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Complaint allege that the merger of ENH and Highland Park substantially lessened competition,  
in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.<sup>2</sup> Complaint ¶¶ 27, 32.

ingress were substantially greater than those of other similar hospitals for similar services

*E.g.*, Complaint ¶¶ 31(a)-(b). Based on these factual allegations of direct evidence of anticompetitive effects, Count II alleges that the merger violated section 7 of the Clayton Act.

Complaint ¶ 32. The fact which is alleged to constitute "Complaint Count I" is

**I. MOTIONS TO DISMISS ARE DISFAVORED AND ARE GRANTED ONLY IF**

~~PROCEEDINGS CAN BE MAINTAINED BY A PARTY TO~~

**FACTS WILL SUPPORT THE CLAIM**

In a motion to dismiss, the party moving for dismissal bears the burden of proving that no claim has been stated. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.), *cert. denied*, 501 U.S. 1222 (1991) (under the Federal Rules of Civil Procedure, “the defendant has the burden of showing that no claim has been stated.”)<sup>4</sup> To prevail, the moving party must show “beyond doubt that the plaintiff can prove no set of facts to support his claim [that] would entitle

in operation of the statute. The effect of such acquisition would be substantially to

[REDACTED]

[REDACTED]

lessen competition, or to tend to create a monopoly." 15 U.S.C. 18. Respondents argue that

[REDACTED]

[REDACTED]

This [redacted] was endorsed by the Commission in one of its most recent decisions. In the Matter

[redacted]

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[redacted]

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The Court was explicit:

In this case, we conclude that the finding of actual, sustained adverse effects on competition in those cases where FED Justice was dominated is limited to the following:

[REDACTED]



These principles apply with equal force to a section 7 case, including the instant case. In *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002), the court recognized that direct evidence showing an “actual detrimental effect” could substitute for the presentation of traditional market definition and market share analysis. *Id.* at 49-40 (quoting *Indiana Federation of Teachers v. IFT*)

[REDACTED]

determine whether an arrangement has the potential for genuine adverse effects on competition.”

*In re: Enbridge*, 476 U.S. at 460-61. When a party complains that a proposed

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

157

[REDACTED]

[REDACTED]

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[REDACTED]

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657 (emphasis added). In *United States v. Marine Bancorp, Inc.*, 418 U.S. 602 (1974), market definition was necessary at the outset to predict the competitive effects of a “*proposed*” merger of two commercial banks. *Id.* at 605 (emphasis added). In *Payne, Inc. v. The Charlotte News-Sun*

cases, the government lacked any direct evidence of the anticompetitive effects of the proposed

merger. Therefore, in these cases, as in *Duquoy*, the government's analysis of the transaction at

**III. COUNT II ALLEGES A LINE OF COMMERCE AND A SECTION OF THE COUNTRY NECESSARY TO STATE A CLAIM UNDER SECTION 7 OF THE CLAYTON ACT**

In *Herbert v. Great Lakes*, the Court concludes that allegations regarding the relevant markets are

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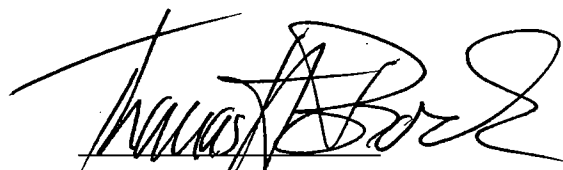
[REDACTED]

Two months ago the Commissioners of the FTC approved the issuance of this Complaint,

including Count II that alleges the same Section 7 violation as Count I but based on direct

evidence of anticompetitive effects. For purposes of this stage of the proceedings, where all that is required is notice of the issues to be tried, Count II suffices. For the foregoing reasons, Respondents' motion to dismiss Count II of the Complaint should be denied.<sup>14</sup>

Respectfully submitted,



Thomas H. Brock, Esq.

April 2, 2004

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing documents were hand delivered to

The Honorable Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., N.W. (H-106)

W-11 D.C. 20530

delivered on counsel for the Respondents by electronic and first class mail delivery to