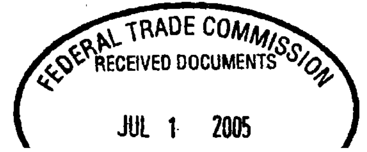


UNITED STATES OF AMERICA

In the matter of Evanston Northwestern Healthcare Corporation,	Docket No. 9315 **Public Record**

TABLE OF CONTENTS

INTRODUCTION..

TABLE OF CONTENTS

(continued)

iv. ENH and United agreed to a new contract in 2004 31

v. Exclusion of other area hospitals contributed to U

contract with ENH 31

b. PHCS ....

c. One Health 33

d. Aetna 35

e. Unicare 36

f. Other health plans 37

4. Complaint Counsel cannot prove its case based on the testimony of the payor witnesses called at trial 39

D. ENH's price increases were explained at trial 41

1. Complaint Counsel failed to put forth "Direct Evidence" of market power 41

2. Complaint Counsel's price increase analysis fails to prove that the Merger provided ENH with market power 42

3. Complaint Counsel's price increase analysis was shown to be flawed 44

II. COMPLAINT COUNSEL HAS NOT SHOWN THAT THE MERGER WILL SUBSTANTIALLY LESSEN COMPETITION

TABLE OF CONTENTS

(continued)

a. Prof. Baker's price level analyses always focused on the prices ...

b. ENH raised prices because it learned about the demand for its services

IV. COMPLAINT COUNSEL CANNOT ESTABLISH THAT THE MERGER IS LIKELY TO CAUSE ANTI-COMPETITIVE EFFECTS THAT OUTWEIGH THE ACTUAL AND DRAMATIC QUALITY IMPROVEMENTS 69

A. Complaint Counsel Distorts the Framework for Analyzing the Quality Improvements

TABLE OF CONTENTS

(continued)

4. Complaint Counsel has no credible evidence to rebut ENH's evidence of quality improvements at HPH after the Merger 91

C. HPH Could Not Have Achieved the Same Results Without the Merger 92

2. HPH lacked the financial capacity to implement quality improvements 92

3. HPH's culture and leadership structure prevented it from implementing essential quality improvements 93

TABLE OF AUTHORITIES

FEDERAL CASES

Am. Chiropractic Ass'n v. Trigon Healthcare, 367 F.3d 212 (4th Cir. 2004) [illegible]

Banks v. NCAA, [illegible]

Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340 (8th Cir. 1995) 19

Blue Cross & Blue Shield [illegible]

FTC v. Staples, 970 F. Supp. 1066 (D.D.C. 1997)

FTC v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999) 19, 39

Hosp. Corp. of America

United States v. Long Island Jewish Med. Ctr. 983 F. Supp 12 (E.D.N.Y. 1997)..............54

United States v. Marine Bancorporation, 418 U.S. 602 (1974)..46

United States v. Mercy Health Servs., 902 F. Supp. 968 (N.D. Iowa 1995)
vac. and remanded for mootness 107 F.3d 632 (8th Cir. 1997)..................................54

United States v Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004)

United States v. Rockford Mem'l Corp., 898 F.2d 1278 (7th Cir. 1990)..........21, 46, 51

INTRODUCTION

In its opening brief, [illegible]

judgment for Respondent and [illegible]

assuming the validity of such a claim

hodgepodge of evidence states a claim in the first instance, Complaint Counsel has not come

forward with evidence

SUMMARY OF ARGUMENT

A. Complaint Counsel Has Not Established Direct Evidence of [illegible]

Neither the economic analyses, contemporaneous documents, nor trial testimony established direct evidence of anticompetitive [illegible]

prior to the Merger ...

could easily substitute in an MCO network, thus belying Complaint Counsel's claims that inclusion of either Evanston Hospital or HPH is critical to the success of a health plan. (RFF ¶¶ 454-460).

4. *Output Has Not Declined.* As referenced above, Complaint Counsel baldly asserts that output necessarily declined ...

learning about demand explanation for the price

benign explanations for statements and documents

geographic market only includes the merging parties – which no Court has ever held – and is contrary to the Merger Guidelines. (CCPTB at 54; Section II.B.2.; *Merger Guidelines* § 1.21). It defines the geographic market

or payor who analyzed prices using the models or statistical analysis she employed. (RFF-Reply ¶ 700; RFF ¶ 1027). Moreover, it is undisputed that all parties who were involved in preparing

no legal basis why the Court should not consider the quality improvements unless Respondent quantifies or values them. Antitrust courts routinely weigh unquantified and

procompettiive benefits against alleged anticompetitive effects.

2 The quality

Glenbrook Hospital from the ground up in the 1970s.

4. ENH made merger specific improvements relative to other hospitals

Complaint Counsel would have the Court believe

the Merger. Respondents offered evidence of structural and process improvements at HPH, as

data when such data were available. Further, Respondent quantified the value of the

demonstrate that the cardiac surgery program under ENH's complete control at HPH has achieved better mortality rates – in fact zero mortality for the past two years – than ENH's joint venture programs at Weiss and Swedish Covenant Hospital.

1643). Complaint Counsel's proposed order may be wishful thinking, but it is inconsistent with the evidence in the case and with common sense.

ARGUMENT

I. THE MERGER DID NOT CREATE MARKET POWER FOR ENH IN

but rather to contract with almost all area hospitals. For example,

REDACTED (Holt-Darcy, Tr. 1584, *in camera*; RFF ¶ 994;

RFF-Reply ¶ 195). Out of [illegible]

had 88 of the hospitals in its network. [illegible]

"substitutes" or alternatives for each other. (*See* RFF ¶¶ 30-43, 475-481).[5] For instance:

- PHCS recognized that pre-Merger, UPH was a "

including Bell

While [PHCS]

REDACTED

Chicagoland Area Hospitals

- - - Complaint Counsel's Proposed Geographic Market
—— Available Substitutes Admitted by MCOs

an economic expert – all of whom concluded that prior to the Merger HPH was in financial

decline and could no longer compete effectively in the Chicago hospital market. (*See* RFF ¶¶ 2298-2413; RFF-Reply ¶¶ 302-372). At the time of the Merger, HPH was not making any money, it was supporting its negative operating

Merger and is now Chief Executive Officer of a competitor.[12] (CCPTB at 26-27, Newton, Tr. 279, Spaeth, Tr. 2282-2283, Hillebrand, Tr. 2028-2029). Newton was not responsible for financial issues at HPH, but rather relied on the advice of Kaufman, who disagreed with the financial plans. (Newton, Tr. 436-437). Respondent respectfully submits that Newton's lay opinion testimony, which covers nearly every topic in this case, is inherently unreliable and

B. Respondent's Documents

Complaint Counsel relies on Respondent's documents

1. The term "leverage" is benign

The term "leverage" was generally employed by Bain Consulting ("Bain"), which was hired by Evanston Hospital to assist in revamping its contracting strategy

from managed care payors to equipment suppliers and vendors. (*See* RFF ¶¶ 670-733; RFF-Reply ¶¶ 1036, 1517). As explained by Kim Odgen, the Bain partner responsible for the engagement, Evanston Hospital did not have an effective managed care contracting strategy and consequently was seriously under-pricing itself. (RFF ¶¶ 677-725; RFF-Reply ¶¶ 1779, 1782). In advising Evanston Hospital on new negotiating strategies and techniques, Bain advised that it "should recognize its position and not be afraid to ask to be paid fair market value" for its services. (RX 2047 at 39-40 (Ogden, Dep.); RFF ¶ 996; RFF-Reply ¶ 1518). This advice was extended to ENH's negotiations in all areas, including those with medical equipment vendors as well as MCOs. (RFF ¶¶ 998). Complaint Counsel's fixation on the word "leverage" reflects its misunderstanding of the context in which it was used; it certainly is not proof of an exercise of market power. (*See* RFF ¶¶ 995-1000; RFF-Reply ¶¶ 1361, 1407, 1450, 1517).

2. Complaint Counsel's comparison of market share numbers is misleading

million people)). The document referencing a "55%" market share, on the other hand, refers to admissions originating from people living within ENH's 20 zip code "core service area." (CX

359 at 16).

Moreover, the documents do not calculate market share under a method relevant to antitrust analysis. The "market share" that is of concern to antitrust analysis

output within a relevant market that takes into

area. (CX 394 at 5; RFF-Reply ¶ 1576).[17] The NHN documents, however, based their market

share references on the entire "Chicago area." In attempting to create ...

ENH's alleged desire for increasing market share, Complaint Counsel ...

generated by people living within thi[illegible]

[illegible]

55%. (CX 84 at 21; CX 250 at 1[illegible]) [illegible]

[illegible]

38. DEF [illegible] 1001 DEF [illegible]

and ENH learned of the demand for its services coincident with the Merger. Thus its price

increases were not anticompetitive; instead, the Merger actually benefited consumers as a result of the multi-million dollar improvements made in the quality of care at HPH

1. ENH upheld its commitment to integrate HPH into the ENH system

Immediately after the Merger was consummated, ENH began the task of integrating a declining HPH into its system. Making good

to create an "integrated

an academic teaching hospital would request reimbursement

by HPH, a community hospital. (RFF-Reply ¶¶ 1387, 1777). ENH immediately used the

increases it received to begin improving the quality of services at HPH.[23]

One of the supposed evils of a discount-off-charges contract is that there is almost no

limit on how much a hospital can charge because it can increase its chargemaster prices at will

(CCPTB at 34). That is

REDACTED

897). For example, MCOs have easily protected

REDACTED (RFF ¶ 684; RFF-Reply ¶ 962). United also admitted to being "embarrassed" by the fact that it had higher rates with HPH than it did with Evanston Hospital. (RX 2047 at 31 (Ogden, Dep.), RFF ¶ 684).

REDACTED

(Noether, Tr. 6086-6088, *in camera*; RFF ¶¶ 680, 883; RFF-Reply ¶¶ 755, 883). Bain advised ENH that the

REDACTED

"should use the better of [the two] existing contracts" as the terms of the new post-Merger contract. (CX 111 at 1; RFF ¶ 888; RFF-Reply ¶ 836, 967). Based on this evidence alone, it is clear that the post-Merger United contract was not the result of market power.

ii. United used the FTC investigation to assist its negotiations

Complaint Counsel cannot dispute th

REDACTED

CCPTB at 36; citing Foucre, Tr. 908-909; CX 6277, *in camera*). There is no such evidence in the record. (RFF-Reply ¶ 1013). This testimony was permitted over Respondent's objection, but only for the perception of the witness and "not for the truth" of the matter asserted. (Foucre, Tr. 906; RFF-Reply ¶ 1013). Complaint Counsel now cites this testimony as truth of employer [illegible]

call Kraft or any other employer at trial and is now attempting to circumvent the rules of evidence and use inadmissible hearsay testimony from a payor witness to fill [illegible]

its failing theories. This attempt should be given no weight.

iv. ENH and United agreed to a new contract in 2004

After negotiating for two years, United and ENH

satisfied the goals of both parties.

REDACTED

(RFF ¶¶ 917-921).

REDACTED

Ballengee's allegations are contradicted by her own actions. As discussed above, PHCS had already identified numerous acceptable alternatives to ENH, including St. Francis [illegible]

Hospital, Advocate Lutheran General, Rush North Shore, and Holy Family. (RX 712 at PHCS 891; *see also* RFF ¶ 457). Moreover, Ballengee admitted that no one at PHCS ever explicitly used the existence of HPH in negotiations with Evanston Hospital or vice versa. (Ballengee, Tr. 170; RFF ¶ 975). PHCS specifically [illegible]

below those being paid to HPH. (RFF ¶ 685; RFF-Reply ¶¶ 758, 1034). Ballengee agreed that the rates at HPH were higher than the rates at Evanston Hospital. (Ballengee, Tr. 203). Therefore, the justification for the price increase is clear: Evanston Hospital was being paid

Notwithstanding its claim that ENH's ability to negotiate discount-off-charges illustrates its market power, Complaint Counsel'

to note that it

REDACTED

(Ballengee, Tr. 252, *in camera*; Hillebrand, Tr. 1803)

(Ballengee, Tr.

an outdated contract that had not

considerably lower than HPH's pre-Merger rates. (Neary, Tr. 633; RFF-Reply ¶¶ 1105, 1112).

ENH requested a one-time adjustment to bring its rates up to market levels

responded by terminating ENH from its hospital network. (Neary Tr. 610-611, 634). However,

since negotiations were ongoing

returned to the [illegible]

(Mendonsa, Tr. 559, *in camera*;

REDACTED

(Mendonsa, Tr. 558, *in camera*; RFF ¶ 411). Complaint Counsel's attempt to characterize as market power a 30 minute negotiation where both parties compromised and ended with

e. Unicare

(Holt-Darcy, Tr. 1420) (emphasis added). The Merger hardly altered the alternatives available to meet Unicare's "access" standards. (Holt-Darcy, Tr. 1420; CCPTB at 42; RFF-Reply ¶¶ 295, 1299). The evidence showed that

REDACTED

(RFF ¶¶ 387-390).

REDACTED

(RFF ¶ 389). As shown above, Holt-Darcy admitted that

REDACTED

(Holt-Darcy, Tr. 1518-1519, *in camera*; RFF-Reply ¶ 1266, 1297-1298).

Unicare's claim that

REDACTED

(CCPTB at 42 (emphasis added);

alleged market power. (*See* RFF ¶¶ 757-777 (Blue Cross); RFF ¶¶ 780-784 (C[illegible]); RFF [illegible]

785-789 (GCN); RFF ¶¶ 800-813 [illegible]; RFF ¶¶ [illegible]

Plan))

contained key rates that were originally proposed by CCN during the negotiation. (RFF ¶¶ 787-789). Finally, Preferred Plan agreed to assign HPH's pre-merger rates to Evanston Hospital at the time of the Merger, and in 2000, negotiated a new contract that actually [illegible]

4. Complaint Counsel [illegible]

payor witnesses called at trial

As discussed above, Complaint Counsel [illegible]

Id. at 1302.[36]

Rather than focus on the testimony of MCO witnesses who were "not disinterested,"[37] the

D. ENH's price increases were explained at trial

Complaint Counsel's conclusion that ENH's price increases [illegible]

market power is wrong for several reasons. First, price increases alone are not direct evidence of

Dr. Haas-Wilson neither examined the competitive price levels following ENH's

hospitals. Likewise, Dr. Haas-Wilson

indirectly – by ruling out every alternative explanation for the price increases, except for market

power that was “reasonable and supported by

Complaint Counsel failed in that attempt because its expert never adequately considered or ruled out plausible explanations for the price increases, particularly “learning about demand.”[38] (RFF ¶¶ 315, 519-520). Dr. Haas-Wilson considered only selective portions of the payor testimony and relied only upon the factual evidence that was helpful to her conclusion without considering

the entire context of often contradictory evidence. (RFF-Reply ¶¶ 742, 980-981).

Furthermore,

REDACTED

REDACTED

relevant factors, it is not possible to conclude that ENH's price increases were caused by market power.

3. Complaint Counsel's price increase analysis was shown to be flawed

Complaint Counsel has taken several liberties with respect to describing the magnitude of the increases. Desperate to make its point, Complaint Counsel starts by "cherry-picking" price increases for individual payors, despite its assertion throughout this entire case that the customers in this case are all of the Chicago area payors.[40] (*See* Section III.C.1, *infra*). Even where Complaint Counsel does discuss the payors as a group, its analysis is flawed and based on data from the Illinois Department of Public Health, which contain no measure of actual payments made by managed care payors. (RPTB at 47-48; RFF ¶¶ 1016; RFF-Reply ¶¶ 395, 397, 501, 524). Furthermore

II. COMPLAINT COUNSEL HAS NOT SHOWN THAT THE MERGER WILL SUBSTANTIALLY LESSEN COMPETITION WITHIN A [illegible]

[illegible]

Counsel appears to have abandoned Count II of its Complaint.[42] [illegible]

[illegible]

1. The Sherman Act cases cited by Complaint Counsel are irrelevant and unavailing

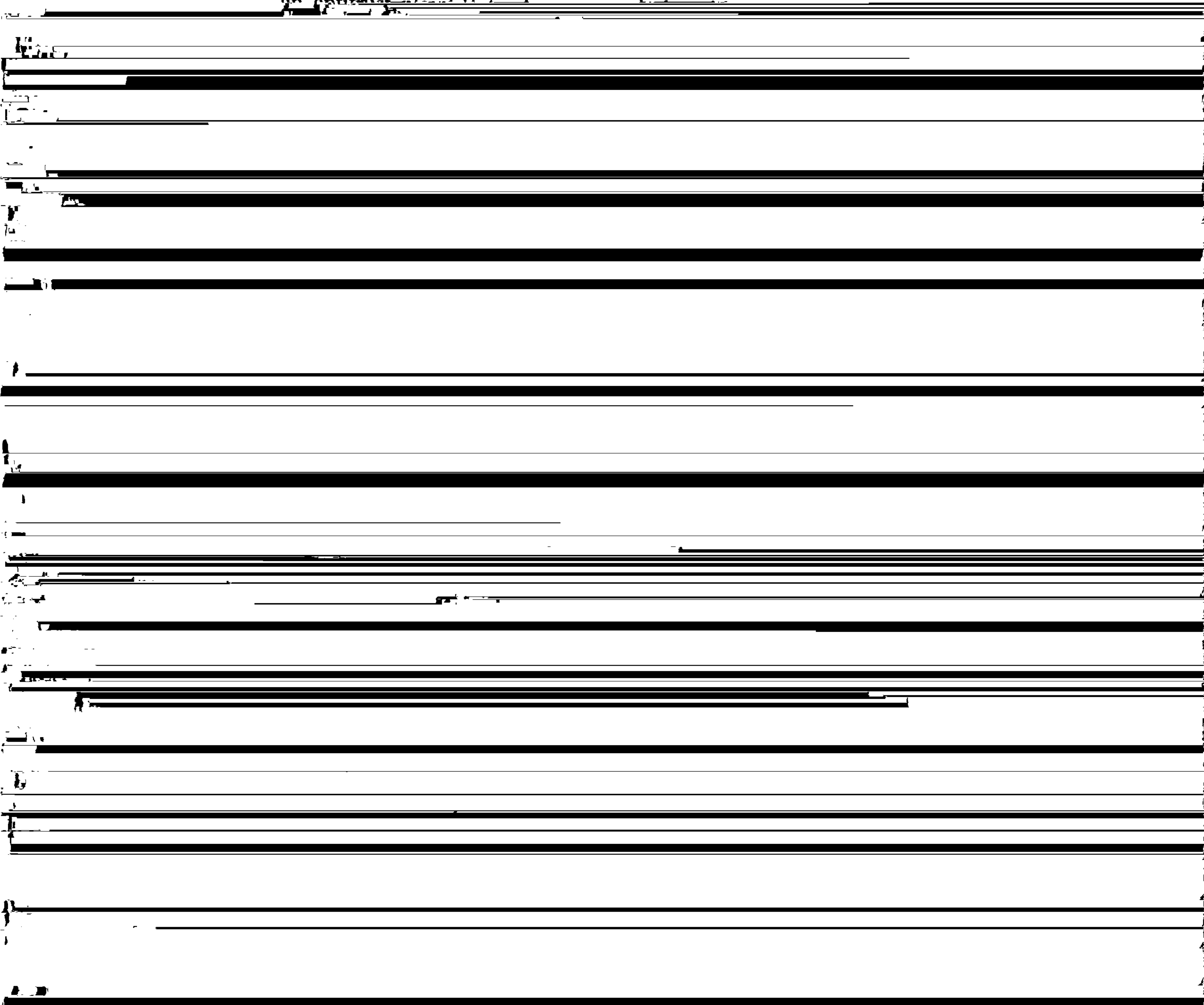
In its brief Complaint Counsel heavily cites

Us (both Sherman Act cases), without accounting for, or even acknowledging, the two principle

factors that render these cases inapplicable to the present case. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). (CCPTB at 49-50). First, the statutory schemes of the Sherman Act and Section 7 of the

virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market." *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004). The *Republic* court further explained that the two cases cited by Complaint Counsel, *FTC v. Indiana Federation of Dentists* and *FTC v. Toys "R" Us, Inc.*, do not support a plaintiff's ability to abrogate market definition:[44]

> [N]either *Toys "R" Us* nor *Indiana Federation of Dentists* allows



product market"), 50-52 (noting *Libbey's* market share of 72%, a post-merger HHI of 5251, and questioning the viability of a potential entrant). The introduction of "direct effects" evidence did

not eliminate the need for market definition and market share analysis; rather, such evidence simply served as one piece of evidence that demonstrated the potential competitive effect of the transaction within the defined market.[46] *Id.* at 50.

Similarly, *Staples* does not hold that evidence of price increases substitutes for defining a relevant market.[47] *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997). First, the "pricing evidence" in *Staples* included evidence of price levels

Third, the pricing evidence in *Staples* was actually used *to define* the relevant product market. *Id.* at 1075-1076, 1080. After defining the product market (the geographic markets were undisputed), the court considered the parties' market shares and HHIs within that market to conclude that there would be a lessening of competition after the merger. *Id.* at 1081. While the court acknowledged that the price evidence used to determine the relevant product market

the Merger will likely cause competitive harm. (*See also* RPTB at 29-30).[50] In contrast, defining the relevant market according to the principles laid down by the Supreme Court reveals that the relevant market extends beyond Complaint Counsel's result-oriented boundaries in both product and geographic dimensions.

1. The relevant product market in this case includes inpatient and outpatient [illegible] services

In its brief Complaint Counsel devotes one page to its discussion of the product market and simply defines a product market comprised of general [illegible]

[illegible]

health plans, which includes primary, secondary and tertiary services, but excludes quaternary inpatient services, as well as [illegible] (CCPTB [illegible]).[51] [illegible]

MCOs purchase a bundle of products that includes inpatient and outpatient services. (*See* RPTB at 16-18). Further, the payors trade-off prices on inpatient and outpatient services as part of the

2. Complaint Counsel has not properly defined a geographic market

includes only the merging parties.[55] Respondent respectfully urges that this Court not be the first to do so.

contention that MCOs were held hostage by ENH.[56] (*See* RPTB at 18-20, 54-57).

Focusing instead on a review of the record evidence, and applying the principles articulated by the courts and in the *Merger Guidelines*, the geographic market here clearly includes numerous hospitals that compete with ENH and which are viable alternatives for MCOs in building and marketing their health plans. (RFF ¶¶ 409-490). Factors such as geographic

competition are particularly relevant in making this determination.[57] (RFF ¶¶ 392, 395, 406,

461, 474, 485; *see also* [illegible]

evidence.[58] The evidence showed that MCOs take patient preferences into account when building their networks.[59] This evidence cannot be ignored when much of it comes from Complaint Counsel's own witnesses. Thus, disregarding cases whose market definition is based

purchasing the relevant product is irrational.[60]

C. A Proper Market Structure Analysis Fails to Show That the Merger Will Cause Competitive Harm

Even the most narrow properly defined

statistics cannot solely be relied upon in predicting competitive harm in a differentiated

market under a unilateral effects theory.[63] The case law that Complaint Counsel does cite all hinged on a coordinated effects theory, a theory that Complaint Counsel's expert concedes is not

Now, for the first time, Complaint Counsel appears to rely on an ENH corporate document that discusses ENH's "core service area"[65] to support its geographic market.[66] While

and is continuing to improve dramatically (RFF ¶¶ 1226-2216); (ii) there are currently several

hospitals both within and outside of the relevant geographic market that are viable alternatives to ENH and which exercise a constraint on ENH's pricing (RFF ¶¶ 383-490); and (iii) existing

hospitals have been repositioning to expand their existing

2289-2297; *see* RPTB at 20-28, 56-59, 67-107). Accordingly, Complaint Counsel has failed to carry its ultimate burden of persuasion. *Baker Hughes,* 908 F.2d at 983. (*See also* RPTB at 58-107).

III. THE EVIDENCE DEMONSTRATES THAT ENH'S RELATIVE PRICE INCREASES WERE ENTIRELY CONSISTENT WITH LEARNING ABOUT DEMAND

A. The Evidence Demonstrates that Evanston Hospital's Prices Were Below-Market Prior to the Merger

Complaint Counsel's contention that [redacted]

not below the market ignores the record evidence, reliable economic analyses and ultimately, the admissions of its own witnesses. As briefly outlined below and described more thoroughly in [redacted]

[redacted]

- The testimony of Fource, United's representative at trial

REDACTED

(RFF ¶¶ 907-908).

- REDACTED

(*See* RFF ¶¶ 1118-1136).

- REDACTED REDACTED (RFF ¶¶ 1111, 1113-1114, 1148).[69]

- REDACTED (RFF ¶ 1150; CCFF ¶¶ 717, 1919).

Complaint Counsel's response to all of this evidence is to theorize that if Evanston

Hospital's prices were really below-market, MCOs would have

The evidence upon which Complaint Counsel relies, the [illegible]

Evanston Hospital's prices were at the same level or below HPH's prices, and thus below competitive levels. (RFF ¶¶ 1012, 1014, 1116; RFF-R... [illegible])

B. Respondent's Price Level Analyses Demonstrated that ENH's Post-Merger Price Increases are Consistent with Learning About Demand

to be used, Dr. Noether never knew the prices of any of the hospitals. (RFF ¶ 1077; RFF-Reply ¶¶ 1819, 1823, 1842). As Dr. Noether explained, her objective was to have a control group that includes a large enough sample of good comparison hospitals

Third. Complaint Counsel identifies severe burn cases as [illegible]

not any specific competitor or customer.[80] As Drs. Noether and Baker explained, examining price levels for any individual payor is a poor proxy for determining whether

whole was diminished by the gain and exercise of market power. (RFF ¶¶ 1109, 1143; RFF-Reply ¶¶ 1952, 1955, 1960, 1964). Not one of Complaint Counsel's five economic experts ever testified, at deposition or trial, that examining price levels across all payors is the wrong method of analysis.

Moreover, even viewing the analyses payor by payor reveals that ENH's post-Merger prices are consistent with learning about demand. (RFF ¶¶ 1118-1136, 1151-1155). In response, Complaint Counsel simplistically argues that if ENH was truly an

"defy business judgment and economic theory" for **REDACTED** to pay ENH more than the other hospitals in the academic control group. (CCPTB at 64).[81] According to this argument, payors would be compelled to drop all but the cheapest hospital in the group, a

REDACTED

(RFF ¶¶ 1110-1014; RFF-Reply ¶ 1981).[82]

REDACTED (RFF ¶ 1127).

Complaint Counsel's argument also fails generally to take into account the factors that affect the prices charged to any given payor, and in particular REDACTED, including:

- REDACTED (RFF ¶ 528).

- REDACTED (RFF ¶¶ 1133, 1143).

- MCOs want to have virtually [illegible]

•

REDACTED

(RFF ¶ 1029, 1128; RFF-Reply ¶ 690).[84]

Accordingly, the appropriate way to conduct a price level analysis in this case is to view the prices of all payors together.

Complaint Counsel impermissibly cites to Prof. Baker's original report.[85] In any event, the conclusion it draws from the report is incorrect and does nothing to undermine learning about

After an error in one step of his methodology was pointed out, Prof. Baker corrected his

average price charged by the academic hospitals, consistent with ENH [illegible]

five retained experts took issue with Prof. Baker's analysis of price levels across all payors.[91]

Prof. Baker's bottom-line approach never changed, and both Complaint Counsel and its experts knew it.[92]

ENH's relative price increases. (RPTB at 41-45; RFF ¶¶ 656-964; Section I.C, *supra*). Indeed, contrary to Complaint Counsel's argument,[93] ENH's experience with Blue Cross proves the point. Blue Cross did not

networks (CCPTB at 4), then ENH should have been able to exercise market power against Blue

Cross as well and obtain price increases

Reply ¶¶ 576, 579, 732, 1942).

IV. COMPLAINT COUNSEL CANNOT ESTABLISH THAT THE MERGER IS LIKELY TO CAUSE ANTI-COMPETITIVE EFFECTS

improvements and prove that they are "significant" and "extraordinary," and that ENH's quality

must not have improved because ENH allegedly

payors. (CCPTB at 75-79). Complaint Counsel's errors are compounded by a profound failure

to explain how – and even whether – these issues

Merger's likely competitive effects. Complaint Counsel's argument demonstrates a fundamental

lack of understanding that there are two distinct ways that the evidence of ENH's quality

REDACTED [96] (RPTB at 46-

47; RFF ¶ 1156, 1158, 1162). ENH's relat...

de minimis, or even zero – Complaint Counsel has not established otherwise – depriving Complaint Counsel of its alleged proof of competitive harm.[97]

ENH established at trial that the quality of care offered at post-Merger HPH compares favorably to other hospitals, and that it improved proportionately faster than at other area

oncology conferences to discuss patient treatment and

services that

2. ENH's quality improvements are a procompetitive

(8th Cir. 1999); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 151 (D.D.C. 2004); *see Baker*

[illegible]

procompetitive benefits are Merger-specific – i.e., but for the [illegible]

[illegible]

improvements would not have existed.[101] Contrary to Complaint Counsel's unsupported

[illegible]

three ENH hospitals misses the point.[103] Complaint Counsel's assumed anticompetitive effect is an increase in the systemwide prices of ENH; therefore, the only relevant consideration – both for purposes of quality adjusted prices and weighing procompetitive benefits – is whether quality improved across the ENH system as a whole.

comprised of three hospitals, ENH is one completely integrated system with one Medicare identification number, one professional staff for all three hospitals, clinically integrated departments overseen by a single department chairman and central decision-making.[104]

(RFF ¶¶ 7, 11-12, 1442). As an integrated system, any quality improvements to HPH resulted in a net gain in quality for the ENH system as a whole unless there were Merger-related declines in

evidence includes NPIC data showing a favorable post

quantified or quantifiable.[107] Here, the Court is weighing the interests of consumers in higher

sufficient evidence of the value of its post-Merger improvements to weigh against any alleged

109

regardless of whether they discussed it during negotiations.

sticker price on the Hershey Bar stays at $1 but the bar gets bigger,

B. Complaint Counsel's Efforts to Refute Respondent's Overwhelming Evidence of Dramatic Post Merger Improvements in th

Unable to dispute that ENH made innumerable changes at HPH after the Merger, Complaint Counsel instead argues, based entirely on Dr. Romano's "quantitative analysis," that

there is no evidence that th

(Chassin, Tr. at 5153-5154).[112] While outcomes are of obvious importance to patients, Dr

Romano agreed that they have inherent weaknesses that [illegible]

quality: certain outcomes may not be under a provider's control; some outcomes occur so rarely that they are not useful as quality measures; some outcomes are so delayed after treatment that they cannot be used to assess whether quality changed as a result of a merger; and the sample size for certain procedures is too small to perform any reliable analysis of the outcomes.[113] (RFF

¶¶ 1178-1182). [illegible]

radiology, intensivists, and electronic medical records. (Romano, Tr. 3289-3290, 3308, 3317-3318, 3327, 3329, 3389-3390; RFF ¶¶ 2219, 1231, 1292; RFF-Reply ¶¶ 2059, 2091). Thus, it is possible to measure healthcare quality without reliance on outcome or patient satisfaction data.

Contrary to Complaint Counsel's suggestion, ENH and Dr. Chassin did not ignore outcomes as measures of quality. ENH relied on outcome data when such data was reliable. For example, ENH presented evidence of HPH's zero mortality rate (from clinical data) for coronary artery bypass graft ("CABG") procedures in the last 2 and 1/2 years and additional evidence

- relying on parts of the Rhea & Kaiser patient satisfaction survey, but disregarding the authors' conclusion that HPH patients who used a

administrative data, which is used primarily for hospital reimbursement and billing purposes and

reporting to government agencies. (RFF ¶¶ 2221-2222).

Dr. Romano conceded that administrative data, including the State of Illinois

d. Dr. Romano's difference-in-difference methodology is fatally flawed

change in mortality for the subject hospital may represent a 70% drop in its mortality.[119] (RFF-Reply ¶ 2104).

e. The patient satisfaction data Dr. Romano relied on is not a valid or reliable measure of quality in this case

Dr. Romano conceded that the Press Ganey data he relied on suffers from [illegible]

from patient satisfaction surveys. (RFF ¶ 2261).

f. Complaint Counsel's discussion of specific service areas demonstrates the flaws in Dr. Romano's analysis

Complaint Counsel's discussion of specific service areas in pages 69-74 of its brief highlights the flaws in Dr. Romano's methodology and analysis.

i. Heart care

Heart Attack Mortality. Complaint Counsel dismisses the JCAHO measure, which showed improvement in heart attack mortality rates, by relegating it to a footnote. (CCPTB at 69 n. 54). Yet the JCAHO measure is more reliable than the AHRQ indicators Dr. Romano used. (RFF-Reply ¶¶ 2060-2061). **REDACTED**

(RFF-Reply ¶ 2062)

Heart Attack Care Processes. Complaint Counsel concedes that HPH's performance increased compared to the control group.[122] (CCPTB at 69). Complaint Counsel's argument that performance deteriorated at Evanston is [illegible]

must be further discounted as a result of his admitted failure to balance the alleged relative changes in performance at HPH and Evanston.

Heart Surgery and Other Procedures. Complaint Counsel focuses solely

while completely ignoring the exemplary mortality rates at post-Merger HPH. (RFF ¶¶ 1609-

Moreover, Complaint Counsel ignores evidence of improvements under Dr. Romano's own analysis. It glosses ...

REDACTED

(RFF-Reply ¶ 2089, *in camera*). Complaint Counsel also ignores evidence that ENH as a whole had lower rates for operative vaginal deli...

Cesarean section throughout the pre- and post-Merger periods relative to the benchmark of hospitals ...

REDACTED (RFF ¶ 1231, *in camera*).

iv. Exporting Evanston's "teaching" status to Highland Park

ENH does not contend that quality improved at HPH simply because it "owns" HPH, as

satisfaction data is an inappropriate measure of quality in this case. The Kellogg Cancer Care

Center is an *outpatient* facility, yet **REDACTED**

¶ 2283).[128]

Dr. Romano's patient satisfaction analysis again demonstrates the problems with using such data.

REDACTED

(Romano, Tr. 3116-3117, *in camera* (discussing DX 441 at 107); RFF ¶ 2172). This means that, at best, Dr. Romano analyzed only 2 or 3 quarters of Press Ganey data in forming his opinion.

conducted informal interviews without ENH administrators or counsel present.[129] (RFF ¶¶ 1205-

1206). Several of the subjects had worked at HPH prior to the Merger and were intimately

familiar with its quality [illegible]

example, was unaware of the addition of cardiac surgery, invasive cardiology, intensivists, and

the Kellogg Cancer Care Center; the expansion of the emergency room coverage; the addition of new high-end equipment such as a PET scanner; or the implementation of Epic at ENH. (Ballengee, Tr. 201-03). As a result, she has absolutely no basis to make any statements about whether HPH's post-Merger quality did or did not improve.

Complaint Counsel argues that any quality improvements at HPH were not "merger-specific" based on the untenable position that HPH had no pre-Merger quality issues, and that HPH had both the money and the ability to make the necessary improvements. The reality, as

improved the quality of care without the Merger are HPH's 1998 and 1999 strategic plans to invest millions of dollars into HPH. (CCPTB at 80). In making this [illegible]

Counsel grossly misrepresents HPH's financial health. Rather than being "impressive," HPH's financial condition was declining so rapidly in the late 1990s that it lacked the wherewithal to make any meaningful [illegible]

beneficiaries.[133] (CCPTR at 67 n. 53). The study showed

Illinois was significantly below the nationwide average, ranking 47th among the 50 states in 1998-1999 and 46th in 2000-2001. (Romano, Tr. 3001).

Moreover, knowing what to do and being able to do it are two different things. Although the benefits of electronic medical records have been well-known for years, no community hospital has deployed an enterprise grade electronic medical record system

on the quality of healthcare

would not produce the level of quality in cardiac care that patients at HPH enjoy today.

The outcome data favored by Complaint Counsel shows that HPH's

prices – higher premiums for employees, increased deductibles, increased co-pays, employers dropping coverage altogether, and consumers losing [illegible] [138]

This argument is nothing more than bald speculation. Complaint Counsel has not produced a single shred of evidence proving that such consequences *actually resulted* from the Merger. Neither Complaint Counsel's experts nor the payors quantified the amount that premiums were

(RPTR at 27-28; DEF

Inc. v. Carrier Express, Inc. 54 F.3d 1125, 1131-1132 (3rd Cir. 1995).[143] Nevertheless,

to order divestiture, reasoning that "Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent." *du Pont* 366 U.S. 316, 331 n.9 (1961).[146] Indeed, the Commission itself has acknowledged that divestiture is not required. *In the Matter of Retail Credit Co.*, 92

FTC 1, 1978 FTC LEXIS 246, at *258-259 (July 7, 1978)

an automatic sanction, mechanically invoked in merger cases"); *In re National Tea Co.*, 69 FTC

226, 1966 FTC LEXIS 41, at *88 (Mar. 4, 1966) ("At least we think it appropriate, in the

B. The Quality of Healthcare Provided By HPH Would Unquestionably Be Impaired as a Result of Divestiture

This case is distinguishable from the typical divestiture because the benefits of the Merger are important, life-saving improvements in the quality of healthcare. *See Olin*, 113 FTC at 330-331 ("there is no indication in this record that

substantial efficiencies or other important benefits to the

and nursing skills, improved clinical protocols, cardiac surgery, interventional cardiology, and Epic, would be eroded and eliminated upon divestiture of HPH.[147] (*See also* RFF ¶¶ 1232, 2483-

1721). The lack of intensivist programs in Illinois hospitals – only six of the 37 reporting

hospitals in Illinois have installed such a program in spite of Leapfrog's recommendation – exemplifies the problem. (RFF ¶ 1721). Third, MCOs only consider quality as "background

[illegible]

coverage that "will be *adequate* to meet their customers' [] needs." *Indiana Fed'n of Dentists*, 476 U.S. at 463 (emphasis added); RFF-Reply ¶¶ 2473-2477, 2479, 2485.[149] Finally, JACHO scores are general and imprecise measures of quality not suited to assure continual advancements

in care. (RFF ¶¶ 1520-1522). This is evidenced by the fact that HPH received a 95 from JCAHO prior to the Merger, but not months later was in jeopardy of losing its Medicare accreditation as a result of significant deficiencies found by the Illinois Department of Public

[illegible]

89).[151] Complaint Counsel cannot have it both ways. If HPH could be a strong stand-alone hospital on its own, and maintain the quality improvements that FNH brought to it, then the

ancillary relief requested would simply be punishing FNH

proximity to HPH, with a similar full-time medical management structure, with similarly high-

CONCLUSION

For the foregoing reasons, judgment should be entered in favor of Respondents and all counts of the Complaint should be dismissed with prejudice.

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CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)
	)
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION,	)
	)
and	)
	)
ENH MEDICAL GROUP, INC.,	)
Respondents.	)

ORDER DENYING NON-PARTY GREAT-WEST HEALTHCARE'S MOTION FOR COST REIMBURSEMENT

I.

Respondents assert that controlling authority holds that subpoenaed third parties, such as

Great-West Healthcare, with a potential interest in the administrative litigation are, at most [illegible]

[illegible]

pay.

III.

Pursuant to Rule 3.31(d), the "Administrative Law Judge [illegible]

[illegible]

[illegible]

[illegible]

UNITED STATES OF AMERICA

OFFICE OF ADMINISTRATIVE LA[illegible]W JUDGES

In the Matter of	)
	)
CORPORATION,	)
ENH MEDICAL GROUP, INC.,	)
Respondents.	)

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR THE ADMISSION OF PORTIONS OF DR. BAKER'S EXPERT REPORTS INTO EVIDENCE

On April 21, 2005, Complaint Counsel filed a motion seeking to have portions of the

On March 28, 2005, the Court ruled that the relevant portions of Baker's report would be admitted "for purposes of impeachment" and to "the extent that they impeach only." Tr. at 5113, 5114. The parties were allowed an opportunity to confer in an attempt to reach an agreement on

[W]hat I said yesterday . . . was that I would allow the first expert report of Dr.