANY OF THE ASPECTS OF THE RESTRAINT THAT WERE HELPFUL TO COMPETITION AGAINST ANY ASPECTS THAT WERE HARMFUL TO IT. IN DOING SO, YOU SHOULD CONSIDER SUCH FACTORS AS THE PARTICULAR BUSINESS IN WHICH DEFENDANT OPERATES; THE CONDITION OF THE MARKET BEFORE AND AFTER THE RESTRAINT WAS IMPOSED; THE NATURE OF THE RESTRAINT AND ITS EFFECT ON COMPETITION; THE HISTORY OF THE RESTRAINT; THE REASON FOR ADOPTING THE RESTRAINT; AND DEFENDANT'S PURPOSE OR INTENT. IN DETERMINING IF THE RESTRAINT SUBSTANTIALLY HARMED COMPETITION, YOU SHOULD CONSIDER DEFENDANT'S MARKET POWER AND HOW MUCH OF THE MARKET WAS AFFECTED BY ITS CONDUCT.

IF PLAINTIFF HAS SHOWN BY A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANT'S CONDUCT HAD A SUBSTANTIALLY HARMFUL EFFECT ON COMPETITION IN A RELEVANT MARKET, YOU MUST ALSO WEIGH ANY EFFECTS OF THE RESTRAINT THAT PROMOTE COMPETITION AGAINST ANY HARMFUL EFFECTS. FOR INSTANCE, YOU SHOULD CONSIDER WHETHER THE RESTRAINT HELPS DEFENDANT TO COMPETE WITH OTHER PROVIDERS, WHETHER DEFENDANT IMPOSED IT TO AID A THIRD-PARTY PAYOR, AND WHETHER IT IS NECESSARY FOR THE PRODUCT OR SERVICE TO BE AVAILABLE.

POTENTIAL PRO-COMPETITIVE BENEFITS ALSO COULD INCLUDE AN ENHANCED ABILITY TO OFFER COST-SAVINGS TO PATIENTS AND OTHER PURCHASERS, TO PROVIDE PURCHASERS WITH A CHOICE OF HEALTH PLAN OPTIONS, AND TO PROVIDE A HIGHER QUALITY OF CARE. IF THE BENEFICIAL EFFECTS OUTWEIGH THE HARMFUL EFFECTS, OR IF THE NET EFFECT ON COMPETITION IS HARMFUL BUT INSUBSTANTIAL, THE CHALLENGED RESTRAINT IS NOT UNREASONABLE OR UNLAWFUL. THE FACT THAT A RESTRAINT DOES NOT PROVIDE ANY BENEFIT TO COMPETITION DOES NOT NECESSARILY MEAN THAT IT IS UNREASONABLE. IF THE RESTRAINT HAS ONLY A SLIGHT OR INSUBSTANTIAL ADVERSE IMPACT ON COMPETITION, IT IS NOT UNREASONABLE OR UNLAWFUL.

CONSIDERATION OF THE PURPOSE OF THE RESTRAINT MAY HELP YOU DETERMINE IF IT WOULD LIKELY HAVE A HARMFUL EFFECT ON COMPETITION. YOU MAY CONSIDER, FOR EXAMPLE, WHETHER DEFENDANT IMPOSED THE

RESTRAINT TO ACHIEVE A LEGITIMATE BUSINESS PURPOSE AND, IF SO, WHETHER THE RESTRAINT WAS TAILORED TO ACHIEVE THAT LEGITIMATE BUSINESS PURPOSE OR, RATHER, WAS BROADER THAN NECESSARY. HOWEVER, GOOD PURPOSE DOES NOT SAVE AN OTHERWISE UNREASONABLE RESTRAINT OF TRADE.

AS I HAVE INSTRUCTED YOU, PLAINTIFF BRINGS ONE CLAIM UNDER §1 OF THE SHERMAN ACT, ALLEGING THAT DEFENDANT ENTERED INTO UNLAWFUL EXCLUSIVE DEALING AGREEMENTS WITH PROVIDENCE HEALTH PLAN, REGENCE BLUECROSS BLUESHIELD, WEYERHAEUSER, AND MONACO. DEFENDANT DENIES THESE ALLEGATIONS.

UNDER A TYPICAL EXCLUSIVE DEAL OR CONTRACT, A BUYER AGREES TO PURCHASE PRODUCTS FOR A PERIOD OF TIME EXCLUSIVELY FROM ONE SUPPLIER AND NOT FROM OTHERS. YOU SHOULD NOT ASSUME THAT A CONTRACT IS ILLEGAL MERELY BECAUSE IT IS EXCLUSIVE. PREFERRED PROVIDER PLANS ARE COMMON IN THE HEALTHCARE INDUSTRY.

PLAINTIFF MUST PROVE THAT DEFENDANT ENTERED INTO AGREEMENTS WITH ONE OR MORE PARTIES THAT WERE EXPRESSLY OR DE FACTO EXCLUSIVE; AND THAT THE EFFECT OF SUCH ARRANGEMENTS WAS TO UNREASONABLY RESTRAIN TRADE AND COMMERCE, AS I HAVE DEFINED THOSE TERMS FOR YOU.

AN AGREEMENT IS EXCLUSIVE IF ITS EXPRESS TERMS REQUIRE THAT THE PARTIES TO IT DEAL EXCLUSIVELY WITH EACH OTHER. AN AGREEMENT IS DE

FACTO EXCLUSIVE IF ITS APPLICATION EFFECTIVELY FORECLOSES BUSINESS WITH OTHERS.

AGREEMENTS THAT BUNDLE DISCOUNTS ON MULTIPLE PRODUCTS, NOT ALL OF WHICH ARE SOLD BY A COMPETITOR, MAY BE FOUND TO BE DE FACTO EXCLUSIVE ARRANGEMENTS.

TO WIN ON ITS EXCLUSIVE CONTRACTING CLAIM, PLAINTIFF MUST PROVE EACH OF THE FOLLOWING ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE:

(1) A PROPERLY DEFINED RELEVANT MARKET;

(2) THAT DEFENDANT ENTERED INTO EXCLUSIVE CONTRACTS WITH PAYORS; AND

(3) THAT THESE EXCLUSIVE CONTRACTS FORECLOSED COMPETITION IN A SUBSTANTIAL SHARE OF THE RELEVANT MARKET.

THE COMPETITION FORECLOSED BY THE CONTRACT MUST BE FOUND TO CONSTITUTE A SUBSTANTIAL SHARE OF THE RELEVANT MARKET. THAT IS TO SAY, THE OPPORTUNITIES FOR OTHER TRADERS TO ENTER INTO OR REMAIN IN THAT MARKET MUST BE SIGNIFICANTLY LIMITED.

IF YOU FIND THAT PLAINTIFF HAS PROVEN THAT THE EXCLUSIVE DEALING ARRANGEMENT HAS IN THE PAST, OR DOES NOW SUBSTANTIALLY LESSEN COMPETITION IN THE RELEVANT MARKET, THEN YOU MUST GO ON TO CONSIDER WHETHER THE EXCLUSIVE DEALING ARRANGEMENT IS NEVERTHELESS REASONABLE. IN SO DOING, YOU SHOULD CONSIDER SUCH FACTORS AS:

(1) THE CIRCUMSTANCES UNDER WHICH DEFENDANT SET UP THE EXCLUSIVE CONTRACT AND ITS REASONS FOR DOING SO;

(2) THE RELATIVE BARGAINING STRENGTH OF THE PARTIES TO THE ARRANGEMENT. IF THE PARTIES HAD RELATIVELY EQUAL BARGAINING STRENGTH THEN THE ARRANGEMENT IS LESS LIKELY TO BE UNREASONABLE;

(3) THE DURATION OF THE EXCLUSIVE CONTRACT AND HOW EASY IT IS TO TERMINATE. IF THE CONTRACT LASTS A RELATIVELY SHORT TIME, OR CAN BE TERMINATED EASILY, IT IS LESS LIKELY TO UNREASONABLY LIMIT THE OPPORTUNITIES FOR COMPETING SELLERS TO ENTER OR REMAIN IN THE MARKET; AND

(4) ANY FAVORABLE EFFECTS ON COMPETITION THAT THE EXCLUSIVE CONTRACT PRODUCES.

YOU SHOULD ALSO CONSIDER THE PRO-COMPETITIVE EFFECTS OF THE ALLEGED EXCLUSIVE CONTRACTS, IF ANY. DEFENDANT CONTENDS THAT ITS CONTRACTS WITH REGENCE BLUECROSS BLUESHIELD, PROVIDENCE HEALTH PLAN, WEYERHAEUSER, AND MONACO COACH PROMOTE COMPETITION BY PROVIDING PAYORS WITH A CHOICE AMONG DIFFERENT TYPES OF HEALTH PLANS, THAT THE CONTRACTS CREATE INCENTIVES TO OFFER LOWER PRICES, INCLUDING LOWER HEALTH INSURANCE PREMIUMS AND CO-PAYMENTS, AND THAT THE CONTRACTS HAVE NOT HARMED MARKET-WIDE COMPETITION IN A RELEVANT MARKET.

IF, AFTER WEIGHING THE ALLEGED FORECLOSURE FROM A SUBSTANTIAL SHARE OF THE MARKET AGAINST THE ALLEGED FACTORS REGARDING WHETHER THE CONTRACTS ARE REASONABLE, YOU FIND THAT PLAINTIFF HAS PROVEN A SUBSTANTIAL LESSENING OF COMPETITION IN THE RELEVANT MARKET DUE TO DEFENDANT'S ALLEGEDLY EXCLUSIVE CONTRACTS, YOU MAY FIND IN FAVOR OF PLAINTIFF ON ITS FIRST CLAIM. IF, HOWEVER, YOU FIND THAT THE CONTRACTS DO NOT FORECLOSE PLAINTIFF FROM A SUBSTANTIAL SHARE OF THE MARKET, OR THAT THE CONTRACTS ARE NOT UNREASONABLE, OR THAT THE PRO-COMPETITIVE EFFECTS OF THE CONTRACTS OUTWEIGH THEIR ANTI-COMPETITIVE EFFECTS, YOU MUST FIND IN FAVOR OF DEFENDANT.

THE ANTITRUST LAW UPON WHICH PLAINTIFF BASES ITS CLAIM ASSERTING CONSPIRACY TO MONOPOLIZE, ITS CLAIM ASSERTING MONOPOLIZATION, AND ITS CLAIM ASSERTING ATTEMPTED MONOPOLIZATION, IS KNOWN AS SECTION 2 OF THE SHERMAN ACT. SECTION 2 MAKES IT UNLAWFUL FOR A PERSON TO MONOPOLIZE, OR ATTEMPT TO MONOPOLIZE OR CONSPIRE WITH ANY OTHER PERSON TO MONOPOLIZE TRADE OR COMMERCE. THE TERM "PERSON" INCLUDES INDIVIDUALS, CORPORATIONS, PARTNERSHIPS, AND EVERY OTHER ASSOCIATION OR ORGANIZATION OF EVERY KIND AND CHARACTER.

MERE POSSESSION OF MONOPOLY POWER, IF LAWFULLY ACQUIRED, DOES NOT VIOLATE THE ANTITRUST LAWS. IT IS UNLAWFUL TO USE MONOPOLY POWER TO FORECLOSE COMPETITION OR TO DESTROY A COMPETITOR, AND A COMPANY

THAT HAS LAWFULLY ACQUIRED MONOPOLY POWER MAY NOT USE THAT POWER TO MAINTAIN OR TIGHTEN ITS HOLD ON THE MARKET. SUCH USE MAY BE SHOWN BY CONDUCT THAT WOULD BE SUCCESSFUL ONLY IF DONE BY A COMPANY WITH MONOPOLY POWER.

BEING A MONOPOLIST DOES NOT, HOWEVER, PLACE ANY SPECIAL BURDENS ON A COMPETITOR. IN THE INTEREST OF OVERALL COMPETITION, THE LAW RECOGNIZES THAT A MONOPOLIST HAS THE SAME RIGHT TO COMPETE AS ANY OTHER COMPANY.

AS WITH ITS CLAIMS UNDER SECTION 1 OF THE SHERMAN ACT, TO ESTABLISH AN UNLAWFUL MONOPOLY UNDER SECTION 2 OF THE ACT, PLAINTIFF MUST SHOW THAT THE CHALLENGED CONDUCT ACTUALLY INJURES COMPETITION, NOT JUST COMPETITORS. PLAINTIFF MUST SHOW THAT THE RESTRAINT HARMED OVERALL COMPETITION IN THE RELEVANT MARKET, FOR EXAMPLE, BY RAISING PRICES OR REDUCING OUTPUT, NOT JUST THAT IT HARMED PLAINTIFF OR PLAINTIFF'S BUSINESS.

PLAINTIFF ALSO HAS CLAIMS FOR ATTEMPT TO MONOPOLIZE, AND MONOPOLIZATION OF, ACUTE CARE HOSPITAL SERVICES WITHIN THE RELEVANT GEOGRAPHIC MARKET. AS I HAVE STATED, SECTION 2 OF THE SHERMAN ACT PROHIBITS MONOPOLIZATION OR ATTEMPTED MONOPOLIZATION OF ANY PART OF TRADE OR COMMERCE AMONG THE STATES.

PLAINTIFF ALLEGES THAT IT WAS INJURED BY DEFENDANT'S UNLAWFUL MONOPOLIZATION OF ACUTE CARE HOSPITAL SERVICES. TO WIN ON ITS MONOPOLIZATION CLAIM, PLAINTIFF MUST PROVE EACH OF THE FOLLOWING ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE:

(1) THAT DEFENDANT HAD MONOPOLY POWER IN THE RELEVANT MARKET;

(2) THAT DEFENDANT WILLFULLY ACQUIRED OR MAINTAINED THAT POWER THROUGH RESTRICTIVE OR EXCLUSIONARY CONDUCT;

(3) THE HARMFUL EFFECT ON COMPETITION OF DEFENDANT'S CONDUCT OUTWEIGHS ANY BENEFICIAL EFFECT ON COMPETITION; AND

(4) THAT PLAINTIFF WAS INJURED IN ITS BUSINESS OR PROPERTY BECAUSE OF DEFENDANT'S RESTRICTIVE OR EXCLUSIONARY CONDUCT.

IF MONOPOLY POWER EXISTS, IT MUST BE FOUND TO EXIST WITHIN A RELEVANT MARKET. THE GOVERNING CONCEPTS THAT I DESCRIBED IN CONNECTION WITH PLAINTIFF'S BURDEN TO DEFINE THE RELEVANT MARKET FOR PURPOSES OF THE SECTION 1 CLAIMS ALSO APPLY TO THE DEFINITION OF THE RELEVANT MARKET FOR PURPOSES OF THE SECTION 2 CLAIMS.

MONOPOLY POWER IS THE POWER TO DOMINATE OR CONTROL A MARKET. THIS MEANS THE POWER TO CONTROL PRICES OR TO EXCLUDE COMPETITION IN A PROPERLY DEFINED PRODUCT AND GEOGRAPHIC MARKET. TO HAVE THE POWER TO CONTROL PRICES, A COMPANY MUST BE ABLE TO ESTABLISH APPRECIABLY HIGHER PRICES THAN THE PRICES CHARGED BY ITS COMPETITORS FOR

EQUIVALENT SERVICES, WITHOUT A SUBSTANTIAL LOSS OF BUSINESS TO THOSE COMPETITORS. THE POWER TO EXCLUDE COMPETITION MEANS A COMPANY'S POWER TO DOMINATE A GIVEN MARKET BY ELIMINATING EXISTING COMPETITION FROM THAT MARKET OR BY PREVENTING NEW COMPETITION FROM ENTERING THAT MARKET.

AS I PREVIOUSLY INSTRUCTED YOU WITH RESPECT TO ASSESSING MARKET POWER FOR PURPOSES OF THE SECTION 1 CLAIM, THERE ARE A NUMBER OF FACTORS YOU SHOULD CONSIDER IN ASSESSING MONOPOLY POWER. THE EXISTENCE OF MONOPOLY POWER MAY BE SHOWN BY EVIDENCE THAT DEFENDANT HAD THE POWER TO RAISE PRICES APPRECIABLY WITHOUT A SUBSTANTIAL LOSS OF BUSINESS TO COMPETITORS, OR BY EVIDENCE THAT DEFENDANT EARNED EXTRAORDINARILY LARGE PROFITS OR MAINTAINED HIGH RATES OF RETURN OVER A LONG PERIOD OF TIME.

IF YOU FIND THAT DEFENDANT DID NOT HAVE MONOPOLY POWER, THEN YOU MUST FIND THAT DEFENDANT DID NOT VIOLATE THE MONOPOLIZATION PART OF SECTION 2 OF THE SHERMAN ACT, AND YOU MUST ACCORDINGLY FIND FOR DEFENDANT AND AGAINST PLAINTIFF ON THIS CLAIM. IF YOU FIND THAT DEFENDANT HAD MONOPOLY POWER, THEN YOU MUST CONSIDER THE REMAINING ELEMENTS OF ITS MONOPOLIZATION CLAIM.

TO PREVAIL ON ITS MONOPOLIZATION CLAIM, PLAINTIFF MUST ALSO PROVE THAT DEFENDANT WILLFULLY ACQUIRED OR MAINTAINED MONOPOLY

POWER THROUGH PREDATORY OR EXCLUSIONARY ACTS OR PRACTICES. PLAINTIFF CONTENDS THAT DEFENDANT'S EXCLUSIVE CONTRACTS, PHYSICIAN ARRANGEMENTS, PRICING, AND RESTRICTIVE COVENANTS CONSTITUTE PREDATORY OR EXCLUSIONARY CONDUCT. DEFENDANT CONTENDS THAT THESE WERE LAWFUL ACTS.

PREDATORY OR EXCLUSIONARY CONDUCT IS CONDUCT THAT HAS THE EFFECT OF PREVENTING OR EXCLUDING COMPETITION, OR FRUSTRATING OR IMPAIRING THE EFFORTS OF OTHER FIRMS TO COMPETE FOR CUSTOMERS WITHIN THE RELEVANT MARKET. IT IS NOT NECESSARY THAT SUCH CONDUCT BE UNLAWFUL IN AND OF ITSELF, APART FROM ITS EFFECT IN SECURING OR MAINTAINING DEFENDANT'S MONOPOLY POWER.

UNDER THE ANTITRUST LAWS, A MONOPOLIST IS ENCOURAGED TO COMPETE VIGOROUSLY WITH ITS COMPETITORS. IN DETERMINING WHETHER THERE HAS BEEN AN UNLAWFUL EXERCISE OF MONOPOLY POWER, YOU MUST BEAR IN MIND THAT A COMPANY HAS NOT ACTED UNLAWFULLY SIMPLY BECAUSE IT HAS ENGAGED IN ORDINARY COMPETITIVE BEHAVIOR THAT WOULD HAVE BEEN AN EFFECTIVE MEANS OF COMPETITION IF IT WERE ENGAGED IN BY A FIRM WITHOUT MONOPOLY POWER, OR SIMPLY BECAUSE IT IS LARGE AND EFFICIENT.

TO PROVE THAT DEFENDANT ACTED WILLFULLY TO ACQUIRE OR MAINTAIN MONOPOLY POWER, PLAINTIFF MUST PROVE EITHER THAT DEFENDANT ENGAGED

IN PREDATORY OR EXCLUSIONARY ACTS OR PRACTICES WITH THE INTENT OF FURTHERING ITS DOMINANCE IN THE RELEVANT MARKET, OR THAT THIS WAS THE NECESSARY DIRECT CONSEQUENCE OF DEFENDANT'S CONDUCT OR BUSINESS ARRANGEMENTS. YOU MAY NOT FIND THAT DEFENDANT WILLFULLY ACQUIRED OR MAINTAINED MONOPOLY POWER IF IT ACQUIRED OR MAINTAINED THAT POWER SOLELY THROUGH THE EXERCISE OF SUPERIOR FORESIGHT AND MANAGEMENT SKILL; OR BY OFFERING SUPERIOR QUALITY; OR BECAUSE OF HISTORICAL ADVANTAGES SUCH AS BEING THE FIRST COMPETITOR IN A MARKET; OR BECAUSE OF ECONOMIC OR TECHNOLOGICAL EFFICIENCY; OR BECAUSE A CHANGE IN COST OR TASTE DROVE OUT ALL BUT ONE SUPPLIER.

THE ACTS OR PRACTICES THAT RESULTED IN THE ACQUISITION OR MAINTENANCE OF MONOPOLY POWER MUST REPRESENT SOMETHING MORE THAN THE CONDUCT OF BUSINESS THAT IS PART OF THE NORMAL COMPETITIVE PROCESS OR COMMERCIAL SUCCESS.

PLAINTIFF HAS ALLEGED THAT ONE WAY DEFENDANT ACQUIRED OR MAINTAINED MONOPOLY POWER IS THROUGH PREDATORY PRICING. "PREDATORY PRICING" MEANS CHARGING A PRICE BELOW COST, AS I WILL DEFINE THAT TERM FOR YOU, TO DRIVE OUT OR INJURE COMPETITION AND WITH A REASONABLE EXPECTATION THAT A HIGHER PRICE CAN BE CHARGED ONCE THE COMPETITION HAS BEEN SUBSTANTIALLY LESSENED OR ELIMINATED.

TO PREVAIL ON THIS CLAIM, PLAINTIFF MUST PROVE EACH OF THE FOLLOWING ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE:

(1) DEFENDANT'S PRICES ARE BELOW COST, AS I WILL DEFINE THAT TERM FOR YOU; AND

(2) DEFENDANT IS LIKELY TO RAISE PRICES IN THE FUTURE TO LEVELS HIGHER THAN COMPETITIVE LEVELS TO RECOUP ITS LOST PROFITS AND OBTAIN SOME ADDITIONAL GAIN.

THE LAW DOES NOT PROHIBIT A FIRM FROM OFFERING LOW PRICES THAT ARE PROFITABLE TO IT, EVEN IF THE SELLER EXPECTS THAT ALL OF ITS COMPETITORS WILL BE UNABLE TO MEET ITS LOW PRICES, AND THAT EVENTUALLY THEY WILL GO OUT OF BUSINESS. OFFERING LOW, BUT PROFITABLE, PRICES IS A LEGITIMATE PRACTICE, AND SHOULD NOT BE CONFUSED WITH "PREDATORY" PRICING.

THE QUESTION YOU MUST DECIDE IS WHETHER DEFENDANT'S PRICES WERE "PREDATORY." IN DECIDING THIS QUESTION, YOU MUST CONSIDER WHETHER DEFENDANT EXPECTED ITS PRICES TO BE PROFITABLE AND WHETHER IT DELIBERATELY INTENDED TO FOREGO PRESENT INCOME IN ORDER TO DISCIPLINE COMPETITORS OR DRIVE THEM OUT OF BUSINESS. IN DETERMINING WHETHER DEFENDANT'S PRICES WERE PROFITABLE, YOU SHOULD DEDUCT WHAT IT COST DEFENDANT TO MAKE AND SELL ITS SERVICES FROM THE MONEY IT RECEIVED FROM THE SALE OF THOSE SERVICES. THERE ARE VARIOUS RECOGNIZED

CATEGORIES OF COSTS THAT A FIRM WILL INCUR IN RUNNING ITS BUSINESS. FOR PURPOSES OF DETERMINING WHETHER DEFENDANT'S CHALLENGED PRICES WERE PREDATORY, YOU MUST APPLY THE COST TESTS THAT I WILL NOW EXPLAIN.

A SELLER'S COSTS IN MAKING AND SELLING A PRODUCT ARE DIVIDED INTO TWO CATEGORIES: COSTS THAT THE SELLER WILL HAVE TO PAY WHETHER OR NOT IT MAKES A PARTICULAR SALE, AND COSTS THAT THE SELLER INCURS ONLY IN CONNECTION WITH THE MANUFACTURE AND SALE OF A SPECIFIC UNIT OF ITS PRODUCT.

THE FIRST KIND OF COST IS REFERRED TO AS AN INDIRECT OR FIXED COST – A COST THAT THE SELLER WOULD BEAR IN ANY EVENT. THE SECOND KIND OF COST IS REFERRED TO AS A DIRECT COST OR A "VARIABLE COST." VARIABLE COSTS IN THIS CASE ARE THOSE COSTS THAT INCREASE AS EACH ADDITIONAL PATIENT IS TREATED OR AS EACH ADDITIONAL PROCEDURE IS PERFORMED. VARIABLE COSTS TYPICALLY INCLUDE SUCH THINGS AS MEDICAL SUPPLIES USED TO TREAT PATIENTS AND WAGES PAID TO HOSPITAL EMPLOYEES DIRECTLY ASSOCIATED WITH PATIENT CARE. "AVERAGE VARIABLE COST" IS THE SUM OF ALL VARIABLE COSTS, DIVIDED BY THE TOTAL NUMBER OF PROCEDURES EXPECTED TO BE PERFORMED.

TOTAL COST IS THE SUM OF BOTH FIXED AND VARIABLE COSTS, AND AVERAGE TOTAL COST IS THE TOTAL COST DIVIDED BY THE NUMBER OF UNITS.

PRICES SET ABOVE AVERAGE TOTAL COST ARE LAWFUL. PRICES SET ABOVE AVERAGE VARIABLE COST ARE PRESUMED TO BE LAWFUL. IF YOU FIND THAT DEFENDANT'S PRICES WERE ABOVE AVERAGE VARIABLE COST, OR THAT DEFENDANT REASONABLY BELIEVED THEY WOULD BE ABOVE AVERAGE VARIABLE COST AT THE TIME THEY WERE SET, YOU MUST FIND THAT DEFENDANT'S PRICES WERE LAWFUL, UNLESS PLAINTIFF PROVES EACH OF THE FOLLOWING BY A PREPONDERANCE OF THE EVIDENCE:

(1) THAT THE CHALLENGED PRICES WERE BELOW AVERAGE VARIABLE COST; AND

(2) THAT DEFENDANT INTENDED TO RECOVER ITS LOSSES BY RAISING ITS PRICES ON THOSE SAME SERVICES AFTER COMPETITION HAD BEEN LESSENED OR ELIMINATED.

PRICES SET BELOW AVERAGE VARIABLE COST, DEPENDING ON THE PRODUCT OR SERVICE BEING OFFERED, MAY CONSTITUTE PREDATORY PRICING. TO FIND FOR PLAINTIFF ON THIS ELEMENT YOU MUST FIND THAT DEFENDANT'S PRICES FOR A SERVICE LINE, AS A WHOLE, WERE NOT REASONABLY ANTICIPATED TO RETURN DEFENDANT'S COST ON THAT SERVICE LINE. IN DETERMINING WHETHER DEFENDANT SOLD AT A PRICE BELOW ITS REASONABLY ANTICIPATED COSTS, YOU MUST CONSIDER DEFENDANT'S PRICES ON ALL OF THE PROCEDURES IN A SERVICE LINE, AS WELL AS DEFENDANT'S COSTS FOR THAT SERVICE LINE AS A WHOLE.

TO ESTABLISH PREDATORY PRICING, PLAINTIFF MUST PROVE THAT DEFENDANT'S PRICES WERE NOT REASONABLY EXPECTED TO COVER ITS AVERAGE VARIABLE COSTS. IF YOU FIND THAT AT THE TIME THE PRICES WERE SET, THE DEFENDANT'S OFFICERS OR EMPLOYEES WHO WERE RESPONSIBLE FOR ESTABLISHING THE PRICES HAD A REASONABLE BELIEF THAT THE PRICES WOULD COVER DEFENDANT'S AVERAGE VARIABLE COSTS, THEN YOU MAY NOT FIND THAT DEFENDANT ENGAGED IN PREDATORY PRICING.

IN DECIDING WHETHER DEFENDANT HAD SUCH A REASONABLE BELIEF, YOU SHOULD FOCUS ON THE INFORMATION AVAILABLE TO THE PERSONS WHO MADE THE PRICING DECISION. YOU ALSO MAY CONSIDER EVIDENCE OF DEFENDANT'S ACTUAL EXPERIENCE IN THE MARKETPLACE IN DECIDING IF IT HAD A REASONABLE BELIEF THAT ITS PRICES WOULD COVER ITS AVERAGE VARIABLE COSTS.

A LOW PRICE CANNOT BE PREDATORY UNDER THE ANTITRUST LAWS WHERE, AT THE TIME THE PRICE WAS OFFERED, THERE WAS NO REASONABLE CHANCE THAT THE SELLER WOULD BE ABLE TO RAISE PRICES IN THE FUTURE TO LEVELS HIGHER THAN WOULD BE OFFERED IN A COMPETITIVE MARKET, AND THEREBY MAKE UP ITS LOST PROFITS AND OBTAIN SOME ADDITIONAL GAIN. MAKING UP LOST PROFITS IN THIS WAY IS CALLED "RECOUPMENT."

FOR RECOUPMENT TO OCCUR, BELOW-COST PRICING MUST BE CAPABLE OF PRODUCING THE INTENDED EFFECTS ON THE FIRM'S RIVALS, WHETHER THAT IS

DRIVING THEM FROM THE MARKET OR CAUSING THEM TO RAISE PRICES TO LEVELS EXCEEDING THOSE THAT WOULD EXIST IN A NORMAL COMPETITIVE MARKET.

TO SHOW PREDATORY PRICING, PLAINTIFF MUST PROVE THAT THE ALLEGED PRICING PRACTICES WOULD LIKELY ENABLE DEFENDANT TO MAKE UP ITS LOSSES BY LATER RAISING ITS PRICES AFTER COMPETITION HAD BEEN ELIMINATED. TO ANALYZE WHETHER SUSTAINED EXCESSIVE PRICING IS LIKELY TO OCCUR, YOU MUST EVALUATE WHETHER THE MARKET IS HIGHLY COMPETITIVE, NEW ENTRY IS EASY, OR WHETHER DEFENDANT HAS EXCESS CAPACITY OR COULD QUICKLY CREATE OR PURCHASE NEW CAPACITY TO ABSORB THE MARKET SHARE OF ITS RIVALS.

IF YOU FIND THAT DEFENDANT HAD NO REASONABLE CHANCE OF RECOVERING THE PROFITS IT LOST FROM OFFERING LOW PRICES THROUGH FUTURE PRICES AT HIGHER THAN COMPETITIVE LEVELS, YOU MAY NOT FIND THAT DEFENDANT'S PRICES WERE PREDATORY.

ADDITIONALLY, PLAINTIFF ALSO CONTENDS THAT DEFENDANT HAS BUNDLED PRICE DISCOUNTS FOR ITS PRIMARY AND SECONDARY ACUTE CARE PRODUCTS AND THAT DOING SO IS ANTI-COMPETITIVE. BUNDLED PRICING OCCURS WHEN PRICE DISCOUNTS ARE OFFERED FOR PURCHASING AN ENTIRE LINE OF SERVICES EXCLUSIVELY FROM ONE SUPPLIER. BUNDLED PRICE DISCOUNTS MAY BE ANTI-COMPETITIVE IF THEY ARE OFFERED BY A MONOPOLIST

AND SUBSTANTIALLY FORECLOSE PORTIONS OF THE MARKET TO A COMPETITOR WHO DOES NOT PROVIDE AN EQUALLY DIVERSE GROUP OF SERVICES AND WHO THEREFORE CANNOT MAKE A COMPARABLE OFFER.

TO PREVAIL ON ITS ATTEMPT TO MONOPOLIZE CLAIM, PLAINTIFF MUST PROVE EACH OF THE FOLLOWING ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE:

(1) THAT DEFENDANT ENGAGED IN PREDATORY OR EXCLUSIONARY CONDUCT;

(2) THAT DEFENDANT HAD A SPECIFIC INTENT TO ACHIEVE MONOPOLY POWER IN A RELEVANT MARKET;

(3) THAT THERE WAS A DANGEROUS PROBABILITY THAT DEFENDANT WOULD ACHIEVE ITS GOAL OF MONOPOLY POWER IN THE RELEVANT MARKET; AND

(4) THAT PLAINTIFF WAS INJURED IN ITS BUSINESS OR PROPERTY BY DEFENDANT'S PREDATORY OR EXCLUSIONARY CONDUCT.

IF YOU FIND THAT THE EVIDENCE IS NOT SUFFICIENT TO PROVE ANY ONE OR MORE OF THESE ELEMENTS, THEN YOU MUST FIND FOR DEFENDANT AND AGAINST PLAINTIFF ON THE ATTEMPT TO MONOPOLIZE CLAIM.

IN ITS ATTEMPT TO MONOPOLIZE CLAIM, PLAINTIFF MUST FIRST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANT ENGAGED IN UNFAIR, PREDATORY, RESTRICTIVE OR EXCLUSIONARY CONDUCT. IT IS NOT ENOUGH TO SHOW THAT DEFENDANT INTENDED TO DOMINATE A MARKET. PLAINTIFF MUST ALSO SHOW PROOF OF SOME UNFAIR OR PREDATORY CONDUCT. PLAINTIFF

CONTENDS THAT DEFENDANT'S EXCLUSIVE CONTRACTS, PHYSICIAN ARRANGEMENTS, PRICING, AND RESTRICTIVE COVENANTS CONSTITUTE PREDATORY OR EXCLUSIONARY CONDUCT. DEFENDANT CONTENDS THAT THESE WERE LAWFUL ACTS THAT RESULTED IN LOWER COSTS, INCREASED PAYOR CHOICE AMONG TYPES OF HEALTH PLANS, AND HIGHER QUALITY FOR CONSUMERS.

THE GOVERNING CONCEPTS THAT I DISCUSSED REGARDING THE WILLFUL ACQUISITION OR MAINTENANCE OF MONOPOLY POWER FOR PURPOSES OF PLAINTIFF'S MONOPOLIZATION CLAIM ALSO APPLY TO A FINDING OF EXCLUSIVE OR RESTRICTIVE CONDUCT FOR PURPOSES OF THIS ATTEMPT TO MONOPOLIZE CLAIM. CONDUCT THAT DOES NOT CONSTITUTE "WILLFUL ACQUISITION OR MAINTENANCE" OF MONOPOLY POWER CANNOT CONSTITUTE THE "PREDATORY OR ANTI-COMPETITIVE CONDUCT" REQUIRED TO ESTABLISH THE ACT OF ATTEMPTING TO MONOPOLIZE.

SIMILARLY, THE GOVERNING CONCEPTS REGARDING PREDATORY PRICING AND BUNDLING ALSO APPLY TO A FINDING OF EXCLUSIVE OR RESTRICTIVE CONDUCT FOR PURPOSES OF AN ATTEMPT TO MONOPOLIZE CLAIM.

TO PREVAIL ON ITS ATTEMPT TO MONOPOLIZE CLAIM, PLAINTIFF MUST SHOW THAT DEFENDANT ACTED WITH THE SPECIFIC INTENT OF ACQUIRING THE POWER TO CONTROL PRICES OR TO EXCLUDE OR DESTROY COMPETITION IN THE RELEVANT MARKET.

THERE ARE SEVERAL WAYS IN WHICH PLAINTIFF MAY PROVE THAT DEFENDANT HAD THE SPECIFIC INTENT TO MONOPOLIZE. THERE MAY BE EVIDENCE OF DIRECT STATEMENTS OF AN INTENT TO OBTAIN A MONOPOLY IN THE RELEVANT MARKET. SUCH PROOF OF SPECIFIC INTENT MAY BE ESTABLISHED BY DOCUMENTS PREPARED BY DEFENDANT'S RESPONSIBLE OFFICERS OR EMPLOYEES AT OR ABOUT THE TIME OF THE CONDUCT IN QUESTION, OR BY TESTIMONY CONCERNING STATEMENTS THAT WERE MADE BY DEFENDANT'S RESPONSIBLE OFFICERS OR EMPLOYEES.

YOU MUST DISTINGUISH BETWEEN A DEFENDANT'S INTENT TO COMPETE AGGRESSIVELY, WHICH IS LAWFUL, AND AN INTENT TO ACQUIRE MONOPOLY POWER BY USING ILLEGAL OR EXCLUSIONARY MEANS. A DESIRE TO INCREASE MARKET SHARE OR EVEN DRIVE A COMPETITOR OUT OF BUSINESS THROUGH VIGOROUS COMPETITION ON THE MERITS IS INSUFFICIENT.

EVEN IF YOU DECIDE THAT THE EVIDENCE DOES NOT PROVE DIRECTLY THAT DEFENDANT ACTUALLY INTENDED TO OBTAIN A MONOPOLY, SPECIFIC INTENT MAY BE INFERRED FROM A DEFENDANT'S ACTIONS. FOR EXAMPLE, IF THE EVIDENCE SHOWS THAT THE NATURAL AND PROBABLE CONSEQUENCE OF A DEFENDANT'S CONDUCT IN THE RELEVANT MARKET WAS TO GIVE THE DEFENDANT CONTROL OVER PRICES OR TO EXCLUDE OR DESTROY COMPETITION, AND THAT THIS WAS FORESEEABLE BY THE DEFENDANT, THEN YOU MAY INFER THAT THE DEFENDANT SPECIFICALLY INTENDED TO ACQUIRE MONOPOLY POWER.

TO PREVAIL ON ITS ATTEMPT TO MONOPOLIZE CLAIM, PLAINTIFF MUST ALSO PROVE THAT THERE WAS A DANGEROUS PROBABILITY THAT DEFENDANT WOULD SUCCEED IN ACHIEVING MONOPOLY POWER IF IT CONTINUED TO ENGAGE IN THE SAME OR SIMILAR CONDUCT. IN DETERMINING WHETHER THERE IS A DANGEROUS PROBABILITY OF SUCCESS, YOU SHOULD CONSIDER THE FOLLOWING FACTORS:

(1) THE MARKET SHARE AND POWER OF DEFENDANT AS COMPARED TO ITS COMPETITORS IN THE RELEVANT MARKET;

(2) WHETHER DEFENDANT'S SHARE OF THE RELEVANT MARKET WAS INCREASING OR DECREASING;

(3) THE ACTUAL OR PROBABLE IMPACT ON COMPETITION OF DEFENDANT'S ALLEGED RESTRICTIVE OR EXCLUSIONARY ACTS OR PRACTICES; AND

(4) WHETHER THE BARRIERS TO ENTRY INTO THE MARKET MADE IT DIFFICULT FOR COMPETITORS TO ENTER THE MARKET.

A DANGEROUS PROBABILITY OF SUCCESS NEED NOT MEAN THAT SUCCESS WAS NEARLY CERTAIN. IT MEANS THAT THE CHANCE OF SUCCESS WAS SUBSTANTIAL AND REAL: THAT IS, THAT THERE WAS A REASONABLE LIKELIHOOD THAT DEFENDANT WOULD ULTIMATELY ACHIEVE THE GOAL OF MONOPOLY POWER IN THE RELEVANT MARKET.

THE GOVERNING CONCEPTS THAT I DISCUSSED REGARDING MONOPOLY POWER ALSO APPLY TO A FINDING OF A DANGEROUS PROBABILITY THAT

DEFENDANT WOULD ACHIEVE MONOPOLY POWER IN THE RELEVANT MARKET FOR PURPOSES OF ITS ATTEMPT TO MONOPOLIZE CLAIM. SIMILARLY, THE GOVERNING CONCEPTS THAT I ADDRESSED REGARDING DEFINING A RELEVANT MARKET ALSO APPLY TO THE DEFINITION OF RELEVANT MARKET FOR PURPOSES OF THE ATTEMPT TO MONOPOLIZE CLAIM.

PLAINTIFF ALSO ALLEGES CONSPIRACY OR COMBINATION TO MONOPOLIZE. I WILL NOW INSTRUCT YOU ON THE LAW PERTAINING TO THIS CLAIM.

PLAINTIFF HAS ALLEGED THAT DEFENDANT CONSPIRED OR COMBINED WITH REGENCE BLUECROSS BLUESHIELD TO MONOPOLIZE THE PROVISION OF ALL HOSPITAL CARE IN THE RELEVANT GEOGRAPHIC MARKET.

TO PREVAIL ON ITS CLAIM OF CONSPIRACY TO MONOPOLIZE, PLAINTIFF MUST PROVE EACH OF THE FOLLOWING ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE:

(1) THAT AN AGREEMENT OR MUTUAL UNDERSTANDING EXISTED BETWEEN DEFENDANT AND REGENCE BLUECROSS BLUESHIELD TO OBTAIN OR MAINTAIN MONOPOLY POWER IN THE RELEVANT MARKET;

(2) THAT DEFENDANT AND REGENCE BLUECROSS BLUESHIELD EACH KNOWINGLY – THAT IS, VOLUNTARILY AND INTENTIONALLY – BECAME A PARTY TO THAT AGREEMENT OR MUTUAL UNDERSTANDING;

(3) THAT DEFENDANT SPECIFICALLY INTENDED THAT THE PARTIES TO THE AGREEMENT WOULD OBTAIN OR MAINTAIN MONOPOLY POWER IN THE RELEVANT MARKET;

(4) THAT DEFENDANT COMMITTED AN OVERT ACT IN FURTHERANCE OF THE CONSPIRACY; AND

(5) THAT PLAINTIFF WAS INJURED IN ITS BUSINESS OR PROPERTY BECAUSE OF THE CONSPIRACY TO MONOPOLIZE.

PLAINTIFF MUST SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE ALLEGED CONSPIRACY WAS FORMED WITH THE SPECIFIC INTENTION TO ACCOMPLISH SOME UNLAWFUL PURPOSE OR SOME LAWFUL PURPOSE BY UNLAWFUL MEANS, AND THAT DEFENDANT AND REGENCE BLUECROSS BLUESHIELD WERE KNOWING MEMBERS OF THE CONSPIRACY ALLEGED IN THE COMPLAINT. SPECIFIC INTENT IS DEFINED AS THE INTENT TO CONTROL PRICES OR TO ELIMINATE OR DESTROY COMPETITION.

IF YOU FIND THAT THE EVIDENCE IS INSUFFICIENT TO PROVE ANY ONE OR MORE OF THESE ELEMENTS AS TO EITHER DEFENDANT OR TO REGENCE BLUECROSS BLUESHIELD, THEN YOU MUST FIND FOR DEFENDANT AND AGAINST PLAINTIFF ON THE CONSPIRACY TO MONOPOLIZE CLAIM.

PLAINTIFF ALLEGES THAT DEFENDANT CONSPIRED OR COMBINED WITH REGENCE BLUECROSS BLUESHIELD. TO PREVAIL, PLAINTIFF MUST SHOW SPECIFIC INTENT TO MONOPOLIZE AND ANTI-COMPETITIVE ACTS DESIGNED TO EFFECT

THAT INTENT. NO PARTICULAR LEVEL OF MARKET POWER OR DANGEROUS PROBABILITY OF SUCCESS HAS TO BE ALLEGED OR PROVEN WHERE THE SPECIFIC INTENT TO MONOPOLIZE IS OTHERWISE APPARENT FROM THE CHARACTER OF THE ACTIONS TAKEN.

THERE CAN BE NO CONSPIRACY OR COMBINATION UNLESS MORE THAN ONE PERSON IS INVOLVED. IT IS NOT NECESSARY FOR THE PLAINTIFF TO JOIN AS DEFENDANTS ALL PERSONS WHO MAY HAVE PARTICIPATED WITH DEFENDANT IN THE ALLEGED CONSPIRACY OR COMBINATION. A ENTITY INJURED BY SUCH A COMBINATION MAY RECOVER AGAINST ONE OR ALL OF THOSE PARTICIPATING.

A COMBINATION RESULTS WHEN ONE OR MORE PERSONS BY HIS OR THEIR ACTS MATERIALLY AIDS IN THE ACCOMPLISHMENT OF THE PLAN OF ANOTHER PERSON. IT DOES NOT REQUIRE AN AGREEMENT OR CONTRACT NOR DOES THERE HAVE TO BE A COMMON AIM OR DESIGN. IT IS ENOUGH THAT ONE MATERIALLY AIDS ANOTHER IN A PLAN. IT IS IMMATERIAL, AS A MATTER OF LAW, THAT ANY OTHER MEMBERS OF THE CONSPIRACY OR COMBINATION MAY HAVE NOT BEEN JOINED IN THIS SUIT BY PLAINTIFF.

THE SUCCESS OR FAILURE OF THE CONSPIRACY TO ACCOMPLISH THE COMMON OBJECT OR PURPOSE IS IMMATERIAL, SO LONG AS PLAINTIFF SUSTAINED SOME DAMAGE AS A RESULT OF THE CONSPIRACY.

THE EVIDENCE IN THE CASE NEED NOT SHOW THAT THE MEMBERS, IF ANY, ENTERED INTO ANY EXPRESS OR FORMAL AGREEMENT, OR THAT THEY DIRECTLY,

BY WORDS SPOKEN OR IN WRITING, STATED BETWEEN THEMSELVES WHAT THEIR OBJECT OR PURPOSE WAS TO BE, OR THE DETAILS THEREOF, OR THE MEANS BY WHICH THE OBJECT OR PURPOSE WAS TO BE ACCOMPLISHED. PLAINTIFF MUST SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE MEMBERS, IF ANY, IN SOME WAY OR MANNER, OR THROUGH SOME CONTRIVANCE, POSITIVELY OR TACITLY CAME TO A MUTUAL UNDERSTANDING TO TRY TO ACCOMPLISH A COMMON AND UNLAWFUL PLAN.

THE EXISTENCE OF A CONSPIRACY OR COMBINATION MUST BE PROVEN BY A PREPONDERANCE OF THE EVIDENCE AND MAY NOT BE MERELY PRESUMED OR BASED UPON CONJECTURE. THE PROOF MUST SATISFY YOU BY A PREPONDERANCE OF THE EVIDENCE THAT THE CONSPIRACY OR COMBINATION CHARGED EXISTED IN FACT, AND IT IS NOT ENOUGH THAT THE EVIDENCE MAY RAISE A SUSPICION OR A POSSIBILITY, AND NOTHING MORE.

MERE SIMILARITY OF CONDUCT AMONG VARIOUS PERSONS, OR THE FACT THAT THEY MAY HAVE ASSOCIATED WITH ONE ANOTHER AND MAY HAVE MET OR ASSEMBLED TOGETHER AND DISCUSSED COMMON AIMS AND INTERESTS, DOES NOT ESTABLISH THE EXISTENCE OF A CONSPIRACY, UNLESS IT TENDS TO EXCLUDE THE POSSIBILITY THAT THE PERSONS WERE ACTING INDEPENDENTLY. IF PARTIES ACT SIMILARLY BUT INDEPENDENTLY OF ONE ANOTHER, WITHOUT ANY AGREEMENT OR MUTUAL UNDERSTANDING AMONG THEM, THEN THERE IS NO CONSPIRACY. PLAINTIFF CANNOT PREVAIL ON ITS CONSPIRACY CLAIM UNLESS

THE EVIDENCE TENDS TO EXCLUDE THE POSSIBILITY THAT DEFENDANT AND REGENCE WERE ACTING INDEPENDENTLY. A CONSPIRACY MAY NOT BE INFERRED WHERE THE PARTIES HAD NO RATIONAL ECONOMIC MOTIVE TO CONSPIRE, AND IF THEIR CONDUCT IS CONSISTENT WITH OTHER EQUALLY PLAUSIBLE EXPLANATIONS.

IF YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT PLAINTIFF HAS PROVEN EACH ELEMENT OF A CONSPIRACY TO MONOPOLIZE CLAIM, YOUR VERDICT ON PLAINTIFF'S CONSPIRACY CLAIM SHOULD BE FOR PLAINTIFF. OTHERWISE YOUR VERDICT ON PLAINTIFF'S CONSPIRACY CLAIM SHOULD BE FOR DEFENDANT.

PLAINTIFF ALSO MAKES TWO CLAIMS AGAINST DEFENDANT FOR VIOLATIONS OF CERTAIN LAWS OF THE STATE OF OREGON. PLAINTIFF ALLEGES THAT DEFENDANT VIOLATED OREGON'S PRICE DISCRIMINATION LAWS AND COMMITTED INTENTIONAL INTERFERENCE WITH POTENTIAL BUSINESS RELATIONSHIPS. DEFENDANT DENIES THESE CLAIMS.

PLAINTIFF CLAIMS THAT DEFENDANT DISCRIMINATED IN PRICING AS BETWEEN REGENCE BLUECROSS BLUESHIELD ON THE ONE HAND, AND OTHER INSURERS IN THE SALE OF SERVICES. PLAINTIFF CONTENDS THAT BUT FOR THIS DISCRIMINATION, IT WOULD HAVE HAD GREATER SALES TO REGENCE BLUECROSS BLUESHIELD UNDER THE PREFERRED PROVIDER PLAN. DEFENDANT DENIES THESE CLAIMS.

YOU ARE INSTRUCTED THAT IN ORDER FOR THE PLAINTIFF TO ESTABLISH A VIOLATION OF THE PRICE DISCRIMINATION STATUTE, IT HAS THE BURDEN OF PROVING EACH AND EVERY ONE OF THE FOLLOWING ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE:

(1) THAT THERE WERE CONTEMPORANEOUS SALES BY DEFENDANT TO OTHER INSURERS IN THE RELEVANT MARKET;

(2) THAT DEFENDANT HAS DISCRIMINATED IN PRICE BETWEEN INSURERS IN THE CONTEMPORANEOUS SALE OF HOSPITAL SERVICES; AND

(3) THAT THE EFFECT OF DEFENDANT'S PRICE DISCRIMINATION WAS TO SUBSTANTIALLY LESSEN COMPETITION OR CREATE A MONOPOLY IN THE SALE OF HOSPITAL SERVICES IN THE RELEVANT MARKET, OR TO INJURE, DESTROY OR PREVENT COMPETITION BETWEEN PLAINTIFF AND DEFENDANT.

THE TERM "DISCRIMINATION" AS USED IN THE STATUTE MEANS NOTHING NEITHER MORE NOR LESS THAN A DIFFERENCE IN PRICE. ALTHOUGH IN OUR EVERYDAY VOCABULARY THE WORD "DISCRIMINATION" HAS CONNOTATIONS OF WRONGDOING, THE WORD "DISCRIMINATION" AS USED IN THE STATUTE MEANS EXACTLY THE SAME AS THE WORD "DIFFERENCE," AND HAS NO CONNOTATIONS OF WRONGDOING.

PRICE DISCRIMINATION ALONE IS NOT SUFFICIENT TO CONSTITUTE A PRICE DISCRIMINATION CAUSE OF ACTION. THE PRICE DISCRIMINATION MUST BE SUCH AS MIGHT LESSEN COMPETITION OR TEND TO CREATE A MONOPOLY, OR TO

INJURE, DESTROY OR PREVENT COMPETITION. PLAINTIFF CONTENDS THAT DEFENDANT BUNDLED PRICE DISCOUNTS FOR ITS PRIMARY AND SECONDARY ACUTE CARE PRODUCTS AND THAT DOING SO IS ANTI-COMPETITIVE. DEFENDANT DENIES THIS.

AS I HAVE INSTRUCTED, BUNDLED PRICING OCCURS WHEN PRICE DISCOUNTS ARE OFFERED FOR PURCHASING AN ENTIRE LINE OF SERVICES EXCLUSIVELY FROM ONE SUPPLIER. BUNDLED PRICE DISCOUNTS MAY BE ANTI-COMPETITIVE IF THEY ARE OFFERED BY A MONOPOLIST AND SUBSTANTIALLY FORECLOSE PORTIONS OF THE MARKET TO A COMPETITOR WHO DOES NOT PROVIDE AN EQUALLY DIVERSE GROUP OF SERVICES AND WHO THEREFORE CANNOT MAKE A COMPARABLE OFFER. DEFENDANT DENIES THAT IT BUNDLED PRICE DISCOUNTS IN THIS WAY.

THE LAW SEEKS TO PREVENT THE REASONABLE POSSIBILITY OF A SUBSTANTIAL LESSENING OF COMPETITION, THE TENDENCY TO CREATE A MONOPOLY, OR THE INJURY, DESTRUCTION OR PREVENTION OF COMPETITION WITH ANY PERSON WHO GRANTS OR RECEIVES THE BENEFIT OF SUCH DISCRIMINATION. THEREFORE, TO SUCCEED ON THIS CLAIM, PLAINTIFF MUST SHOW THAT THE ACTS OF DEFENDANT NOT ONLY AMOUNT TO PRICE DISCRIMINATION, BUT THAT THE PRICE DISCRIMINATION WAS SUFFICIENT TO CONSTITUTE THE EVIL WHICH THE LAW SEEKS TO PREVENT. IT IS SUFFICIENT IF

THERE IS A REASONABLE POSSIBILITY THAT COMPETITION MAY BE ADVERSELY AFFECTED BY THE ACTS COMPLAINED OF.

IN AN ACTION BROUGHT UNDER THIS STATUTE, IT IS NOT ENOUGH FOR PLAINTIFF TO SHOW THAT DEFENDANT WAS GUILTY OF PRICE DIFFERENTIALS, WHICH MIGHT LESSEN OR INJURE COMPETITION. IN ADDITION, PLAINTIFF MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT IT SUFFERED ACTUAL MEASURABLE INJURY TO ITS BUSINESS OR PROPERTY AND THAT DEFENDANT'S CONDUCT WAS A MATERIAL CAUSE OF SUCH INJURY.

THEREFORE, IF YOU FIND THAT PLAINTIFF HAS PROVEN, BY A PREPONDERANCE OF THE EVIDENCE EACH AND EVERY ONE OF THE ELEMENTS OF A STATUTORY VIOLATION, THEN YOU MUST FURTHER DETERMINE WHETHER PLAINTIFF SUFFERED ACTUAL AND MEASURABLE INJURIES TO ITS BUSINESS AND PROPERTY. IF SUCH INJURY DID OCCUR, YOU MUST FIND WHETHER PLAINTIFF HAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANT'S CONDUCT WAS A MATERIAL CAUSE OF THE INJURY.

THE FINAL CLAIM OF PLAINTIFF IS THAT DEFENDANT WRONGFULLY INTERFERED WITH PROSPECTIVE BUSINESS RELATIONSHIPS BY ENTRY INTO EXCLUSIVE OR SEMI-EXCLUSIVE AGREEMENTS WITH REGENCE BLUECROSS BLUESHIELD, PROVIDENCE HEALTH PLAN, WEYERHAEUSER AND MONACO, AND BY PROHIBITING SOME OF ITS EMPLOYED PHYSICIANS FROM TREATING PATIENTS AT PLAINTIFF.

TO PREVAIL ON ITS CLAIM FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIPS, PLAINTIFF MUST PROVE EACH OF THE FOLLOWING ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE:

(1) THAT PLAINTIFF HAD A PROSPECTIVE ECONOMIC RELATIONSHIP;

(2) THAT DEFENDANT WAS NOT A PARTY TO THE PROSPECTIVE RELATIONSHIP;

(3) THAT DEFENDANT INTENDED TO INTERFERE WITH THE PROSPECTIVE ECONOMIC RELATIONSHIP OR KNEW THAT SUCH INTERFERENCE WAS SUBSTANTIALLY CERTAIN TO OCCUR FROM DEFENDANT'S ACTIONS;

(4) THAT DEFENDANT INTERFERED THROUGH USE OF IMPROPER MEANS;

(5) THAT DEFENDANT'S INTERFERENCE CAUSED HARM TO THE PROSPECTIVE RELATIONSHIP; AND

(6) THAT DEFENDANT'S INTERFERENCE RESULTED IN DAMAGES TO PLAINTIFF.

FOR PURPOSES OF MEETING ELEMENT FOUR, "IMPROPER MEANS," PLAINTIFF MUST PROVE THAT DEFENDANT INTERFERED BY VIOLATING THE ANTITRUST LAWS.

PLAINTIFF SEEKS TO RECOVER MONEY DAMAGES FROM DEFENDANT FOR WHAT PLAINTIFF CLAIMS TO BE WRONGFUL INTERFERENCE WITH ITS PROFESSIONAL AND BUSINESS RELATIONSHIPS. THE LAW RECOGNIZES THAT EVERYONE HAS A RIGHT TO ESTABLISH AND CONDUCT A LAWFUL BUSINESS, FREE FROM UNJUSTIFIED INTERFERENCE, AND IS ENTITLED TO THE PROTECTION OF

ORGANIZED SOCIETY, THROUGH ITS COURTS, WHENEVER THAT RIGHT IS UNLAWFULLY INVADED.

PLAINTIFF MUST PROVE THAT DEFENDANT HAD KNOWLEDGE OF THE EXISTENCE OF THE PROPOSED RELATIONSHIP AND INTENTIONALLY INTERFERED WITH IT. PLAINTIFF CONTENDS THAT DEFENDANT INTERFERED WITH PLAINTIFF'S PROPOSED RELATIONSHIP WITH OTHERS.

IN DETERMINING WHETHER THE ACTOR'S CONDUCT IS IMPROPER, THE QUESTION IS WHETHER THE ACTOR'S CONDUCT WAS FAIR AND REASONABLE UNDER THE CIRCUMSTANCES. RECOGNIZED STANDARDS OF BUSINESS ETHICS AND BUSINESS CUSTOMERS AND PRACTICES ARE PERTINENT, AND CONSIDERATION IS GIVEN TO CONCEPTS OF FAIR PLAY.

THE TERM "WRONGFUL MOTIVE" IS AN INTENT TO HARM A RELATIONSHIP FOR THE SAKE OF INJURY TO IT. IF YOU FIND THAT DEFENDANT KNOWINGLY INTERFERED WITH PLAINTIFF'S PROSPECTIVE BUSINESS RELATIONS AND DID SO THROUGH IMPROPER MEANS OR WITH AN IMPROPER MOTIVE, AND THAT PLAINTIFF SUFFERED INJURY, THEN YOUR VERDICT MUST BE FOR PLAINTIFF. IF NOT, YOUR VERDICT MUST BE FOR DEFENDANT.

IT IS THE DUTY OF THE COURT TO INSTRUCT YOU ABOUT THE MEASURE OF DAMAGES. THE MERE FACT THAT I AM INSTRUCTING YOU WITH REGARD TO THE MEASURE OF DAMAGES IS NOT TO BE CONSIDERED BY YOU AS AN ATTEMPT BY

THE COURT TO SUGGEST OR INDICATE THAT YOU SHOULD, OR SHOULD NOT, AWARD DAMAGES.

IF YOU FIND FROM THE EVIDENCE AND THE INSTRUCTIONS THAT PLAINTIFF IS ENTITLED TO PREVAIL, THEN IT BECOMES YOUR DUTY TO DECIDE WHETHER PLAINTIFF HAS BEEN DAMAGED, AND IF SO, THE AMOUNT OF THE DAMAGES. PLAINTIFF HAS THE BURDEN OF PROVING DAMAGES BY A PREPONDERANCE OF THE EVIDENCE, AND IT IS FOR YOU TO DETERMINE WHAT DAMAGES, IF ANY, HAVE BEEN PROVEN. DAMAGES MEANS THE AMOUNT OF MONEY WHICH WILL REASONABLY AND FAIRLY COMPENSATE PLAINTIFF FOR ANY INJURY YOU FIND WAS CAUSED BY DEFENDANT.

IF YOU FIND FOR PLAINTIFF ON ITS ANTITRUST CLAIMS, YOU MUST DETERMINE PLAINTIFF'S DAMAGES, IF ANY, WITH RESPECT TO EACH SUCH CLAIM. YOUR AWARD MUST BE BASED UPON EVIDENCE AND NOT SPECULATION, GUESSWORK, OR CONJECTURE.

YOU CANNOT CONSIDER THE AMOUNT OF DAMAGE UNLESS AND UNTIL YOU HAVE CONCLUDED THAT PLAINTIFF HAS ESTABLISHED THAT IT WAS IN FACT INJURED AS A RESULT OF A VIOLATION OF THE ANTITRUST LAWS BY DEFENDANT. THIS IS SOMETIMES REFERRED TO AS PROVING "CAUSATION." PROVING CAUSATION REQUIRES PLAINTIFF TO LINK ITS INJURY TO AN "ACTUAL ADVERSE EFFECT" ON COMPETITION AS A WHOLE IN THE RELEVANT MARKET. YOU MUST

MAKE SEPARATE DECISIONS REGARDING WHETHER PLAINTIFF WAS IN FACT INJURED BY THE CHALLENGED CONDUCT FOR EACH OF PLAINTIFF'S CLAIMS.

TO ESTABLISH INJURY, PLAINTIFF MUST HAVE OFFERED EVIDENCE SHOWING THAT A VIOLATION OR VIOLATIONS OF THE ANTITRUST LAWS BY DEFENDANT WAS A MATERIAL CAUSE OF ITS INJURY. THIS REQUIRES SEPARATING OUT INJURIES THAT WERE NOT CAUSED BY UNLAWFUL CONDUCT, BUT BY LAWFUL CONDUCT OR OTHER FORCES. PLAINTIFF IS ENTITLED TO RECOVER ONLY FOR THAT PORTION OF ITS LOSSES, IF ANY, CAUSED BY DEFENDANT'S UNLAWFUL CONDUCT. ANY AWARD OF DAMAGES MUST BE A JUST AND REASONABLE ESTIMATE OF DAMAGE.

PLAINTIFF IS NOT REQUIRED TO PROVE THAT EACH ALLEGED ANTITRUST VIOLATION WAS THE SOLE CAUSE OF ITS INJURY. IT IS ENOUGH IF PLAINTIFF HAS PROVEN THAT THE ALLEGED ANTITRUST VIOLATION WAS A MATERIAL CAUSE OF ITS INJURY. THIS REQUIRES SEPARATING OUT INJURIES THAT WERE NOT CAUSED BY UNLAWFUL CONDUCT, BUT BY LAWFUL CONDUCT OR OTHER FORCES. PLAINTIFF IS ENTITLED TO RECOVER FOR ONLY THAT PORTION OF ITS LOSSES, IF ANY, CAUSED BY DEFENDANT'S UNLAWFUL CONDUCT.

IN ADDITION TO CAUSATION, PLAINTIFF MUST ALSO PROVE THAT IT SUFFERED AN ANTITRUST INJURY. TO SHOW AN ANTITRUST INJURY, PLAINTIFF MUST SHOW THAT ITS INJURY IS LINKED TO AN ACTUAL ADVERSE EFFECT ON COMPETITION AS A WHOLE IN THE RELEVANT MARKET. AN ANTITRUST INJURY

REQUIRES THAT PLAINTIFF PROVE BOTH THAT DEFENDANT'S CONDUCT CAUSED HARM TO PLAINTIFF ("INJURY IN FACT") AND THAT THIS HARM FLOWED FROM CONDUCT THAT HARMED MARKET-WIDE COMPETITION. IF YOU FIND THAT DEFENDANT'S CONDUCT DID NOT HARM MARKET-WIDE COMPETITION, SUCH AS RESULTING IN HIGHER PRICES OR LOWER QUALITY, YOU MUST FIND THAT PLAINTIFF FAILED TO PROVE AN ANTITRUST INJURY.

AS I HAVE TOLD YOU, TO RECOVER ANTITRUST DAMAGES, THE PLAINTIFF MUST FIRST PROVE WITH REASONABLE PROBABILITY THAT PLAINTIFF HAS IN FACT BEEN INJURED BY THE ALLEGED ILLEGAL CONDUCT OF DEFENDANT. THE FACT OF INJURY FROM THAT CAUSE MUST FIRST BE SHOWN BEFORE YOU MAY DETERMINE THE AMOUNT OF DAMAGES, IF ANY. A MERE POSSIBILITY OF INJURY WILL NOT SUFFICE. PLAINTIFF MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE ALLEGED ANTITRUST VIOLATION MATERIALLY CAUSED THE INJURY TO PLAINTIFF'S BUSINESS OR PROPERTY. AN INJURY OR DAMAGE IS PROXIMATELY CAUSED BY AN ACT OR FAILURE TO ACT WHENEVER IT APPEARS FROM THE EVIDENCE THAT THE ACT OR OMISSION PLAYED A SUBSTANTIAL PART IN BRINGING ABOUT OR ACTUALLY CAUSING THE INJURY OR DAMAGE, AND THAT THE INJURY OR DAMAGE WAS EITHER A DIRECT RESULT OR A REASONABLY PROBABLE CONSEQUENCE OF THE ACT OR OMISSIONS.

THE CAUSAL CONNECTION BETWEEN THE CONDUCT AND THE DAMAGE IS EXPRESSED BY THE WORDS "SUBSTANTIAL FACTOR." IT IS NOT NECESSARY FOR

PLAINTIFF TO PROVE THAT DEFENDANT'S CONDUCT WAS THE ONLY, OR THE MOST IMPORTANT CAUSE, OF PLAINTIFF'S DAMAGE. WHAT PLAINTIFF MUST PROVE IS THAT DEFENDANT'S CONDUCT WAS A SUBSTANTIAL CONTRIBUTING CAUSE OF ITS DAMAGE.

PLAINTIFF MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT AN ALLEGED ANTITRUST VIOLATION MATERIALLY CAUSED INJURY TO PLAINTIFF'S BUSINESS OR PROPERTY. AN INJURY OR DAMAGE IS MATERIALLY CAUSED BY AN ACT WHENEVER IT APPEARS FROM THE EVIDENCE IN THE CASE THAT THE ACT PLAYED A SUBSTANTIAL PART IN BRINGING ABOUT OR CAUSING THE INJURY OR DAMAGE AND THAT THE INJURY OR DAMAGE WAS EITHER A DIRECT RESULT OR A REASONABLY PROBABLE CONSEQUENCE OF A WRONGFUL ACT OF DEFENDANT.

YOU MAY NOT FIND FOR PLAINTIFF UNLESS YOU FIND THAT IT WAS IN FACT INJURED IN ITS BUSINESS OR PROPERTY BY AN ALLEGED ACT OF DEFENDANT THAT VIOLATES THE ANTITRUST LAWS. IN OTHER WORDS, EVEN IF THERE WAS A VIOLATION OF THE ANTITRUST LAWS, PLAINTIFF IS ENTITLED TO NO RELIEF UNLESS DEFENDANT'S UNLAWFUL CONDUCT MATERIALLY CAUSED INJURY TO PLAINTIFF'S BUSINESS OR PROPERTY.

THE FACT THAT AN ANTITRUST VIOLATION MAY HAVE OCCURRED DOES NOT NECESSARILY ENTITLE PLAINTIFF TO DAMAGES. PLAINTIFF MAY NOT RECOVER DAMAGES THAT ARE BASED UPON ANTI-COMPETITIVE ACTIVITIES THAT ACCRUE TO PLAINTIFF'S BENEFIT, SUCH AS THE IMPOSITION OF HIGH PRICES BY A

MONOPOLIST. THUS, IF THE CONDUCT CHALLENGED BY PLAINTIFF HAD THE IMPACT OF REDUCING OUTPUT OR RAISING PRICES IN A RELEVANT MARKET, THERE WOULD BE NO INJURY TO PLAINTIFF.

THE PURPOSE OF AWARDING DAMAGES IN A PRIVATE ANTITRUST CASE IS TO PUT PLAINTIFF IN AS GOOD A POSITION AS IF THE VIOLATION HAD NOT OCCURRED. THUS, IF YOU FIND THAT VIOLATIONS OF THE ANTITRUST LAWS HAVE OCCURRED, EVEN THOUGH YOU DON'T KNOW EXACTLY AND WITH MATHEMATICAL CERTAINTY WHAT WOULD HAVE OCCURRED TO PLAINTIFF BUT FOR THOSE VIOLATIONS OF THE ANTITRUST LAWS, THE LAW ALLOWS YOU TO ARRIVE AT AN AWARD OF DAMAGES. THE AWARD, IF ANY, MUST BE BASED ON YOUR JUDGMENT FROM RELEVANT DATA INTRODUCED IN EVIDENCE SO AS TO COMPENSATE THE PLAINTIFF FOR ALL DAMAGES PROXIMATELY CAUSED BY THE ACTS OF DEFENDANT WHICH HAVE VIOLATED THE ANTITRUST LAWS, INCLUDING LOST INCOME OR ANY OTHER ACTUAL DAMAGES.

IF YOU FIND THAT PLAINTIFF HAS IN FACT SUFFERED DAMAGES TO ITS BUSINESS OR PROPERTY, SUCH AS LOSS OF PROFITS, PROXIMATELY CAUSED BY ILLEGAL CONDUCT OF DEFENDANT, THEN THE CIRCUMSTANCE THAT THE PRECISE AMOUNT OF PLAINTIFF'S DAMAGE MAY BE DIFFICULT TO ASCERTAIN SHOULD NOT PRECLUDE ITS RECOVERY. HOWEVER, ANY DAMAGES AWARDED MUST BE REASONABLE, ASCERTAINABLE FROM THE EVIDENCE PRESENTED IN THE CASE. ONLY ACTUAL DAMAGES WHICH ARE SUSCEPTIBLE OF EXPRESSION IN FIGURES,

AND NOT DAMAGES WHICH ARE PURELY SPECULATIVE, REMOTE, UNCERTAIN, CONJECTURAL, OR FOUNDED ON ESTIMATES OF WITNESSES NOT BASED ON FACTS OR DATA SHOWN BY THE EVIDENCE, ARE RECOVERABLE AS COMPENSATORY DAMAGES.

THE FACT THAT THE AMOUNT OF DAMAGES CANNOT BE CALCULATED WITH ABSOLUTE EXACTNESS DOES NOT MAKE THEM SO UNCERTAIN AS TO BAR RECOVERY, PARTICULARLY IF WRONGDOING OF THE DEFENDANT HAS CAUSED DIFFICULTY IN DETERMINING THE PRECISE AMOUNT. IT IS SUFFICIENT IF YOU FIND THAT AN INJURY IN FACT OCCURRED, THAT IT WAS MATERIALLY CAUSED BY THE ALLEGED WRONGFUL ACT OF DEFENDANT, AND THAT A REASONABLE BASIS IS SHOWN BY THE EVIDENCE FOR THE COMPUTATION, ALTHOUGH THE RESULT IS ONLY APPROXIMATE.

IN CONSIDERING THE ELEMENT OF FUTURE PROFITS IN DETERMINING WHAT DAMAGES, IF ANY, WERE SUSTAINED BY PLAINTIFF, YOU ARE INSTRUCTED THAT IF BECAUSE OF A VIOLATION OF THE ANTITRUST LAWS THE PLAINTIFF WAS UNABLE TO EARN NET PROFITS WHICH WOULD HAVE ACCRUED TO IT BUT FOR A VIOLATION OF THE ANTITRUST LAWS, THEN PLAINTIFF WAS IN FACT DAMAGED. FUTURE PROFITS MEAN NET PROFITS AND ARE DETERMINED BY SUBTRACTING THE COSTS AND EXPENSES OF A BUSINESS FROM ITS GROSS REVENUE.

PLAINTIFF IS ENTITLED TO RECOVER FOR ANY PROFITS IT LOST AS A RESULT OF AN ANTITRUST VIOLATION CAUSED BY DEFENDANT. PROFIT IN THIS

SENSE IS NET PROFIT, AND SIMPLY MEANS THAT AMOUNT BY WHICH PLAINTIFF'S GROSS REVENUES WOULD HAVE EXCEEDED ALL OF THE COSTS AND EXPENSES THAT WOULD HAVE BEEN NECESSARY TO PRODUCE THOSE REVENUES.

ANY AWARD FOR FUTURE ECONOMIC DAMAGES MUST BE FOR THE PRESENT CASH VALUE OF THOSE DAMAGES. PRESENT CASH VALUE MEANS THE SUM OF MONEY NEEDED NOW, WHICH, WHEN INVESTED AT A REASONABLE RATE OF RETURN, WILL PAY FUTURE DAMAGES AT THE TIMES AND IN THE AMOUNTS THAT YOU FIND THE DAMAGES WILL BE INCURRED. THE RATE OF RETURN TO BE APPLIED IN DETERMINING PRESENT CASH VALUE SHOULD BE THE INTEREST THAT CAN REASONABLY BE EXPECTED FROM SAFE INVESTMENTS THAT CAN BE MADE BY A PERSON OF ORDINARY PRUDENCE, WHO HAS ORDINARY FINANCIAL EXPERIENCE AND SKILL.

THE LAW THAT APPLIES TO THIS CASE PERMITS AN AWARD OF NOMINAL DAMAGES. IF YOU FIND FOR PLAINTIFF BUT YOU FIND THAT PLAINTIFF HAS FAILED TO PROVE DAMAGES AS DEFINED IN THESE INSTRUCTIONS, YOU MUST AWARD NOMINAL DAMAGES. NOMINAL DAMAGES MAY NOT EXCEED ONE DOLLAR. YOU MAY FIND, FOR EXAMPLE, THAT YOU ARE UNABLE TO COMPUTE THE MONETARY DAMAGES RESULTING FROM THE ALLEGEDLY WRONGFUL ACT, EXCEPT BY ENGAGING IN SPECULATION OR GUESSING. YOU MAY FIND THE PROOF THE AMOUNT OF DAMAGE INSUFFICIENT IF FAILS TO PROVIDE A REASONABLE BASIS ON WHICH TO ESTIMATE HOW MUCH PLAINTIFF'S INCOME OR

PROFIT WAS REDUCED BY FACTORS WHOLLY SEPARATE FROM THE ANTITRUST VIOLATIONS, INCLUDING PERFECTLY LAWFUL COMPETITIVE ACTS, BUSINESS DECISIONS MADE BY DEFENDANT'S OR PLAINTIFF'S OWN MISMANAGEMENT. OR YOU MAY FIND THAT PLAINTIFF FAILED TO PROVE A PRECISE AND CONCRETE AMOUNT OF DAMAGES.

IF YOU FIND THAT DEFENDANT WRONGFULLY INTERFERED WITH PLAINTIFF'S PROSPECTIVE BUSINESS RELATIONS, AND, AS A PROXIMATE RESULT, PLAINTIFF SUFFERED DAMAGES, YOU MAY AWARD DAMAGES UTILIZING THE STANDARDS DISCUSSED UNDER THE ANTITRUST INSTRUCTIONS WITH ONE EXCEPTION. DAMAGES, IF ANY, MUST BE THOSE SUFFERED AFTER JANUARY 28, 2000.

IN ADDITION TO OTHER DAMAGES REQUESTED BY PLAINTIFF, ON THE CLAIM FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIPS, PLAINTIFF HAS REQUESTED AN AWARD OF PUNITIVE DAMAGES. PUNITIVE DAMAGES ARE DESIGNED TO PUNISH A WRONGDOER AND TO DISCOURAGE THAT WRONGDOER AND OTHERS FROM ENGAGING IN WANTON MISCONDUCT. PUNITIVE DAMAGES MAY BE AWARDED ONLY IF DEFENDANT INTENDED TO HARM PLAINTIFF BY SOME GRIEVOUS VIOLATION OF SOCIETY'S INTERESTS. GROSS RECKLESSNESS OR NEGLIGENCE IS NOT ENOUGH TO SUPPORT AN AWARD OF PUNITIVE DAMAGES.

TO RECOVER PUNITIVE DAMAGES, PLAINTIFF MUST SHOW BY CLEAR AND CONVINCING EVIDENCE THAT DEFENDANT HAS ACTED WITH MALICE TOWARD PLAINTIFF. CLEAR AND CONVINCING EVIDENCE IS EVIDENCE THAT MAKES YOU BELIEVE THAT THE TRUTH OF THE CLAIMS IS HIGHLY PROBABLE.

IF YOU DECIDE THAT DEFENDANT HAS ACTED AS CLAIMED BY PLAINTIFF, YOU HAVE THE DISCRETION TO AWARD PUNITIVE DAMAGES, BUT YOU ARE NOT REQUIRED TO DO SO. IN THE EXERCISE OF THAT DISCRETION, YOU MAY CONSIDER THE IMPORTANCE TO SOCIETY IN DETERRING SIMILAR MISCONDUCT IN THE FUTURE.

IF YOU DECIDE TO AWARD PUNITIVE DAMAGES, YOU MAY CONSIDER THE FOLLOWING ITEMS IN FIXING THE AMOUNT:

(1) THE CHARACTER OF DEFENDANT'S CONDUCT;

2) DEFENDANT'S MOTIVE;

(3) THE SUM OF MONEY THAT WOULD BE REQUIRED TO DISCOURAGE DEFENDANT AND OTHERS FROM ENGAGING IN SUCH CONDUCT IN THE FUTURE; AND

(4) THE INCOME AND ASSETS OF DEFENDANT.

IF YOU FIND THAT PUNITIVE DAMAGES ARE APPROPRIATE, YOU MUST USE REASON IN SETTING THE AMOUNT. PUNITIVE DAMAGES, IF ANY, SHOULD BE IN AN AMOUNT TO FULFILL THEIR PURPOSES BUT SHOULD NOT REFLECT BIAS, PREJUDICE, OR SYMPATHY TOWARD ANY PARTY. IN CONSIDERING PUNITIVE

DAMAGES, YOU MAY CONSIDER THE DEGREE OF REPREHENSIBILITY OF DEFENDANT'S CONDUCT, THE RELATIONSHIP OF ANY AWARD OF PUNITIVE DAMAGES TO ANY ACTUAL HARM INFLICTED ON PLAINTIFF, AND THE IMPORTANCE TO SOCIETY IN DETERRING SIMILAR MISCONDUCT IN THE FUTURE.

YOU WILL HAVE WITH YOU IN THE JURY ROOM THE EXHIBITS RECEIVED INTO EVIDENCE, YOUR COPY OF THESE INSTRUCTIONS, AND THE VERDICT FORM WHICH HAS BEEN PREPARED FOR YOU. UPON RETIRING TO THE JURY ROOM, YOU WILL SELECT ONE OF YOUR NUMBER TO ACT AS THE PRESIDING JUROR. THE PRESIDING JUROR WILL BE YOUR SPOKESPERSON IN COURT AND PRESIDE OVER THE DELIBERATIONS, BUT HAS NO GREATER VOICE THAN ANY OTHER JUROR.

YOU MUST EACH DECIDE THE CASE FOR YOURSELF. YOUR DECISION MUST BE BASED ON THE CONSIDERED JUDGMENT OF EACH OF YOU. ALL OF YOU MUST AGREE ON YOUR ANSWERS ON THE VERDICT FORM. YOU MUST TALK WITH ONE ANOTHER WITH THE IDEA OF REACHING AN AGREEMENT. DO NOT REACH A DECISION UNTIL YOU HAVE IMPARTIALLY CONSIDERED THE EVIDENCE IN THE CASE WITH YOUR FELLOW JURORS.

WHEN DELIBERATING, DO NOT HESITATE TO RE-EXAMINE YOUR OWN VIEWS AND CHANGE YOUR OPINION IF YOU BECOME CONVINCED THAT THE OPINION IS ERRONEOUS, BUT DO NOT SURRENDER YOUR HONEST CONVICTIONS AS TO THE WEIGHT OR EFFECT OF EVIDENCE SOLELY BECAUSE OF THE OPINION OF YOUR FELLOW JURORS OR BECAUSE YOU WISH TO REACH A UNANIMOUS

DECISION. REMEMBER AT ALL TIMES THAT YOU ARE NOT PARTISANS. YOU ARE JUDGES – JUDGES OF THE FACTS. YOUR SOLE INTEREST IS TO SEEK THE TRUTH FROM THE EVIDENCE IN THE CASE.

IF IT BECOMES NECESSARY DURING YOUR DELIBERATIONS TO COMMUNICATE WITH THE COURT, YOU MUST PUT THE COMMUNICATION IN WRITING, SIGNED BY YOUR PRESIDING JUROR, OR BY ONE OR MORE MEMBERS OF THE JURY, AND GIVE IT TO THE COURTROOM DEPUTY OR ONE OF MY LAW CLERKS. NO MEMBER OF THE JURY SHOULD EVER ATTEMPT TO COMMUNICATE WITH THE COURT BY ANY MEANS OTHER THAN A SIGNED WRITING, AND THE COURT WILL NEVER COMMUNICATE WITH ANY MEMBER OF THE JURY ON ANY SUBJECT TOUCHING UPON THE MERITS OF THE CASE OTHER THAN IN WRITING, OR ORALLY HERE IN OPEN COURT. IF YOU SEND OUT A QUESTION, I WILL CONSULT WITH THE PARTIES BEFORE ANSWERING IT, WHICH MAY TAKE SOME TIME. YOU MAY CONTINUE DELIBERATING WHILE WAITING FOR THE ANSWER TO ANY QUESTION.

YOU WILL NOTE FROM THE OATH ABOUT TO BE TAKEN BY THE CLERKS THAT THEY TOO, AS WELL AS ALL OTHER PERSONS, ARE FORBIDDEN TO COMMUNICATE IN ANY WAY OR MANNER WITH ANY MEMBER OF THE JURY ON ANY SUBJECT TOUCHING THE MERITS OF THE CASE.

BEAR IN MIND ALSO THAT YOU ARE NEVER TO REVEAL TO ANY PERSON – NOT EVEN TO THE COURT – HOW THE JURY STANDS, NUMERICALLY OR

OTHERWISE, ON THE QUESTIONS BEFORE YOU, UNTIL AFTER YOU HAVE REACHED A UNANIMOUS VERDICT.

A VERDICT FORM HAS BEEN PREPARED FOR YOUR USE, AND I WILL REVIEW THE FORM WITH YOU IN A MOMENT. THIS FORM WILL BE WITH YOU IN THE JURY ROOM AND, WHEN YOU HAVE REACHED A UNANIMOUS AGREEMENT AS TO EACH OF THE QUESTIONS YOU ARE DIRECTED TO ANSWER, THE PRESIDING JUROR WILL FILL IN, DATE, AND SIGN THE VERDICT FORM. THEN, RETURN YOUR VERDICT TO THE COURTROOM.

IT IS PROPER TO ADD THE CAUTION ONCE AGAIN THAT NOTHING SAID IN THESE INSTRUCTIONS AND NOTHING IN THE VERDICT FORM PREPARED FOR YOUR CONVENIENCE IS MEANT TO SUGGEST OR CONVEY IN ANY WAY OR MANNER ANY INTIMATION AS TO WHAT I THINK YOU SHOULD DECIDE. THAT IS THE SOLE AND EXCLUSIVE DUTY AND RESPONSIBILITY OF YOU, THE JURY.