UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENTS' MOTION TO DISMISS COUNT II OF THE COMPLAINT

In January 2000, Evanston Northwestern Healthcare Corporation ("ENH") acquired Highland Park Hospital ("Highland Park"), creating a company of three hospitals with $1 billion in assets and annual revenues of more than $500 million. As a result of this merger, ENH immediately imposed price hikes of up to 190 percent on its customers, which were significantly higher than price increases for comparable services charged by comparable hospitals in the surrounding area and in other areas. Based on these facts, Count II of the Complaint alleges that the merger violated section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

Respondents have asked the Court to dismiss Count II because, in their words, "it fails to allege the *requisite* relevant product and geographic market elements of a Section 7 claim."[1] Respondents' analysis, however, is mistaken. A motion to dismiss asks only whether the complaint states a claim. Under well-established precedent of the Commission and the courts,

[1] Respondents' Memorandum in Support of Motion to Dismiss Count II for Failure to State a Claim ("Respondents' Memorandum"), dated March 17, 2004, at 3 (emphasis added).

when a plaintiff bases an antitrust claim like Count II on the actual anticompetitive effects of a merger, it is unnecessary for the plaintiff to include a detailed market definition in the complaint. Instead, it is sufficient to plead the product that has been the subject of the anticompetitive effects, and the geographic region in which such effects have taken place. Count II plainly does both.

To prevail on its section 7 claim, of course, a plaintiff must – and we will – prove that the merger may tend substantially to lessen competition "in any line of commerce . . . in any section of the country." 15 U.S.C. § 18. Under the methodology reflected in Count II, both the "line of commerce" and "the section of the country" will be proved via an examination of the price increases implemented by Respondents, as fully explained below. Thus, the allegations (and direct evidence showing) that anticompetitive effects exist necessarily implies that the effects have occurred in a product market that includes the services sold by Respondents, and in a geographic market that includes the area in which Respondents do business. Count II need not allege anything more. For these reasons, Respondents' motion to dismiss should be denied.

BACKGROUND

Before 2000, ENH owned and operated Evanston Hospital ("Evanston"), a 466-bed acute care hospital located in Evanston, Illinois, and Glenbrook Hospital ("Glenbrook"), a 136-bed acute care hospital located near Evanston. In the 2000 transaction, ENH merged with Highland Park, a 234-bed acute care hospital also located near Evanston. Complaint ¶ ¶ 5, 12.

On February 10, 2004, the Federal Trade Commission issued an antitrust Complaint against ENH challenging its January 2000 merger with Highland Park. Counts I and II of the

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

As issued by the Commission, Count I follows a mode of analysis that is patterned after the 1992 *Horizontal Merger Guidelines* issued by the FTC and the Department of Justice,[3] which set forth the analysis that the antitrust agencies use in predicting the competitive effects of a merger absent actual evidence of competitive effects. Consistent with the *Guidelines*, Count I specifically identifies a product market: "the sale to private payers, including commercial payers, managed care plans and self-insurance plans of general acute care inpatient hospital services." Complaint ¶ 16. Count I also specifically alleges the geographic market in which the respondents competed: "the geographic area directly proximate to the three ENH hospitals and contiguous geographic areas in northeast Cook County and southeast Lake County, Illinois." Complaint ¶ 17. Employing this market definition, Count I alleges that the merger of the three hospitals gave ENH a significant market share; that through the merger Respondents gained market power in the relevant market; and that the merger had anticompetitive effects, in violation of section 7 of the Clayton Act. Complaint ¶ 18.

Count II of the Complaint takes a more direct approach to alleging the identical section 7 violation. Count II is based on allegations regarding the actual anticompetitive effects of the challenged merger. As issued by the Commission, Count II alleges that, after the merger, ENH dramatically raised prices for the hospital services it sold to private insurers and that these rate

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[2] Respondents' motion to dismiss does not address Count III, which alleges that respondent ENH Medical Group engaged in price fixing in violation of section 5 of the FTC Act.

[3] *Reproduced at* http://www.ftc.gov/bc/docs/horizmer.htm.

increases were substantially greater than those of other, similar hospitals for similar services. *E.g.*, Complaint ¶¶ 31(a)-(b). Based on these factual allegations of direct evidence of anticompetitive effects, Count II alleges that the merger violated section 7 of the Clayton Act. Complaint ¶ 32. The fact – which is pleaded and which Complaint Counsel will prove at trial – that the merger caused the price increases and that these price increases cannot be attributed to anything other than market power (such as increased quality of care) necessarily proves that Respondents charged the anticompetitive prices within a relevant product market that includes the sale of acute care inpatient hospital services to private payers, and in a relevant geographic market that includes the area in which the three ENH hospitals are located.

Thus, both Count I and Count II state a claim which, if proved, entitle plaintiff to relief. How these claims are to be proved is not a fit subject for a motion to dismiss. Accordingly, Respondents' motion must be denied.

ARGUMENT

Summary of Argument

1. Motions to dismiss are disfavored and are to be granted only if the moving party can demonstrate beyond doubt that the plaintiff can prove no set of facts that will support the claim.

2. Count II sufficiently alleges a section 7 violation and does not require explicit allegations defining a relevant product and geographic market.

3. Count II adequately alleges the "line of commerce" and "the section of the country" in which the merger had anticompetitive effects.

I. MOTIONS TO DISMISS ARE DISFAVORED AND ARE GRANTED ONLY IF RESPONDENTS CAN DEMONSTRATE, "BEYOND DOUBT," THAT NO SET OF FACTS WILL SUPPORT THE CLAIM

In a motion to dismiss, the party moving for dismissal bears the burden of proving that no claim has been stated. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.), *cert. denied*, 501 U.S. 1222 (1991) (under the Federal Rules of Civil Procedure, "the defendant has the burden of showing that no claim has been stated.")[4] To prevail, the moving party must show "beyond doubt that the plaintiff can prove no set of facts to support his claim [that] would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Barnett v. Bailey*, 956 F.2d 1036, 1043 (11th Cir. 1992) ("beyond doubt" standard applies to motion to dismiss). A court, in considering a motion to dismiss, "must accept [the] petitioner's allegations as true." *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984). A court should draw "all reasonable inferences" in the complainant's favor. *Sanner v. Chicago Bd. of Trade*, 62 F.3d 918, 925 (7th Cir. 1995). Additionally, dismissal for failure to state a claim is "disfavored" because it is "summary disposition on the merits." *Johnsrud v. Carter*, 620 F.2d 29, 33 (3rd Cir. 1980).[5]

II. ALLEGATIONS OF MERGER-RELATED ANTICOMPETITIVE PRICE INCREASES STATE A CAUSE OF ACTION UNDER SECTION 7 OF THE CLAYTON ACT

At issue in this motion is the proper application of section 7 of the Clayton Act, which prohibits a person from acquiring the stock or assets of another person "where in any line of

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[4] The Federal Rules of Civil Procedure may be consulted for guidance in proceedings before the Commission. *Operating Manual for Administrative Litigation* § 10.7 (2004), *reproduced at* http://www.ftc.gov/foia/ch10administrativelitigation.pdf.

[5] Notably, Respondents' papers neglect to discuss this demanding standard for motions to dismiss.

commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. 18. Respondents argue that Count II fails to identify explicitly the "line of commerce" and the "section of the country." They fail to recognize, however, that there are at least two accepted methods of establishing a section 7 violation: one indirect (as set forth in Count I) and one direct (as set forth in Count II). Here, Count II of the Complaint sets forth the actual anticompetitive effects of the merger and, with that direct evidence, detailed market definition allegations are unnecessary. A plaintiff can state a section 7 violation by alleging that the merger caused anticompetitive price increases that are attributable to market power. Once those facts are established, it necessarily follows that the price increase took place in a line of commerce in a section of the country.

A. As Reflected in Count II, Allegations of Anticompetitive Effects State a Cause of Action Under Section 7 of the Clayton Act

Antitrust case law clearly holds that an antitrust violation can be established through direct evidence of anticompetitive effects. If, as in Count II, a plaintiff adopts this approach, the allegations of the complaint and evidence supporting those allegations are sufficient to establish a product and geographic market. Importantly, however, the market definition is a derivative conclusion that is drawn from the allegations of (and evidence demonstrating) anticompetitive effects. Market definition is not, in itself, an independent element of the claim that must be separately pleaded or proved.

This analysis was endorsed by the Commission in one of its most recent decisions, *In the Matter of Schering-Plough Corp.*, Docket No. 9297 (FTC Dec. 18, 2003),[6] *appeal pending*. In *Schering*, the Commission found that it was unnecessary to establish a relevant market to prove an antitrust violation if direct evidence of anticompetitive effects was available. Citing various merger cases as well as the *Guidelines,* the Commission observed that the "traditional way" of establishing an antitrust violation begins with the definition of a relevant market and proceeds from there. However, this approach was "unnecessary" in cases in which the plaintiff alleged (and, at trial, presented direct evidence showing) that the challenged activity had anticompetitive effects. In a unanimous decision, the Commission reasoned:

> ". . . [S]ome in the antitrust community have become so accustomed to the traditional way of proceeding that they forget that this complex market analysis [starting from a definition of relevant market] provides only an *indirect* indication that trade has been or may be restrained. It is not necessary to weigh all of these factors if a case presents more direct evidence of actual or likely anticompetitive effects." *Id.*, slip op. at 16 and n. 32 (emphasis in original).

This distinction has been regularly recognized by the courts and the Commission. In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), for example, the Supreme Court dispensed with market definition requirements where there was direct evidence of anticompetitive effects. The Court reasoned:

> ". . . '[P]roof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 476 U.S. at 460-461 (citations omitted).

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[6] *Reproduced at* www.ftc.gov/os/adjpro/d9297/031218commissionopinion.pdf.

The Court was explicit:

> In this case, we conclude that the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis. 476 U.S. at 460-61.

More recently, the Seventh Circuit has confirmed that direct evidence of anticompetitive effects dispenses with the need to separately define a relevant market. In *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), the court affirmed the Commission's ruling that the respondent there had engaged in a boycott of certain discount retailers. Although the court held that the agreements were *per se* unlawful, it also rejected the respondent's argument that antitrust analysis required a market definition:

> [Toys "R" Us] seems to think that anticompetitive effects in a market cannot be shown unless the plaintiff, or here the Commission, first proves that it has a large market share. This, however, has things backwards. ... [T]he share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration. The Supreme Court has made it clear there are two ways of proving market power. One is through direct evidence of anticompetitive effects. *Id.* at 937 (emphasis added, citations omitted).

Instructively, the *Toys "R" Us* court then evaluated the direct evidence showing the anticompetitive impact of the defendants' practices and held that such evidence "is sufficient proof of actual anticompetitive effects [and] that no more elaborate market analysis was necessary." *Id.; see also Ball Memorial Hospital, Inc. v Mutual Protective Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) ("Market share is just a way of estimating market power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them.").

These principles apply with equal force to a section 7 case, including the instant case. In *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002), the court recognized that direct evidence showing an "actual detrimental effect" could substitute for the presentation of traditional market definition and market share analysis. *Id.* at 48-49 (quoting *Indiana Federation* and *Toys "R" Us*). In *Libbey*, the FTC presented direct evidence that showed that the prices would increase after the merger because the defendants' own records indicated an increase in their manufacturing costs following the merger. *Id.* at 49. The court found this and other evidence sufficient to establish the FTC's prima facie case that the transaction may have an anticompetitive effect. *Id.* at 50.[7]

Here, the Complaint alleges that the merger enabled ENH to increase its prices by an amount that was significantly higher than the price increases implemented at comparable hospitals, Complaint ¶ 29, and that its customers thought the price increases were "unwarranted," Complaint ¶ 30; and the Complaint details the percentage price increases that ENH instituted for its largest private customers, Complaint ¶ 31. With allegations of actual sustained adverse effects in the area in which ENH operated – viewed in light of the reality that the markets for hospital services tend to be relatively localized, *cf. Indiana Federation* – an elaborate market definition in Count II separate and apart from the rest of the allegations is unnecessary.[8]

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[7] The *Libbey* court distinguished *Indiana Federation* and *Toys "R" Us* from the *Libbey* transaction because "in those cases there had already been an administrative investigation by the FTC and the evidence suggested a finding that there had been 'actual, sustained adverse effects on competition.'" *Id.* at 49. In this administrative hearing, Complaint Counsel will show, in connection with Count II (as well as Count I) of the Complaint that there have been actual adverse effects on competition.

[8] For the record, Complaint Counsel also notes that Respondents raised factual issues that need not be considered now. For example, while Count II alleges that Respondents' drastic post-merger price increases are due to the merger, *see* Complaint ¶ 32, Respondents speculate

(continued...)

In sum, "[t]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." *Indiana Federation*, 476 U.S. at 460-61. When, as here, a complaint alleges that a merger had actual anticompetitive effects, the relevant market will be derived from the allegations and evidence showing anticompetitive effects and allegations defining the market are unnecessary.

B. As Reflected in Count I, Market Definition Is Often a Tool Used in Predicting the Competitive Effects of a Merger.

Respondents' mistaken analysis rests on a misinterpretation of past cases which have focused almost exclusively on predicting the likely effects of mergers. Predictive analysis was necessary in most instances because the parties (and the court) lacked direct evidence of the competitive effects of the conduct under review. In those circumstances – unlike here – when the antitrust plaintiff lacked any direct evidence of the competitive effects of the merger, the plaintiff had to employ an analytical framework for developing indirect evidence predicting the likely effects of the conduct in question. By necessity, this required the court and the parties to define the relevant markets.

Count I follows the predictive analysis set forth in the *Guidelines*. The *Guidelines* clearly set forth a predictive framework, delineating a method for conducting a "forward-looking inquiry," to be used in determining "whether a merger *is likely* substantially to lessen

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[8] (...continued)
that the price increases were due to other factors, such as improvements in quality of care. *E.g.*, Respondents' Brief at 9-10. At most, Respondents have simply tried to rationalize their price increases without any supporting evidence. Thus, while Complaint Counsel disagrees with Respondents' conjecture, and these issues might be considered at trial, it is unnecessary to address these issues in considering the motion to dismiss Count II.

competition."[9] To make this prediction, the first step in developing this indirect evidence is to define the relevant product and geographic market in order to estimate market shares and market power,[10] which in turn make it possible to predict the competitive effects of the merger.[11] In other words, the rigorous market definition required in the predictive approach to a section 7 claim is a practical necessity, and it must be undertaken first if the parties cannot develop direct evidence of the competitive effects of the merger. *See FTC v. Libbey, supra.*

In the principal Supreme Court decision on which the Respondents rely, *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962), the government was challenging a merger immediately after it was consummated. Direct evidence regarding the anticompetitive effects of the merger simply did not exist and the case had to rest on indirect evidence, *i.e.,* projections of (and allegations regarding) the likely competitive effects of the merger. To make these projections, it was unavoidably necessary first to define the product and geographic markets. "Thus, again, the proper definition of the market is a 'necessary predicate' to an examination of the competition that *may be affected* by the horizontal aspects of the merger." *Id.* at 335 (emphasis added).

Other decisions cited by Respondents also employed this "necessary predicate" of theoretical market analysis because the courts were attempting to estimate the likely effects of the mergers. In *United States v. Connecticut National Bank,* 418 U.S. 656 (1974), for example, the court required initial market definition to assess "the legality of a *proposed* consolidation." *Id.* at

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[9] *Guidelines* at §§ 0, 0.1 (emphases added).

[10] *Id. at* §§ 1.1 - 1.4.

[11] *Id.*

657 (emphasis added). In *United States v. Marine Bancorp, Inc.*, 418 U.S. 602 (1974), market definition was necessary at the outset to predict the competitive effects of a "*proposed*" merger of two commercial banks. *Id.* at 605 (emphasis added). In *Berlyn, Inc. v. The Gazette Newspapers, Inc.*, 157 F. Supp. 2d 609 (D. Md. 2001), the court required market analysis to determine if "there is a reasonable probability that competition *would be* adversely affected." *Id.* at 622 (emphasis added). And, in *Advocacy Org. v. Mercy Health Services,* 987 F. Supp. 967 (E.D. Mich. 1997), the plaintiff alleged that "*if* the merger is allowed to take place, it *will* substantially lessen competition ." *Id.* at 969 (emphasis added); *see also Federal Trade Commission v. Staples*, 970 F. Supp. 1066 (D.D.C. 1997) ("[a]nalysis of the *likely* competitive effects of a merger requires determinations" of the product and geographic market)(emphasis added).

Respondents also repeatedly but mistakenly rely on decisions in cases the federal government filed in the past challenging the mergers of other acute care hospitals. *E.g.*, Respondents' Memorandum at 6-7. These cases – some of which were filed more than a decade ago and none of which rested on a full analysis of the market implications of managed care, which is at issue in this case [12] – all involved challenges to proposed transactions. In each of these

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[12] Although the issue is not directly before the Court on this motion, Complaint Counsel also respectfully suggest that the decisions addressing past hospital mergers repeatedly cited by Respondents are irrelevant to the proper analysis of the competitive effects of the hospital merger at issue here. The analysis used in those decisions rested on an evaluation of selection of hospitals by individual patients (and his or her doctor). This analysis, however, was developed more than two decades ago, *see, e.g., American Medical International, Inc.,* 104 F.T.C. 1 (1984), at a time when insurance plans contracted with and reimbursed all hospitals under the same formula, and the patient (or his or her doctor) had complete discretion to choose the hospital at which to seek care.

Today, however, as alleged in the Complaint, the private health care delivery system has (continued...)

cases, the government lacked any direct evidence of the anticompetitive effects of the proposed merger. Therefore, in these cases, as in *Brown Shoe*, any antitrust analysis of the transaction at issue had a "necessary predicate," *i.e.*, a detailed market definition.[13]

In sum, the pleading requirements in those cases cited by Respondents were defined by the sequence of steps necessary to analyze the *predicted* effects of a merger. Unlike this case, the parties and the courts there lacked any direct evidence of the anticompetitive effects of the merger. Therefore, a detailed market definition at the outset was necessary to assess the competitive effects of the merger. Here, however, the Complaint details the actual anticompetitive price increases imposed by ENH as a result of the merger on private payers who purchased hospital services. Notice pleading requires nothing more in Count II.

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[12] (...continued)
witnessed the introduction of managed care. Although there are a variety of managed care plans – such as preferred provider organizations, point of service plans, and health maintenance organizations, to name a few – they share one basic characteristic fundamentally different than the old health insurance plans: a managed care plan selectively negotiates and enters contracts with individual hospitals and the individual patient must seek care at the hospital with which his or her managed care plan contracts. Therefore, as alleged in the Complaint, *see, e.g.*, Complaint ¶ 16, 29-31, in evaluating Counts I and II, it will be necessary for the Court to examine the competitive effects of a hospital merger on the commercial transaction between the managed care plan, as the buyer, and a hospital, rather the transaction between the individual patient (and his or her doctor) and the hospital.

[13] Respondents cited just a few cases in which the plaintiff had challenged a consummated merger. Still, in those cases, the plaintiff elected to allege that – and the courts evaluated whether – the merger would have prospective anticompetitive effects. For example, Respondents are correct that in *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), the court examined a merger that had occurred thirty years previously. Still, the government (and the Court) employed prospective merger analysis to assess the future anticompetitive effects of the merger. Market definition was "a necessary predicate to a finding of a violation of the Clayton Act because the *threatened* monopoly must be one which will substantially lessen competition . . . ." *Id.* at 593 (emphasis added).

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

In the event the Court concludes that allegations regarding the relevant markets are necessary, Count II of the Complaint sets forth those allegations. Count II explicitly identifies a line of commerce and an area of the country in which the lessening of competition occurred. With respect to the line of commerce, the Complaint alleges that ENH, an acute care hospital, charged its major private payers "significantly higher prices for inpatient care" as a result of the merger. Complaint ¶¶ 31(a) - 31(h). The Complaint also identifies the geographic locations of the hospitals, *i.e.,* in the area of Evanston, Illinois, where the three hospitals do business. Complaint ¶ ¶ 1, 5 12. In this light, the Complaint gives Respondents "reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R.. § 3.11(b)(2).

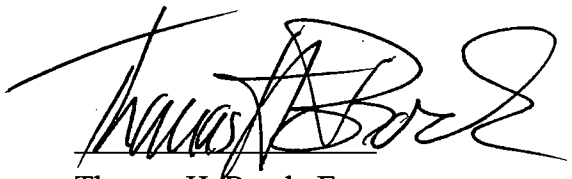
These allegations are sufficient to provide Respondents with notice of the relevant markets. The commerce that is identified – the acute care hospital services – and the area of the country that is identified – Evanston, Illinois – establish sufficient information for Respondents to answer the allegations of Count II.

CONCLUSION

There are two well-established ways to prove that the merger created or increased market power in violation of section 7 of the Clayton Act. Count I of the Complaint analyzes the merger under the typical constructs used when direct evidence of anticompetitive effects is unavailable. Count II employs a method of antitrust analysis preferred by the Commission and the courts when direct evidence of anticompetitive effects is available. Complex market analysis, starting with product and geographic market definitions, is not necessary to Count II.

Two months ago the Commissioners of the FTC approved the issuance of this Complaint, including a Count II that alleges the same Section 7 violation as Count I but based on direct evidence of anticompetitive effects. For purposes of this stage of the proceedings, where all that is required is notice of the issued to be tried, Count II suffices. For the foregoing reasons, Respondents' motion to dismiss Count II of the Complaint should be denied.[14]

Respectfully submitted,



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[14] Complaint Counsel also respectfully suggests that Respondents' motion should be treated as a motion for a more definite statement pursuant to 16 C.F.R. § 3.12(a)(2) rather than a motion to dismiss. Therefore, should the Court determines that Count II does not set forth any necessary factual allegations for the purposes of a claim under section 7 of the Clayton Act, Complaint Counsel respectfully requests that the Court grant leave to amend Count II.

CERTIFICATE OF SERVICE

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

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
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