United States of America

FEDERAL TRADE COMMISSION

Docket No. 9315

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 1

ARGUMENT 10

I. COMPLAINT COUNSEL'S PRICING AND OTHER NON-STRUCTURAL EVIDENCE DOES NOT MEET ITS BURDEN OF ESTABLISHING ANTICOMPETITIVE UNILATERAL EFFECTS UNDER ESTABLISHED STANDARDS 10

A. Complaint Counsel's "Bargaining Theory" Does Not Meet The Legal Standard For Establishing Unilateral Anticompetitive Effects. 11

B. Complaint Counsel's MCO Evidence Does Not Satisfy Its Burden To Prove That The Merger Gave ENH Unilateral Market Power. 13

C. The Post-Merger Price Increases Cannot Establish Unilateral Market Power. 22

D. Evidence Regarding Negotiations With MCOs And Respondent's Internal Discussions About The Merger Do Not Establish Unilateral

III. COMPLAINT COUNSEL HAS NOT OVERCOME RESPONDENT'S SHOWING THAT THE MERGED PRODUCED [illegible]

COMPETITIVE BENEFITS THAT OUTWEIGH ANY COMPETITIVE RISKS. 53

A. Complaint Counsel Has Not Undermined Respondent's Showing That The Merger Increased HPH's Financial Strength And Made It A More Potent Competitor. 53

B. Complaint Counsel Has Not Undermined Respondent's Showing That The Merger Produced Significant Verified Quality [illegible]

TABLE OF AUTHORITIES

FEDERAL CASES

Blue Cross & Blue Shield United of Wisconsin v. [illegible]

65 F. 3d 1406 (7th Cir. 1995)......22

Chevron v. Huson, 404 U.S. 97 (1971)......79

Chowaniec v. Arlington Park Race Track, Ltd., 934 F. 2d 128 (7th Cir. 1991)......79

Donahue v. Barnhart, 279 F. 3d 441 (7th Cir. 2002)......26

New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321 (S.D.N.Y. 1995)......................3, 20

Olympia Equip. Leasing Co. v. W. Union Telegraph Co.,
797 F. 2d 370 (7th Cir. 1986)..81

Re/Max International, Inc. v. Realty One, Inc., 173 F. 3d 995
(6th Cir. 1999)..52

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F. 3d 1421
(9th Cir. 1995)..52

Republic Tobacco Co. v. North Atlantic Trading Co., Inc.,

United States v. Oracle Corp., 331 F. Supp. 2d 1098

U.S. v. Philadelphia National Bank, 374 U.S. 321 (1963). 47

United States v. Rockford Mem'l Corp., 717 F. Supp. 1251
(N.D. Ill. 1989) ....

United States v. Syufy Enters., 903 F. 2d 659 (9th Cir. 1990) 55

ADMINISTRATIVE DECISIONS

Coca-Cola Co., 91 F.T.C. 517, 1978 WL 206107, Dkt. No. 8855
(Apr. 7, 1978)..82

In re Merck & Co., Inc, 1999 FTC LEXIS 18,
Dkt. No. C-3853 (Feb. 18, 1999) 75

In re Retail Credit Co., 1978 FTC LEXIS 246, Dkt. No. 8920
(July 7, 1978) 71, 78

In re R.R. Donnelley, 120 F.T.C. 36, Dkt. No. 9243 (July 21, 1995) ....

U.S. v. Lehman Bros. Holdings, Inc. and L-3 Communications Holdings, Inc.,
Civil No.: 1:98CV00796 (SS) (1998) 75

FEDERAL STATUTES

15 U.S.C. § 18 52

16 C.F.R. §3.2 84

16 C.F.R. §3.31(c)(1) 84

H.R. Rep. No. 9401373 (1976) 72

S. Rep. 81-1775 (1950) 52

OTHER AUTHORITIES

Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, ABA Antitrust Section
Fall Forum, Nov. 18, 2004 72

Frank H. Easterbrook, *Limits of Antitrust Law*, 63 Tex. L. Rev. 1 (1984) 9, 78

Herbert Hovenkamp, ANTITRUST ENTERPRISE (2005) 9

Hillestad, et al., *Can Electronic Medical Record Systems Transform Health Care?*

Scott A. Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 Santa Clara L. Rev. 41 (2004)........74, 78

U.S. Dep't of Justice and Fed. Trade Comm'n Horizontal Merger Guidelines ....*passim*

William A. Landes & Richard A. Posner, *Market Power in Antitrust Cases,* 94 Harv. L. Rev. 937 (1981) 10, 50

Recognizing that it cannot defend the reasoning of the Administrative Law

Judge ("ALJ"), Complaint Counsel now urges an alternative rationale for

breakup of a successful hospital merger—a merger that has already produced enormous benefits for patients from Highland Park and the surrounding community. That rationale, while certainly "simple" (CCAB87), is based on a legal and economic theory that is as erroneous as it is unprecedented. The Commission should therefore reject that theory, which Complaint Counsel has devised to achieve *even more* relief in a case that has been

assumes that absent market power, prices are ...

level. But that assumption is false. As Judge Posner and many other respected scholars have recognized, accurate information about costs and prices is often costly and difficult to obtain, particularly in a highly complex and differentiated market like ...

services. *See, e.g.*, Richard A. Posner, ANTITRUST LAW 160 (2d Ed. 2001). Moreover, as

with sufficient speed to prevent the merged firm from raising prices above competitive levels if it attempted to do so. That is the rule articulated in the Commission's decision in *Donnelley*, in the *Merger Guidelines* §2.21, and in pertinent court decisions. *In re R.R. Donnelley*, 120 F.T.C. 36, 195 (1995); *see United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1117-18 (N.D. Cal. 2004); *New York v. Kraft Gen. Foods*, 926 F. Supp. 321, 365-66 (S.D.N.Y. 1995). Complaint Counsel's di[illegible]

tacit admission that the only way it can win this case is for the Commission to [illegible]

were next best substitutes for use in any MCO network. Haas-Wilson, Tr. [illegible]

camera.

Moreover, MCO witnesses, contemporaneous documents and expert testimony all confirm that Evanston and HPH were very different from each other before the merger, and that *each* had much closer competitors in both product and geographic space. As *Donnelley* makes clear, the "closeness" of the merging firms is "the primary factor determining the market power that will be created by a merger in a differentiated product setting." 120 F.T.C. at 196.

Beyond this, Complaint Counsel makes no effort to show that these MCO customers account for a significant share of the relevant sales (the second *Donnelley* requirement), much less that the many other hospitals in the Chicago area—or even in the area immediately surrounding the ENH hospitals—could not reposition themselves to accommodate ENH's customers in the event ENH attempted to exercise unilateral market

Complaint Counsel relies, including out-of-context snippets from ENH's internal documents and the supposed pattern of price increases ...

Donnelley requirements.

On the central issue of unilateral market power, then, this is indeed a "simple and straightforward case" (CCAB87), but not for the reason Complaint Counsel asserts. It is simple because Complaint Counsel has failed to satisfy the requirements established by the Commission and the courts for demonstrating that a merger has ...

produced or is likely to produce unilateral market power.

Moreover, although ENH has no burden of proof on the issue, Complaint Counsel has failed to overcome ENH's showing that its post-merger price increases not only were far smaller than Complaint Counsel claims (which are in turn far smaller than alleged in the complaint), but also were the result of bargaining idiosyncrasies ...

price changes do not reflect an exercise of market power in the first instance, they cannot be used to define relevant markets. And Complaint Counsel nowhere comes to grips with

other, a direct refutation of Complaint Counsel's gerrymandered market definition. Section II also rebuts Complaint Counsel's argument that the ALJ erred in dismissing Count II which, as noted above, has no basis in economics or the law.

As shown in Section III, Complaint Counsel offers no serious response to

Hughes Inc., 908 F.2d 981, 983 (D.C. Cir. 1990). Accordingly, all quality improvements

accomplished to date and likely to be achieved in the foreseeable future must be

amicus curiae filing of Highland Park, the community that will be most [illegible]

ARGUMENT

I. COMPLAINT COUNSEL'S PRICING AND OTHER NON-STRUCTURAL EVIDENCE DOES NOT MEET ITS BURDEN OF ESTABLISHING ANTICOMPETITIVE UNILATERAL EFFECTS UNDER ESTABLISHED STANDARDS.

Complaint Counsel concedes (CCAB35; Pak, Tr. 6537) that this merger does not raise concerns about increased *collusion* (i.e., coordinated effects) in the relevant

Health, Inc., 12 F. Supp. 2d 34, 45 n.8 (D.D.C. 1998).

the industry. RFF315-17,519-20. As shown below, Complaint Counsel's bargaining theory—the heart of its economic case—simply ignores the legal standards for establishing unilateral anticompetitive effects. Neither the MCO testimony, the pricing evidence, nor the negotiating history between ENH and MCOs satisfies the *Donnelley*

requirements or, indeed, the requirements of the bargaining theory Complaint Counsel espouses.

A. Complaint Counsel's "Bargaining Theory" Does Not Meet The Legal Standard For Establishing Unilateral Anticompetitive Effects.

merger increased ENH's bargaining strength because it "eliminated a hospital competitor

On its face, this variation of Complaint Counsel's bargaining theory would condemn virtually every horizontal merger, and therefore cannot be correct. Although all

power, the mere fact that a merger of competing firms reduces the number of choices available to purchasers does not create the kind of market power that has ever been a concern of antitrust law. Posner, ANTITRUST LAW at 81 (2d Ed. 2001); Noether, Tr. 6131.

In a second version of its bargaining theory, Complaint Counsel argues that when MCOs were evaluating alternative networks, Evanston and HPH were their "first and second choices" because of their appeal to persons residing in certain neighborhoods between HPH and Evanston. CCAB21, n.21. In addition to the fact that it addresses only one of the elements articulated in *Donnelley*, this was not the bargaining theory that Dr. Haas-Wilson or any other witness presented at trial. Indeed, Dr. Haas-Wilson offered no analysis or opinion on whether Evanston and HPH were first and second choices for the

no means by which to determine the closeness of other substitute hospitals to the merging firms.[1]

In short, neither version of Complaint Counsel's shifting bargaining theory satisfies the *Donnelley* requirements. Neither variant satisfies the requirement that sales

Merger Guidelines §2.21. This section of the brief addresses Complaint Counsel's non-price evidence, while the next sections address Complaint Counsel's pricing and [illegible]

1. Complaint Counsel Has Failed To [illegible]

The witnesses also established that...

substitutes for Evanston and HPH than they were for each other. Every MCO witness confirmed that St. Francis and Rush North Shore were within minutes of and were alternatives to Evanston. RFF389(a)-(b),455-59,570-74.

Similarly, every MCO witness confirmed that Lake Forest was closer to HPH than HPH is to Evanston (IDF21,266; RFF577), and contemporaneous documents corroborated that Lake Forest was a "viable" alternative to HPH in any MCO network. RFF578. The MCOs, moreover, universally assessed Condell as a "significant" or primary alternative to HPH. RFF577; Neary, Tr. 621. One MCO...

Ballengee *never* testified that Evanston and HPH were her first and second choices. She

that PHCS "could have one or the other hospital" and that their separate existence made her "feel comfortable" in case PHCS did not find the rates "to be appropriate." Ballengee, Tr. 166-67. Because an MCO would obviously feel more "comfortable" with more alternatives in any negotiation, this statement cannot establish that Evanston and HPH were first and second choices even for PHCS.[2] Nor did PHCS (or any other MCO) act as though it viewed Evanston and HPH as close substitutes, such as playing them off each other in negotiations. *See* RFF974-83.

Complaint Counsel is also wrong in suggesting that the merging parties' status as first and second choices can be inferred from testimony that HPH and Evanston were important or even "necessary" parts of MCOs' Chicago networks. *See* CCAB25-31. Chicago-area MCOs have on average 87 hospitals in their networks. *See* IDF163-65; RFF145,178. They obviously view *all* the hospitals in their networks as important, or else they would not go to the trouble of including them. Thus, Evanston and HPH could be viewed as important or necessary to a network, along with many other hospitals, and still not be the first and second choices of MCOs or their customers. Indeed, these same MCOs may have believed that Evanston and HPH were necessary to their networks primarily because the MCOs had independently terminated the merging hospitals' admitted primary alternatives, including Advocate Lutheran General, Rush, and Lake [illegible]

[illegible]

"[a]lthough these witnesses speculated on that subject, their speculation was not backed up by serious analysis that they had themselves performed or evidence they presented. . .

331 F. Supp. 2d at 1130-31.

Fourth, Complaint Counsel presented no other evidence corroborating its view that Evanston and HPH were first and second choices for any group of customers:

1167; *Merger Guidelines* §2.211, n.22. For all these reasons, the evidence did not establish that Evanston and HPH were first and second choices for any MCOs or other customers.[4]

2. MCO Testimony Does Not Establish That Customers Who Might Have Regarded Evanston and HPH As First and Second Choices Accounted For A Significant Share Of The Market.

Even if Complaint Counsel could establish that some customers viewed Evanston and HPH as first and second choices, it has failed to carry its burden of establishing that those customers accounted for a "significant share" of the pertinent market. *Donnelley*, 120 F.T.C. at 195; *Oracle*, 331 F. Supp. 2d at 1117-18; *Merger*

Guidelines §2.21. It is undisputed that *all* MCOs accounted for only 45% percent of ENH's revenues (RFF14) and that the vast majority of the MCO b

they therefore account for only a minuscule percentage of any properly defined market. *See* RAB27-33.

In short, whatever a "significant share" of sales may mean, this subset of purchasers is far too small to satisfy the second *Donnelley* requirement.

3. Complaint Counsel Has Failed To Establish That Repositioning By Other Hospitals Would Not Likely Preclude ENH From

and likely would reposition to handle the business that ENH would sacrifice if it attempted unilaterally to raise its prices above competitive levels. RFF2278-97. And it offers no serious response to the ALJ's finding that the MCOs already have ample alternatives to Evanston and HPH and could construct alternative networks. ID144,147,149 ("It is highly probable that the four non-ENH hospitals in the geographic market would have the ability to constrain prices at ENH, either now or in the future, and

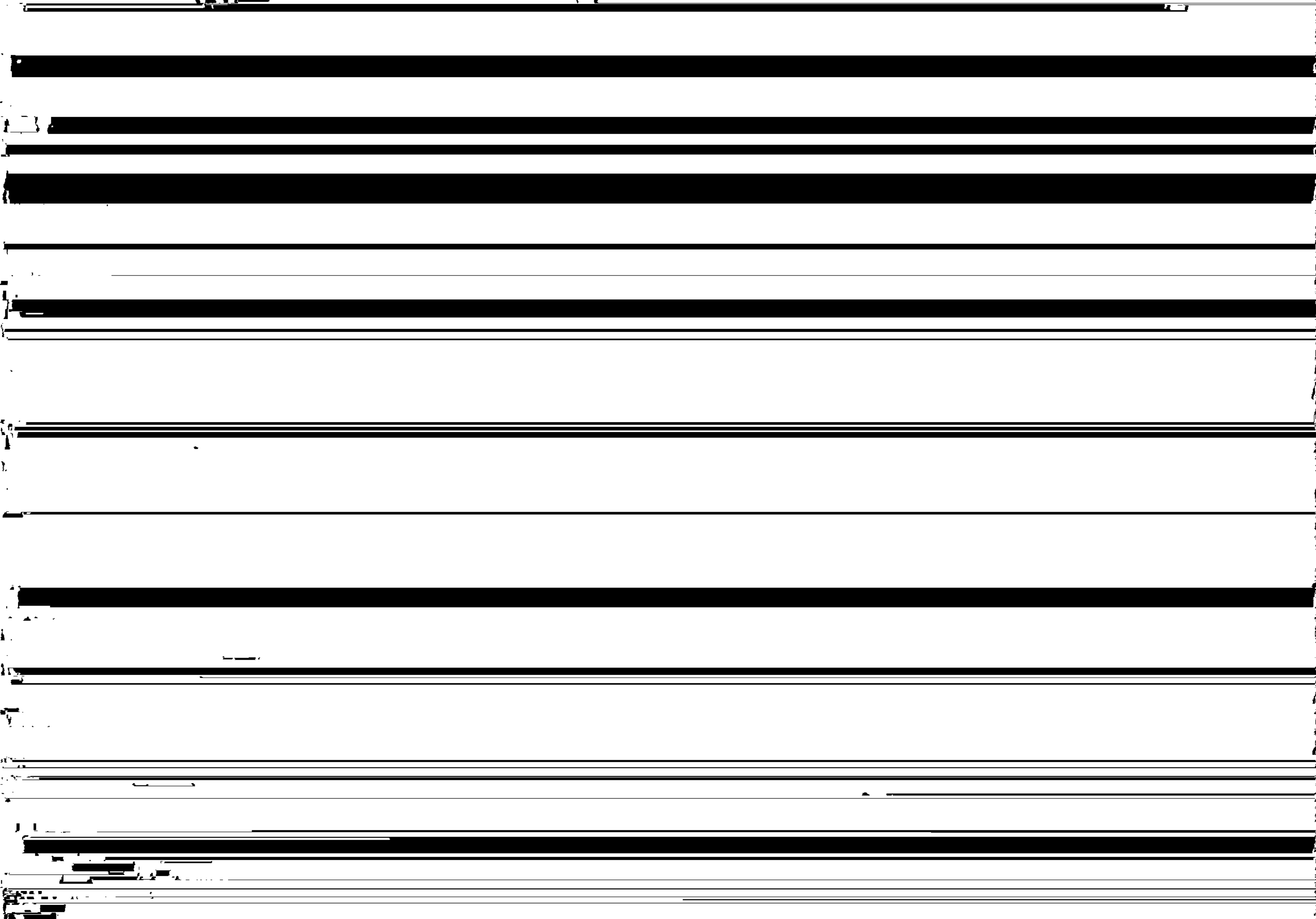
The evidence, moreover, establishes that hospitals

Need ("CON") regime, the expected expiration of which (in 2006) will only further accelerate repositioning and new entry. RFF2281-82.

This evidence, supporting and supported by the ALJ's finding of alternatives, squarely forecloses a ruling in Complaint Counsel's favor on this essential element of its case, even as it rebuts Complaint Counsel's entire "bargaining" analysis.

C. The Post-Merger Price Increases Cannot Establish Unilateral Market Power.

Unable to satisfy the *Donnelley* requirements for proving unilateral market power, Complaint Counsel rests its case principally upon post-merger price increases. In



FTC, 807 F.2d at 1381, 1386 (7th Cir. 1986)(hereinafter "*HCA*"); *FTC v. PPG Indus.*, 798 F.2d at 1500, 1503 (D.D.C. 1986); *see* RAB36-37. As Judge Posner has noted, and as Complaint Counsel and its expert previously acknowledged, "monopoly pricing . . . results when firms create an *artificial scarcity* of their product and thereby drive its level under competition." Posner, ANTITRUST LAW at 2 (emphasis added); *see also* 9,13; *accord* CCRB19-20; Elzinga, Tr. 2403; *see also* Noether, Tr. 6217-18. Thus, Complaint Counsel's failure to prove a reduction in output undermines any attempt to rely upon price increases to show that a merger increased market power.

Complaint Counsel not only failed to present evidence of output reduction, it actually acknowledged that ENH experienced *no* reduction in patient admissions.

unilaterally or collectively with other firms, to increase prices *above competitive price level*."

And Complaint Counsel concedes that under the *Merger Guidelines* "market power to a seller is the ability profitably to maintain prices *above competitive levels* for a significant period of time." CCAB13; *Merger Guidelines* §0.1. Yet Complaint Counsel offers no

The Pattern Of Price Increases And Is Based Upon Unreliable Analysis.

Even if the Commission were inclined to overrule *Donnelley* and replace it with something akin to Complaint Counsel's "bargaining theory," that change would not help Complaint Counsel here.

First, the evidence linking that theory to the facts here is not reliable enough to support a finding of liability. As in federal court, the proponent of expert

Dr. Haas-Wilson, who was unfamiliar with much

will be to a hospital, and thus the *lower* the price increase the hospital would be able to

obtain relative to the increase it could obtain from smaller MCOs.

Yet Dr. Haas-Wilson's relative price change analysis is flatly inconsistent with this implication of Complaint Counsel's own bargaining theory. RAB52-53; RFF1050. Contrary to the theory, it is undisputed that (REDACTED)

greater bargaining power over ENH, received *larger* post-merger price increases than the smaller MCO (REDACTED) RAB52-53; RFF125,143,170,1050-52. This inconsistency between theory and results confirms that the post-merger price increases were caused by something other than an increase in ENH's bargaining power.

A further discrepancy between Complaint Counsel's theory and results

(REDACTED)

RFF84,86; *see also* RFF-Reply789.

(REDACTED)

Tr. 270-71, *in camera*; RFF-Reply1233.

Second, some payors, such as (REDACTED), simply rejected ENH's request for discount-off-charges contracts during the 2000 negotiations and obtained (REDACTED) instead. IDF438-39. Other payors such as (REDACTED) negotiated discount-off-charges contracts on some plans or services, but per diem and per case rates for others. RFF889; CX5064 at 17, *in camera*; RFF-Reply1113; IDF418.

(REDACTED) RFF-Reply799,1108; CX5008 at 6, *in camera*; CX5059 at 18; CX5064 at 18, *in camera*; CX5065 at 19; CX5067 at 16, *in camera*; CX5072 at 29, *in camera*; CX5075 at 17, *in camera*; CX5174 at 12, *in camera*. Complaint Counsel does not and cannot claim that hospitals throughout Chicago have market power in outpatient services because they are reimbursed on a discount-off-charges methodology, and the same goes for inpatient services.

2. ENH's Internal Discussions Do Not Show That The Merger Gave ENH Unilateral Market Power Or That Post-Merger Price Increases Resulted From Market Power.

Complaint Counsel's continued reliance on ENH's internal business records also does not help it prove that the price increases resulted from merger-related market power under the *Donnelley* standards. The documents do not even arguably show that Evanston and HPH were the first and second choices (or even close substitutes) for any group of customers; that these customers accounted for purchases of a significant [illegible]

Reply47,57,1351,1356,1588. And any competitive concerns about the physician negotiations with MCOs have already been resolved by the Commission's consent order. RAB61. These documents do not contain a single reference to the two hospitals competing for inclusion in MCO networks or suggest that the merger would end that competition. Yet Complaint Counsel inserts the word "[hospital]" throughout its brief, apparently to create the false impression that the documents concern hospital competition. CCAB24.

Moreover, although the merging parties did believe that the merger would

to prove that the parties *intended* to achieve market power, much less that the merger actually produced that result. *See* RAB59-62.[8]

E. The Evidence Shows That The Post-Merger Price Increases Resulted From Other Factors.

Finally, although ENH is under no obligation to establish an alternative explanation for the post-merger price increases, ENH has done so. As shown below, moreover, Complaint Counsel has failed to undermine Respondent's showing that the

in this case is the aggregate "relative" price change across all MCOs rather than changes on a payor-by-payor basis. Yet it was an ENH witness, Professor Jonathan Baker, former

relative price changes across all payors. RFF1024-26. And Prof. Baker's calculations show that the actual size of the aggregate relative price increases in Complaint Counsel's market is no more than 9-10%. IDF689-90; RFF1004. If anything, Prof. Baker's pricing analysis overstates the amount of the actual price increases.[9] *See* RAB58, n.13;

these figures approaches the outlandish price increases Complaint Counsel alleged in the complaint. *See* Compl. ¶31.

2. Complaint Counsel Has Failed To Undermine Respondent's Showing That ENH's Pre-Merger Prices Were Significantly Below Market Levels.

Complaint Counsel has likewise failed to undermine the extensive evidence showing that ENH was able to raise prices after the merger only because it learned, at about the same time, that its pre-merger prices were well below market levels. *See* RAB

First, Complaint Counsel's assertion that Respondent's explanation is "unconfirmed by any contemporaneous business documents" is simply wrong. CCAB3, 45. At every stage of this litigation, Respondent has presented contemporaneous business documents and testimony from its MCO customers confirming this. RB41-45; RRB56-59; RAB17,49-52. For example, in November 1999, Bain informed Evanston

would *reduce* [HPH's] annual net revenue from managed care payors by approximately $8,000,000." RFF665; RX674 at ENHLTC17915 (emphasis added).[11]

Second, Complaint Counsel's assertion that ENH could not have learned anything about pricing from HPH is false. CCAB45-46. While it is true that an MCO's

terms, and are therefore difficult to calculate from those terms alone, the unrefuted

hospital and that such hospitals typically have higher cost structures and rates than

community hospitals, concluded on that basis that its prices were below market levels. *See* Neaman, Tr. 1344-45; Hillebrand, Tr. 1853-54.

Third, Complaint Counsel's conclusion that this explanation for the price increases is implausible because it "implies that Evanston was not choosing prices so as

to maximize its profits before the merger" is not supported by economic theory or the

evidence. CCAB50. As discussed in more detail in Respondent's opening brief, there are sound economic reasons why firms may price below the full-information competitive level and, contrary to Complaint Counsel's assertions (CCAB50-51), Respondent presented ample evidence that ENH was pricing below that level.[13] RAB48-50.

3. **Economic Analyses Confirm that ENH's Post-M**

"learning about demand" explanation than with Complaint Counsel's bargaining theory (RAB52-55).[14] Complaint Counsel's criticisms of their work are misplaced.

First, although Complaint Counsel mounts an extensive attack on Dr. Noether's academic control group, there is no evidence that the inclusion in that group of any or all of the hospitals identified in Complaint Counsel's brief would have changed the conclusion that ENH's prices did not exceed competitive levels. Accordingly the

(REDACTED) RFF564-69,1150;

IDF276,280,322; ID145-46.

Complaint Counsel's economic experts disagreed.[17] When prices are examined across all

[illegible]

not rise above the academic average. RFF1111,1138,1144-49.[18]

Complaint Counsel also ignores the fact that the prices charged by hospitals

to MCOs result from the give and take [illegible]

“beyond surprised” when it learned this information

the disparity and were “very embarrassed” that Evanston’s contracts were so far behind

the market. RFF682-84. Yet Complaint Counsel ignores contemporaneous evidence that

92; *see also* RFF898-906.[20] United's internal documents—not those manipulated as part of a sales pitch—tell a different story and show that ENH was priced significantly below **(REDACTED)** for hospital services, and well below **(REDACTED)** RFF908; RFF-Reply991.

Complaint Counsel also disregards the fact that United's negotiating position was substantially affected by its independent decision

Complaint Counsel also continues to ignore the most important PHCS document: its statement to its customers at the time of the merger that "[i]n case of a termination, there are other contracted providers within the same geographical area as [illegible]

that of Highland Park Hospital and [illegible]

Complaint Counsel also misleadingly suggests that Aetna thought a

alternative network was "inadequate." CCAB30. Yet

(REDACTED)

RFF-Reply1190,1209. Therefore, it is not surprising that Aetna was uncertain about offering a network without both Evanston and **(REDACTED)** —but again, this had nothing to do with the merger.

One Health/Great West. Even though One Health is the smallest payor in

this case (1% of ENH's revenue), Complaint Counsel called two witnesses from that company who *both* conceded that One Health had several alternatives to ENH. RFF458. Moreover, One Health's witnesses conceded that "it had been several years since the contracts had been renegotiated and it was appropriate to [] increase some of the rates."

Unicare. Complaint Counsel's argument about the Unicare [illegible]

II. THE MARKET STRUCTURE EVIDENCE REFUTES

THAT THE MERGER MATERIALLY ENHANCED MARKET POWER AND PRODUCED ANTICOMPETITIVE EFFECTS

Departing from its previous briefs and the ALJ's decision, Complaint

A. Complaint Counsel's Market Definition Analysis Is Circular And Incapable Of

Complaint Counsel's attempt to define a relevant market on the basis of its

interpretation of ENH's price increases is flawed for three reasons.

merger produced market power within *some* relevant market. *Id.* As a matter of simple economics, however, that reasoning has no validity unless one first proves that post-merger prices exceeded the fully-informed competitive level by at least five percent. *See*

attempted to make such a showing. *See supra* section I.C.2.[25]

Third, while Complaint Counsel acknowledges a link between patient preferences and MCO hospital choices (CCAB21, n.21), its market analysis ignores patients and instead seeks to define a geographic market on the basis of abstract *MCO* preferences divorced from the preferences of their customers and members (employees or patients).

Indeed, given that Complaint Counsel now concedes that

relevant product market—a major change from the complaint issued by the Commission—the broader geographic market must logically include the major downtown hospitals that are within a 35-minute drive of Evanston and HPH. *See United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 141-42 (E.D.N.Y. 1997). This conclusion is also mandated by Landes and Posner's showing that even "fringe sellers"

violation of the Clayton Act" because it provides a framework within which to analyze the alleged anticompetitive effects of a merger, even where the government brings a challenge years after the merger was consummated. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957)(substantial lessening of competition "*can be determined only in terms of the market affected*.") (emphasis added). The Commission has also required proof of a relevant market in post-consummation challenges. *Donnelley*, 120 F.T.C at 151-52; *In re Chicago Bridge & Iron*, No. 9300 at 7 (Op. of the FTC Comm'n)(Jan. 6, 2005)(following *Guidelines* approach to market definition). There is no doubt that Complaint Counsel must allege, define, and prove a relevant market as part of a Section 7 case. *See* RB 31-34; RRB 45-49.

The cases relied on by Complaint Counsel—one Section 7 case and several

Sherman Act cases—do not support its [illegible]

Complaint Counsel from its statutory obligation—confirmed by a half century of precedent—to allege and prove a relevant market in a Section 7 case.

III. COMPLAINT COUNSEL HAS NOT OVERCOME RESPONDENT'S SHOWING THAT THE MERGER PRODUCED SIGNIFICANT COMPETITIVE BENEFITS THAT OUTWEIGH ANY COMPETITIVE RISKS.

Having failed to show that the merger lessened competition, Complaint

evidence of HPH's “significant operating shortfalls

improvement investments. RAB67. Complaint Counsel does not dispute this simple

arithmetic. RAB67.

In sum, when one looks at all the evidence, not just speculative plans discussed in the two-month period highlighted by Complaint Counsel, it is clear that HPH's financial "downward spiral" was quickly making HPH competitively insignificant in the Chicago hospital market. *See* H. Jones, Tr. 4157; RFF46. [illegible]

not only reversed this downward trend, but made HPH a stronger competitor. *See United States v. Syufy Enters.*, 903 F.2d 659, 673, n.24 (9th Cir. 1990)(finding that "[i]n a competitive market…the ability to buy out competitors who are merely ailing may well promote market efficiency, enhance consumer welfare and foster competition"). As the [illegible]

countless hours of management effort, the merger produced significant, verified quality improvements, particularly at HPH. RAB3-4,68-81. Complaint Counsel dismisses this evidence on three grounds. First, Complaint Counsel attempts to shift the burden of proof, claiming that "*ENH* . . . must demonstrate that the benefits of the merger outweigh the merger's anticompetitive effects." CCAB66 (emphasis added). Second, relying upon Dr. Romano's discredited testimony, Complaint Counsel argues that HPH's quality improvements cannot be verified. Finally, Complaint Counsel speculates that HPH would have provided the same quality of care as it does today without the merger and, therefore, suggests that the Commission ignore the verified improvements on the grounds that they were not "merger-specific." CCAB53. None of these arguments has merit.

1. Complaint Counsel Improperly Attempts To Shift *Its* Burden Of Proving That The Merger Was Anticompetitive Under The "Totality Of The Circumstances."

As to the burden of proof, Complaint Counsel concedes that "quality improvements can justify an otherwise anticompetitive merger" under certain circumstances (CCAB52), and does not dispute that verified quality improvements in this case should be analyzed as procompetitive effects of the merger. RAB70; RB69-71; CCAB52-53. However, relying upon a line of cases dealing with speculative "efficiencies" from proposed mergers, Complaint Counsel erroneously asserts that Respondent has the burden of proving that the merger's quality benefits outweigh any anticompetitive effects. CCAB52-53; *see also* RB68-71. Ironically, having argued that

unless Respondent proves otherwise, it now argues that quality improvements should *not*

be presumed attributable to the merger unless Respondent proves th[illegible]

This "heads we win, tails you lose" approach to merger enforcement cannot

be squared with *Baker Hughes*, which rejected the government's attempt to impose a

heightened burden on a merger defendant. *See Baker Hughes, Inc.*, 908 F.2d at 983; *see also* RAB76-77. Enhanced quality, quite aside from its role as a potential efficiency

defense, is a cognizable procompetitive effect that must be considered in a Section 7

clinical fact witnesses, a quality expert, and an economist, as well as numerous documents, all confirming ENH's quality enhancements to HPH after the merger. ID177-78; RAB68-84. Complaint Counsel attempts to escape this mountain of evidence by suggesting that such improvements do not count unless they can be measured by a narrow set of indicators based entirely on "administrative" data collected for billing purposes.[30] But that unduly narrow approach is not valid from either a legal or a clinical perspective.

a. Complaint Counsel's Narrow View Of How To Measure Quality Has No Basis in Law.

Consistent with case law (cited above) recognizing that quality

improvements are procompetitive benefits, Respondent introduced evidence directed at three measures of quality that are widely employed by healthcare organizations and state governing bodies: structural improvements (e.g., facilities and staffing), processes of care (e.g., prescribing medication), and outcomes (e.g., mortality). RFF1171-74. Applying these well established criteria, Respondent demonstrated substantial

improvements in physician staffing, access to high-quality physicians through an academic affiliation with Evanston, improved managerial structure, significant upgrades to HPH's patient facilities, and acquisitions of state-of-the-art diagnostic and therapeutic equipment. RFF1199,1610,1621-22.

[illegible]

specifically, patient satisfaction surveys and outcomes estimated using administrative data—are relevant. CCAB61-62. But [illegible]

[illegible]

Respondent's method of showing quality improvements is consistent with this precedent. RFF1199,1226-32.[31] Indeed, the evidence in this post-consummation case is much stronger than the evidence presented in the cases described above, almost all of which involved mere *plans* of *future* quality improvements from mergers that had yet to be consummated. *See, e.g.*, *Tenet Health Care Corp.*, 186 F.3d at 1048 (plan to employ more specialists); *Carilion Health Sys.*, 707 F. Supp. at 845 (plan to consolidate services). By contrast, the record here demonstrates *actual* quality improvements that have been implemented continually from the date of the merger in 2000 through today. ID177; RAB72-73; RFF1228-30. Accordingly, unlike the typical pre-consummation case, the Commission need not speculate as to if, when, or how quickly post-merger

that ENH demonstrated "that significant improvements have been made to Highland Park and that those improvements can be verified." ID177.

RFF1483-1504,1622. First, Complaint Counsel asserts that its quality expert—Dr.

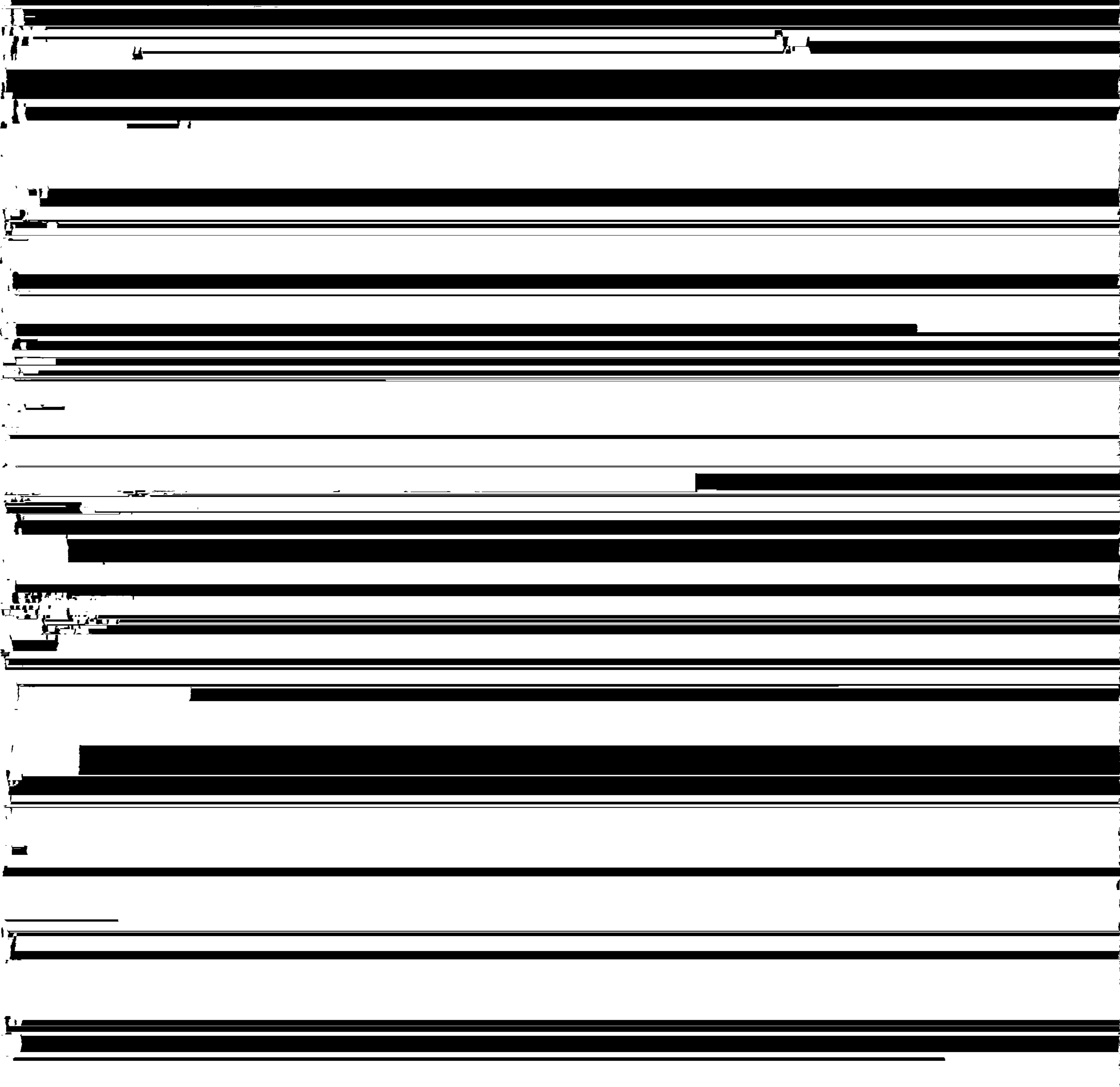
Patrick Romano

CCAB61. This is false. Dr. Romano's conclusions were predicated almost exclusively on narrow outcome indicators utilizing unreliable administrative data that lacked clinical validity, and most failed to reach the minimum threshold of statistical significance.

Second, the methods and data that Dr. [illegible]

c. There Is No Evidence Of A Decline In Quality At Evanston And Glenbrook After The Merger.

Complaint Counsel also argues that quality of care at Evanston "actually declined" after the merger, but this argument has no basis in the record. CCAB61, n.67, 65. First, Dr. Romano's observation about quality ...



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RFF1483-1504; RFF-Reply 2064.

This directly disproves Complaint Counsel's false suggestion that Evanston's

performance in the use of heart-attack medication deteriorated after the merger. CCAB65.

3. The Evidence Demonstrates That ENH's Substantial and Verified Quality Improvements at HPH Were Merger-Specific.

Nor is there any basis for Complaint Counsel's speculation that the extensive quality improvements which the ALJ found were both "substantial" and

"verified," would have occurred without the merger. CCAB60, n.66; ID177-78.

Although some improvements took years of advance planning, other

HRH Strategic Plans Were Unreliable And Speculative

Complaint Counsel's view of HRH as a high quality, financially robust

institution is belied by the evidence that HRH was financially unable (*see* section III.A

Complaint Counsel's contrary position is based on the anecdotal and unsubstantiated testimony of one witness—HPH's former VP of business development, Mark Newton. CCAB56. But Mr. Newton had no responsibility for the quality of HPH's

with the Board throughout much of 1999, it did not issue a Certificate of Need for the program until November, a month after the merger agreement was executed. CX501 at 16; Newton, Tr. 423. Moreover, HPH's own projected cardiac surgery volumes as a stand-alone program were low, and HPH suffered from clinical deficiencies that [illegible]

In re Genzyme Corp., No. 021 0026 at 18 (Jan. 13, 2004) (Statement of Chairman

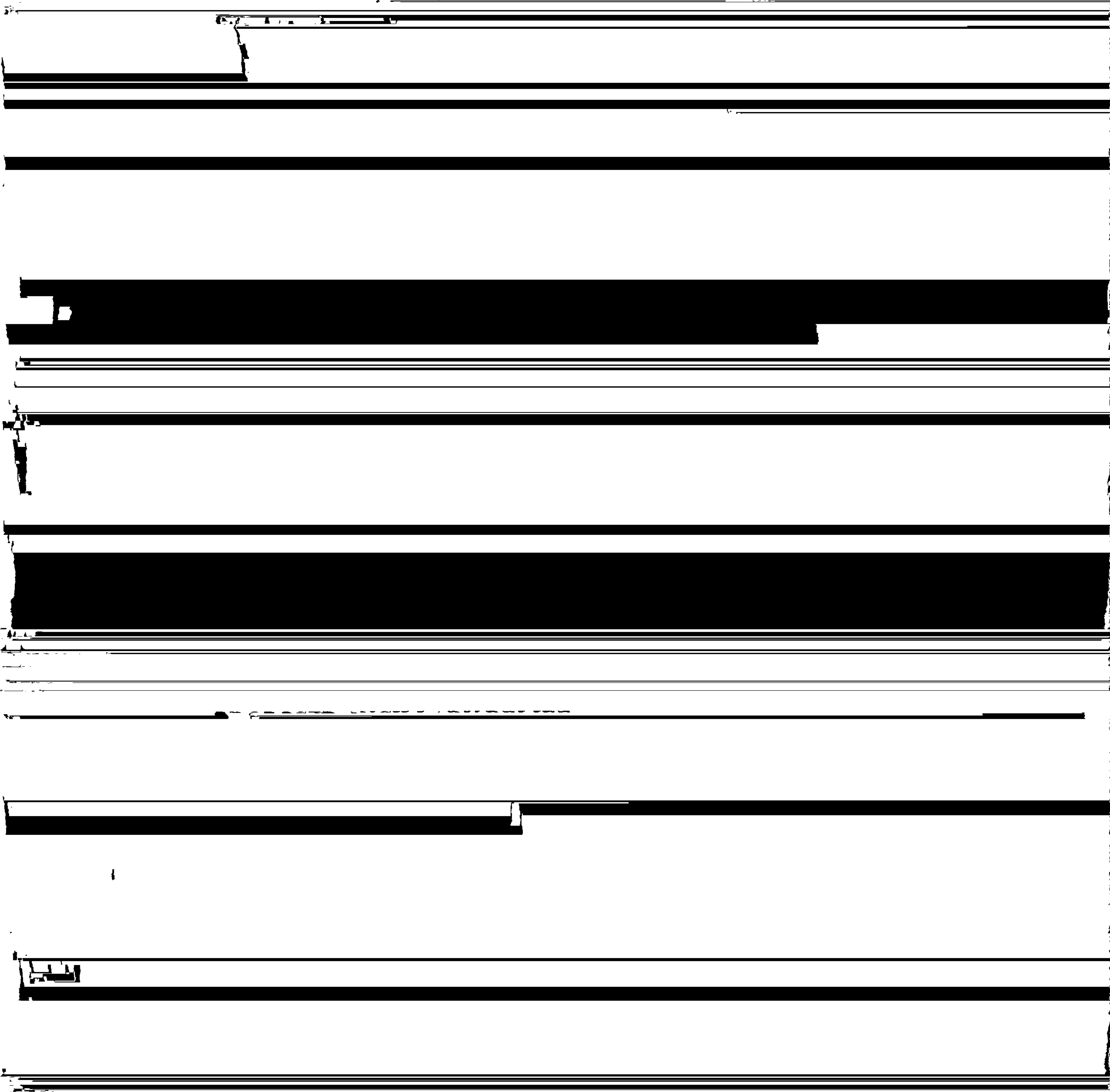
c. The Record Demonstrates That HPH Improved Much Faster Than Its Peers After The Merger.

Complaint Counsel further speculates that HPH would have been swept

CCAB57-58. But Complaint Counsel's speculation regarding a "nationwide trend" was

Accordingly, Complaint Counsel's unsupported speculation about an ill-defined national trend is entitled to no weight in light of actual evidence that HPH attained improvements faster and more efficiently than it would have without the merger.

IV. COMPLAINT COUNSEL HAS NOT MET ITS BURDEN OF JUSTIFYING



A. **Complaint Counsel Has Failed To Show That Any Anticompetitive Effects Cannot Be Remedied Through Less Intrusive Alternative Remedies, Including The Remedy To Which ENH Has Already Agreed.**

Complaint Counsel's argument for divestiture [illegible]

reasons.

First, it rests upon a misunderstanding of the pertinent legal standard. Complaint Counsel's bald assertion that its "choice of remedy prevails," without any [illegible]

particular facts of each case so as to best effectuate the remedial objectives." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962)(emphasis added).

Nor is it true, as Complaint Counsel asserts, that divestiture is the "[illegible] preferred remedy" for a Section 7 violation. CCAB[illegible] p. [illegible]

when Congress passed the H.S.R. Act, it specifically noted that "[u]nscrambling the merger, and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible." H.R. Rep. No. 94-1373, at 8 (1976). Recognizing the extraordinary disruption caused by divestiture, courts have cautioned that this remedy should *not* be ordered without "convincing reasons why that remedy is necessary to prevent the continued violations of the antitrust laws." *Switzer Bros., Inc., v.* [illegible]

divestiture is be ordered in this case, Complaint Counsel should have ...

such relief vindicates the public interest, promotes competition, and is not punitive. *See E. I. du Pont de Nemours*, 366 U.S. at 326-27. As Respondent showed in its opening brief, the evidence here overwhelmingly points *against* divestiture, and Complaint Counsel has failed to rebut that evidence.

Second, Complaint Counsel gives short shrift to the non-structural remedies

with respect to Respondent's suggestion that it give the Commission advance notice of any future acquisitions. Such a requirement would ensure that any future acquisitions that ENH may pursue would be reviewed by Commission staff prior to consummation. Such a remedy would not interfere with the present competitive market conditions or destroy the quality improvements that now benefit consumers.

The same is true of Respondent's suggestion that a narrow conduct remedy could be crafted requiring Evanston and HPH to maintain and negotiate separate contracts, not to make one contract contingent on the other, and to have separate negotiators. This practice is already employed by other Chicago hospital systems and has

concerns—by allowing an MCO to choose, if it desired, one of the ENH hospitals over another—without losing the quality improvements created by the merger.

Third, Complaint Counsel's argument ignores the fact that the Commission has *already* achieved substantial relief as a result of its complaint and the ensuing settlement of a large part of this case prior to trial. The complaint alleged that "ENH required private payers to accept its terms for both hospital and physician services or face termination of both hospital and physician contracts." Compl. ¶¶3,34. This conduct has been stopped by the consent order prohibiting joint negotiations between ENH and the ENH Medical Group. Thus, the Commission has already resolved the principal issue presented by the merger. Complaint Counsel has failed to demonstrate that additional relief is necessary.

testimony of physicians who work in these hospitals every day and who understand the improvements that integration has brought to HPH and the Highland Park community as well as what would be lost if HPH were divested. Despite extensive discovery, Complaint Counsel could not find one doctor who would testify that a divested HPH

would serve the community as well as the integrated HPH.

A number of HPH's clinical improvements, moreover, are already

quality results either through a joint venture or by a partnership with a more distant hospital. RFF1628-29,2462.

Further, the loss of the cardiac surgery program would mean the end of HPH's percutaneous coronary intervention ("PCI") program, which could not be sustained because elective PCIs could not be done at HPH without onsite cardiac surgical backup. RFF2498-99. The loss of the PCI program, in turn, would result in increased transfers of heart attack patients out of HPH, further endangering patient safety. RFF2506-10.

Concerns about divestiture have been voiced not only by ENH doctors, but

Roundtable. These *amici* represent broad segments of the public which are rightfully

before this merger was challenged, equity dictates that Respondent should not be divested. Congress enacted the H.S.R. Act in part to prevent the need for punitive post-consummation divestitures that not only disrupt ongoing businesses but are often "detrimental to customers." *See* Sher, *supra* at 81 (citing H.R. Rep. No. 94-1373, at 11 (1976)); *see also* Easterbrook, *supra* at 3 ("[S]uits against mergers more often than not have attacked combinations that increased efficiency.")

Divestiture would be especially inequitable if the Commission adopts Complaint Counsel's novel unilateral effects theory as a basis for liability. As explained

Econ. 43, 59 (1969). Complaint Counsel has presented no evidence of purchasers waiting in the wings and willing to continue ENH's commitment to improving HPH. Before the merger, HPH approached numerous hospital systems, all of which rejected a merger or partnership with HPH. RFF2312. The hospital systems in the Chicago area (Advocate, Rush, and Resurrection) that arguably have the ability to support a divested HPH each falls within the geographic market identified by the ALJ and therefore cannot be potential acquirers because the acquisition would create the same competitive problems alleged in this proceeding. ID143-46. Further, the City of Highland Park's *Amicus* Brief has expressly indicated that a not-for-profit organization with no religious affiliation is a "necessary attribute[]" of any merger partner. *See* City of Highland Park's

Amicus Br. at 12-13 (Dec. 16, 2005); *see also* RFF2311. A Commission Order imposing a remedy that has been identified by the community as harmful would create an alarming

the statute." *Ford Motor Co. v. United States,* 405 U.S. 562, 573, n.8 (1972)(emphasis

added). Complaint Counsel's proposals do not meet that standard.

expensive affirmative obligations on ENH for the benefit of a divested HPH—does not

Second, the proposed ancillary relief will not preserve the merger's

benefits. Integration is essential to HPH's quality. For instance, as described above, HPH's [illegible] will work at the optimal level only under an integrated

merely "*adequate* to meet their customers' [] needs." *Indiana Fed'n of Dentists*, 476 U.S. at 463 (emphasis added); RFF-Reply2471-80.

Also, some of the "ancillary" relief proposed by Complaint Counsel could

V. RESPONSE TO CROSS-APPEAL: THE ALJ'S DISCOVERY ORDER CONCERNING BACKUP TAPES SHOULD BE AFFIRMED.

The Commission should also reject Complaint Counsel's cross-appeal seeking to overturn the ALJ's decision denying additional discovery of Respondent's email backup data tapes. Before trial, Complaint Counsel moved to compel Respondent to spend more than $1 million and countless attorney hours to produce information from three dozen [illegible]

unprecedented, discovery obligation is subject to considerable deference on appeal and should be affirmed. *See, e.g.*, *In re Hoechst Celanese Corp.*, 1990 FTC LEXIS 152, at *2 (May 25, 1990); *In re Gen. Foods Corp.*, 1980 FTC LEXIS 112, at *2-3 (Feb. 15, 1980); *see also* Resp't Opp'n Compl. Counsel's Mot. Compel (Sept. 2, 2004) (incorporated here by reference).

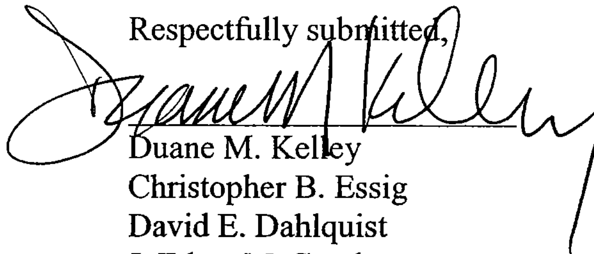
Complaint Counsel does not contend that the financial burden of backup

adjudicative proceeding cannot "include other proceedings such as. . .the promulgation of substantive rules and regulations." 16 C.F.R. §3.2.

Regardless, the ALJ's fact-specific discovery ruling left open the possibility that a future Respondent could be ordered to incur the cost of restoring backup data if, unlike here, the circumstances supported such an order. Order Den. Compl. Counsel's Mot. Compel at 3-4 (Sept. 22, 2004). Complaint Counsel thus has no basis to claim that this discovery order creates an "insurmountable burden on the Commission in future investigations and litigation matters." CCAB71.

CONCLUSION

For all these reasons, the Complaint should be dismissed.



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ATTACHMENT A

(REDACTED)

ATTACHMENT B

(REDACTED)

ATTACHMENT C

(REDACTED)

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2006 copies of the **Respondent's Brief In Reply and Opposition To Cross-Appeal (Public Version)** were served (unless otherwise indicated) by messenger on:

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