



respectfully moves for leave to file the accompanying brief *amicus curiae* in support of Evanston Northwestern Healthcare Corporation (“ENH”).

Highland Park is a residential community of approximately 22,000 residents located 22

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**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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)  
In the matter of )

) Docket No. 9315

)  
)  
Evanston Northwestern Healthcare Corporation \_\_\_\_\_ )

) Public Record

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Healthcare Corporation )  
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**ORDER**

Upon consideration of the Motion of the City of Highland Park for Leave to File Brief *Amicus Curiae* In Support of Evanston Northwestern Healthcare Corporation, the Commission finds that the proposed brief amicus curiae may assist in the determination of the matters presented by this appeal.

Accordingly, IT IS ORDERED that the City of Highland Park hereby is granted leave to file the proposed amicus curiae brief.

By the Commission

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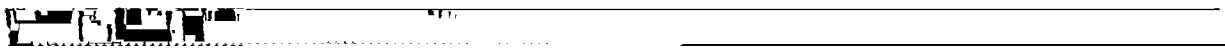
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1. Valuable Gains From the Merger Could Be Lost or

## I. INTRODUCTION

The City of Highland Park ("Highland Park") is a residential community of

approximately 32,000 residents located 23 miles north of Chicago on Lake Michigan's North Shore. Highland Park is also the home of Highland Park Hospital, which merged with Evanston Northwestern Healthcare Corporation ("ENH") in 2000. Highland Park believes that a full and

subsequent merger of Highland Park Hospital with another hospital would be as successful as the

various ENVI arrangements. And given the frequency with which most consummation failed colossally



of Fact (hereinafter "FF"). ¶ 24 Community opinion was that "if you were really sick you went

somewhere else." Spaeth, Tr. 2243-44; 1/ see also Belsky, Tr. 4901. 2/

The purpose of the merger was to add and improve certain key services. FF ¶ 848. In  
response to the Highland Park community's "various serious concerns about Everston's



records (through the EPIC system) to the hospital, FF ¶¶ 976-987, and integrated the hospital's

1. The Court found that the hospital's integration with all of the other hospitals

2.

retention of many of the gains made as a result of the original merger. But several facts cast

certain key benefits would be lost. Second, Highland Park Hospital's operations have been so thoroughly integrated into ENH that it would be difficult, if not impossible, to separate the hospitals without diminishing Highland Park Hospital and harming consumers, who are the main beneficiaries of Highland Park Hospital's improved services. Third, hospital mergers are very

RX 1148; RPF 2169-2170. These research opportunities and recruiting advantages could well be lost following divestiture.

The loss of its academic affiliation could also lead to Highland Park Hospital's loss of

physicians whose practices and opportunities have changed significantly since the merger. Since

Highland Park Hospital was integrated into ENH, 60 Highland Park Hospital physicians who



excellence. A potential decline to mediocrity, or in the ALJ's words "acceptable levels of quality," is simply insufficient to render divestiture a palatable remedy.

**2. In this Case the Eggs are so Completely Scrambled that Successful Divestiture is Unlikely.**

One reason why so many benefits from the merger are likely to be lost is that, unlike with many other mergers, the parties have been so successfully integrated with each other that a

successful extraction is unlikely. As the saying goes, "the eggs have been scrambled".

Once a merger takes place and the firms' operations are integrated, it can be very difficult, or impossible, to unscramble the eggs and reconstruct a viable, divestible group of assets. . . . In these ways the acquiring and acquired firms are, in effect, irreversibly "scrambled" together. The independent identity of the acquired firm disappears. "Unscrambling" the merger and restoring the acquired firm to its former status as an independent competitor is

And even if we accept supposing Highland Park Hospital from ENH and combining it with

another hospital is a dollar that could be better spent on the provision of health care to the members of the Highland Park community.

That is, if an attempt to facilitate the unscrupling process does not solve the problem



Without the respondent's assistance, critical, even indifference by the

respondent to the buyer's success may make the divested business fail.”).

surpassed them: there are reasons to doubt that a merger with another hospital will be as

The past several decades have seen an alarming number of failed hospital mergers. See

*e.g.* Fuhr, *Failed Hospital Mergers*, 36 J. Health L. at 301 (cataloging failed hospital mergers

and noting that "few hospital mergers have yielded efficiency gains and many hospitals have

profit corporation. Spaeth, Tr. 2272; RPF ¶ 246. The mission of a non-profit hospital is to serve the health needs of the community, and excess profits will be put to that purpose rather than sent elsewhere. Moreover, not much is known regarding the likely results when a for-profit

of Jack Bierig).

With these and other criteria in mind, Highland Park Hospital carefully considered potential merger partners and eventually settled on ENH, which provided a particularly good fit

(1976), "The Antitrust Improvement Act of 1976," Report of the Committee on the Judiciary to Accompany S. 1284, Part 1 at 65.

As the Divestiture Report observed, there are many obstacles to ensuring that a divestiture is a successful remedy to address the perceived competition concerns raised by a merger. These obstacles multiply, however, when a divestiture will not occur until seven or

parties have so integrated their operations that a divestiture will require both substantial

incentive to continue investing in Highland Park Hospital. As one panelist at the FTC/DOJ

Hearings observed:

In the short run, if divestiture is the only practical remedy, it is unlikely that during the course of the retrospective investigation, that the merging hospitals will continue to invest heavily in new

medical equipment and construction, or to add new services. So,

consider the public interest.

*In considering the nature of its role in deciding appropriate remedies, the Commission has*

Given the high costs of divestiture to the Highland Park community, and given the

burdensome oversight that would be necessary for divestiture to have a chance of success, if the

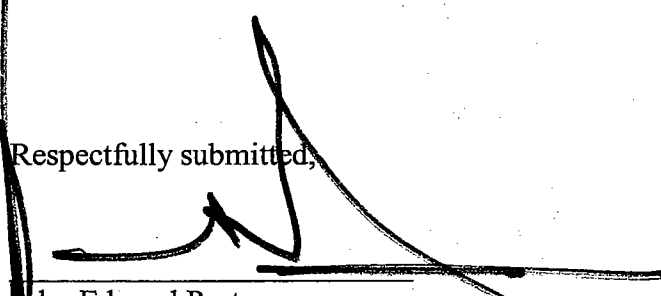
Commission does conclude that the merger violated Section 7 of the Clayton Act, equity strongly

favors an alternative remedy in this case.

### III. CONCLUSION

For these reasons, Highland Park advocates overturning the Initial Decision's order of divestiture.

Respectfully submitted,



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