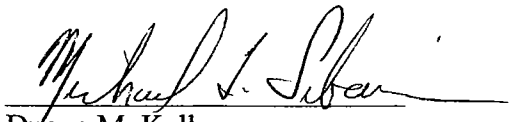
UNITED STATES OF AMERICA

Dated: March 17, 2004

Respectfully Submitted,



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Attorneys for Respondents

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
	)	
Evanston Northwestern Healthcare	)	
Corporation	)	Docket No. 9315
a corporation, and	)	**Public**
	)	
ENH Medical Group, Inc.,	)	
a corporation.	)	
	)	

MOTION TO DISMISS COUNT II FOR FAILURE TO STATE A CLAIM

Pursuant to the Federal Trade Commission's Rules of Practice ("FTC Rules"), 16 C.F.R. § 3.22, Respondents Evanston Northwestern Healthcare Corporation ("ENH") and ENH Medical Group, Inc. ("ENH Medical Group"), by counsel, move to dismiss Count II of the

Division of the Department of Justice had investigated and cleared years earlier under the Hart-

[redacted]

Counts I and II of the complaint each allege that the hospital merger violated

Section 7 of the Clayton Act.[1] Count I includes the traditional elements of a prima facie merger

[redacted]

ARGUMENT

Any "complaint must contain either direct allegations on every material point necessary to sustain a recovery ... or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995).[3] Complaints alleging antitrust violations are no exception:

> When the requisite elements [of an antitrust claim] are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the

I. Section 7 Requires Complaint Counsel To Plead A Relevant Market.

[redacted]

> [N]o person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged in commerce or in any activity affecting commerce, *where in any line of commerce or in any activity affecting commerce in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly

must be defined as "a market 'sufficiently inclusive to be meaningful in terms of trade realities,'" and the relevant geographic market must ascertain "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." Id. at 357

(citations omitted)

The Supreme Court has reaffirmed this doctrine in a series of merger cases since the Philadelphia National Bank era.[8] And lower courts have followed this precedent,[9] which was forged at a time when the "sole consistency" in Section 7 law was that "the Government always wins." United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). It is difficult to see why holding complaint counsel to these basic tenants of market definition would in any way prejudice the government.

Complaint counsel may assert that its burden of establishing a prima facie case should be lower because, unlike in pre-consummation cases, the complaint purports to allege direct evidence of anticompetitive effects following the January 2000 merger. Such an argument, however, would be misplaced because the elements of a Section 7 claim are identical

[8] See, e.g., United States v. Conn. Nat'l Bank, 418 U.S. 656, 669-73 (1974) (emphasizing that it was "the Government's role to come forward with evidence delineating the"

in the post-consummation context. In United States v. E.I. du Pont de Nemours & Co., 353 U.S.

Clayton Act claim); California v. Sutter Health System, 130 F. Supp. 2d 1109, 1132 (N.D. Cal. 2001) (Plaintiff failed "to meet its burden of proving a well defined geographic market

[redacted]

encompassing the practical alternative sources of acute inpatient services[.]"); United States v. Long Island Jewish Medical Ctr., 983 F. Supp. 121, 140 (E.D.N.Y. 1997) ("[T]he Government failed to establish its definition of the relevant product market as an anchor hospital providing

[redacted]

post-merger price increases viewed in a vacuum can provide the basis for divesting a successful

merger years after-the-fact.

This Court should adhere to the "basic outline" articulated by then Judge Thomas

Despite the many criticisms of the relevant market concept as it has been applied in the case law, the concept is not necessarily unsound and may indeed be necessary for merger analysis. Common sense suggests that competition issues must be addressed in the context of some market, and no alternative that promises to be appreciably more precise, predictable, or workable has yet emerged. Moreover, the very vagueness of the relevant market concept may be viewed by some as desirable. Distinguishing

[redacted]

been outdated and due for renegotiation. In short, there are any number of reasons why prices may have increased having nothing to do with any alleged increase in market power arising from the merger.

Count II fails to allege the requisite nexus between the merger and ENH's purported post-merger price increases. Sustaining this Section 7 claim would thus amount to a dangerous departure from settled law, under which complaint counsel may establish a presumption that the transaction will substantially lessen competition *only* upon a showing of proof of the relevant product market, relevant geographic market, high markets shares and high entry barriers. The burden to rebut this presumption shifts to the respondent if and only if

of merger cases interpreting a statute first adopted 90 years ago, neither the Commission nor the judiciary have experience in the many errors and dangers of going down a path of permitting the government to challenge a merger based on some select new group of elements that would be deemed a reliable proxy for demonstrating that a merger had anticompetitive effects. The

CONCLUSION

For the foregoing reasons, Respondents ENH and ENH Medical Group respectfully request that Count II be dismissed with prejudice.

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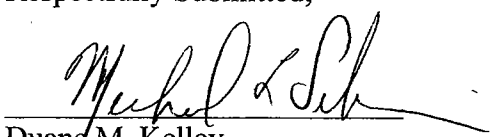

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2004, a copy of the foregoing Respondents' Motion to Dismiss Count II for Failure to State a Claim, supporting memorandum and proposed order were served by hand delivery on:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
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BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
Evanston Northwestern Healthcare Corporation, a corporation, and	)	Docket No. 9315
ENH Medical Group, Inc., a corporation.	)	

ORDER

Upon consideration of Respondents' Motion to Dismiss Count II for Failure to State a Claim and complaint counsel's response thereto, and the Court being fully informed, it is this _____ day of _____, 2004 hereby

ORDERED, that the Motion is GRANTED; and it is further

ORDERED, that Count II of the complaint is dismissed with prejudice.

The Honorable Stephen J. McGuire
CHIEF ADMINISTRATIVE LAW JUDGE
Federal Trade Commission