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VIA UPS OVERNIGHT DELIVERY

Ms. Cathy A. Catterson  
Clerk of the Court  
U.S. Court of Appeals For the Ninth Circuit  
95 Seventh Street  
San Francisco, California 94103-1526

Re: *McKenzie-Willamette Hospital v. PeaceHealth*  
Case Numbers 05-35627; 05-35640; 05-36153 and 05-36202

Dear Ms. Catterson:

On April 4, 2007 Appellant/Cross-Appellee PeaceHealth (“PeaceHealth”) provided this Court with “\* \* \* pertinent and significant authority that has come to [its] attention after oral argument.”

It brings the Court's attention to the Antitrust Modernization Commission Report. The Report contains recommendations concerning whether and how the antitrust laws should be modernized. PeaceHealth's letter then proceeds to assert that the Commission found *Lepage's, Inc. v. 3M Co.*, 324 F.3d 141 (3rd Cir. 2003) to be flawed; and the cost-based analysis of *Brooks Group, Ltd. v Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), controlling. PeaceHealth then argues that this authority compels grant of its motion for judgment as a matter of law, or, in the alternative, for a new trial because of a flawed jury instruction.

It is tempting to dismiss these arguments by simply inquiring just what legal precedent a commission report establishes. Going further, there are three telling additional comments to be considered.

First, the Report notes that there was disagreement among the experts; and “\* \* \* all appeared to agree, however, that further empirical study would benefit enforcement and policymakers.”

Ms. Cathy A. Catterson  
April 20, 2007  
Page 2

Second, the Commission's discussion of *LePage's* fails to address a record, such as that present here, where the evidence demonstrated that the plaintiff was the more efficient producer.

Third, during the trial of this case, PeaceHealth was careful to distinguish bundling claims from predatory pricing claims. It informed the trial court that there was a clear distinction between predatory pricing cases and bundling cases. It further stated:

“\* \* \* There is language in the *LePages* case, it is not a predatory pricing case. It is a foreclosure case. It is a case built on the proposition that bundling discounts together has essentially created a situation where the plaintiff or the competitor doesn't have access to a substantial share of the market.”

Tr. Vol. 12 A, p. 60, ll. 16-22.

The jury instruction, rewritten by PeaceHealth, made no reference to a cost based analysis, nor did any objection interposed by PeaceHealth to the Sherman Act instructions do so. Tr. Vol. 12 C, pp. 8-11.

Respectfully, care and attention should be confined to this record and the issues as drawn by the parties. Authorities that are unaware of or ignore that record are unhelpful and should be rejected.

Very truly yours,

Thomas M. Triplett

TMT:bak

cc: M. Laurence Popofsky, Esq.  
Peter H. Glade, Esq.  
David Marx, Esq.

