

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION
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DOCUMENT PROCESSING

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

RESPONDENTS' FIRST AMENDED ANSWER

Pursuant to the Federal Trade Commission's Rules of Practice ("FTC Rules"), 16 C.F.R. § 3.12 Respondents Evanston Northwestern Healthcare Corporation ("ENH") and ENH Medical Group, Inc. ("ENH Medical Group") (collectively, "Respondents"), by counsel, hereby answer Counts I, II and III of the Federal Trade Commission's ("FTC") Complaint as follows:

NATURE OF THE CASE

1. This complaint concerns the merger of ENH and Highland Park Hospital ("Highland Park") in January 2000. The merger combined ENH's Evanston and Glenbrook hospitals located in Cook County, Illinois with Highland Park Hospital, the nearest hospital to the north. Shortly after the merger, ENH negotiated uniform prices for the three hospitals as a single system and raised prices at all three locations, the largest of which was at ENH. The price increases that resulted from the merger are large and far beyond those achieved by comparable hospitals during this time period.

ANSWER: This paragraph is a mere characterization of the complaint to which no responsive pleading is required. To the extent that a response to this paragraph is deemed necessary, Respondents admit that ENH and Highland Park Hospital merged in January 2000, that ENH's and Glenbrook hospitals are located in Cook County and that after the merger ENH negotiated contracts

on behalf of the three hospitals as a system. Respondents deny the remaining allegations in paragraph 1.

2. The merger also folded the Highland Park Independent Physician Association (“IPA”) into ENH Medical Group, creating a larger group that included both ENH salaried physicians as well as other independent physicians. Following the merger, ENH Medical Group engaged in price fixing of physician services by negotiating with third party payers for uniform prices for both the salaried physicians and non-salaried, independent physicians. This conduct deprived commercial payers, employers, and individuals the benefits of competition in physician services.

ANSWER: Respondents admit that following the merger physician-members of the Highland Park IPA – including salaried physicians and non-salaried affiliated physicians – became members of the ENH Medical Group. Respondents deny the remaining allegations in paragraph 2.

3. After merging the hospitals and the physician groups, ENH conducted negotiations with private payers by offering hospital services and physician services as a package. In many instances, ENH required private payers to accept its terms for both hospital and physician services or face termination of both hospital and physician contracts.

ANSWER: Respondents deny the allegations in paragraph 3.

BACKGROUND ON THE ENH HOSPITALS AND MEDICAL GROUP

4. ENH is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of Illinois, with its office and principal place of business located at 1301 Central Street, Evanston, Illinois 60201. For the fiscal year ending September 30, 2000, ENH had revenues of about \$735 million.

ANSWER: Respondents admit the allegations in the first sentence of paragraph 4. Respondents deny the remaining allegations in paragraph 4.

5. ENH owns and operates Evanston Hospital (“Evanston”), a 466-bed acute care hospital located in Evanston, Illinois, Glenbrook Hospital (“Glenbrook”), a 136-bed acute care hospital located near Evanston, and Highland Park, a 234-bed acute care hospital also located near Evanston.

ANSWER: Respondents admit that ENH owns and operates Evanston, located in Evanston, Illinois; Glenbrook, a 136-bed hospital; and Highland Park. Respondents deny the remaining allegations in paragraph 5.

6. Prior to the merger Highland Park was offering a broad range of medical and surgical services. In addition, Highland Park was pursuing the offering of open heart surgery through regulatory filings with the state of Illinois and through formation of a joint venture with Evanston.

ANSWER: Respondents admit that, prior to the merger, Highland Park offered some medical and surgical services. Respondents deny the remaining allegations in paragraph 6.

7. ENH is the sole member or owner of ENH Faculty Practice Associates (“Faculty Practice Associates”), an Illinois non-profit corporation located at 1301 Central Street, Evanston, Illinois 60201. Faculty Practice Associates was organized in 1990 under its former name Evanston Medical Specialists Foundation. It currently employs about 500 physicians who primarily serve the patients of ENH.

ANSWER: Respondents admit the allegations in paragraph 7, except that Faculty Practice Associates currently employs about 445 physicians.

8. ENH Medical Group is a for-profit corporation organized, existing, and doing business under, and by virtue of, the laws of Illinois, with its office and principal place of business located at 1301 Central Street, Evanston, Illinois 60201. Faculty Practice Associates, which ENH controls, is the sole shareholder of ENH Medical Group.

ANSWER: Respondents admit that ENH Medical Group is a for-profit corporation organized, existing, and doing business under, and by virtue of, the laws of Illinois, with its office and principal place of business located at 1301 Central Street, Evanston, Illinois 60201. Respondents further admit that Faculty Practice Associates is the sole shareholder of ENH Medical Group. The allegation in paragraph 8 that ENH controls Faculty Practice Associates states a legal conclusion to which no response is required. To the extent that a response to this allegation is deemed necessary, such allegation is denied.

JURISDICTION

9. ENH is, and at all relevant times has been, engaged in commerce within the meaning of the Clayton Act. Before their merger with ENH, Highland Park, a non-profit Illinois corporation, and its parent Lakeland Health Services, Inc., a non-profit Illinois corporation, were engaged in commerce within the meaning of the Clayton Act. ENH's merger with Highland Park constitutes an acquisition under the Clayton Act.

ANSWER: Paragraph 9 attempts to state a legal conclusion to which no response is required.

To the extent that a response to this paragraph is deemed necessary, the allegations are denied.

10. ENH Medical Group is, and at all relevant times has been, engaged in commerce within the meaning of the Federal Trade Commission Act.

ANSWER: Paragraph 10 attempts to state a legal conclusion to which no response is required.

To the extent that a response to this paragraph is deemed necessary, the allegations are denied.

11. ENH Medical Group is a corporation within the meaning of Section 4 of the Federal Trade Commission Act.

ANSWER: Paragraph 11 attempts to state a legal conclusion to which no response is required.

To the extent that a response to this paragraph is deemed necessary, the allegations are denied.

THE MERGER

12. On or about January 1, 2000, ENH and Lakeland Health Services, Inc., completed a merger by which Lakeland Health Services, Inc., and its subsidiary, Highland Park, merged with and into ENH. There was no merger or acquisition price in connection with this transaction. In August 1999, ENH estimated the fair market value of Highland Park at \$233,528,000.

ANSWER: Respondents admit that on or about January 1, 2000, ENH and Lakeland Health Services, Inc. ("Lakeland") completed a merger by which Lakeland and its subsidiary, Highland Park, merged with and into ENH. Respondents also admit that there was no merger or acquisition price stated at the time of the transaction. Although an Illinois Certificate of Need state regulation proscribed a value of \$233,528,000 for Highland Park, ENH denies that it made a fair market value determination in that amount. Respondents deny the remaining allegations in paragraph 12.

13. The merger placed Evanston, Glenbrook, and Highland Park under the control of ENH. The merger established one board of directors, one management staff, and one medical staff. Since the merger, ENH has collectively negotiated prices for all three hospitals.

ANSWER: The first sentence of Paragraph 13 states a legal conclusion to which no responsive pleading is required. To the extent that any answer is required, however, Respondents state that Highland Park merged into ENH. Respondents answer further that, both prior to and at the time of the merger, the Northwestern Healthcare Network was the sole corporate member of ENH and Lakeland. Respondents admit that ENH negotiated contracts on behalf of its three-hospital system after the merger. Respondents deny the remaining allegations in paragraph 13.

14. Prior to the merger, ENH and Highland Park, along with several other hospitals, were members of a joint venture known as the Northwestern Healthcare Network. Under that joint venture, ENH and Highland Park and the other members maintained separate management and negotiated prices independently. At the time of the merger negotiations, members of the Northwestern Healthcare Network planned to exit from or dissolve the joint venture. They dissolved the joint venture on January 3, 2000, two days after ENH and Highland Park consummated the merger.

ANSWER: Respondents admit that, prior to the merger, the Northwestern Healthcare Network was the sole corporate member of ENH and Lakeland. Respondents also admit that, at the time of the merger negotiations, ENH and Highland Park planned to exit the Northwestern Healthcare Network and that the Network dissolved shortly after the merger in January 2000. Respondents lack information sufficient to admit or deny whether other hospitals who participated in the Northwestern Healthcare Network planned to exit or dissolve the network, and therefore deny the same. Respondents deny the remaining allegations in paragraph 14.

COUNT I: MERGER OF HOSPITALS IN VIOLATION OF CLAYTON ACT §7

15. The allegations of paragraphs 1 through 14 are incorporated by reference as though fully set forth herein.

ANSWER: Respondents incorporate by reference their answers to paragraphs 1 through 14.

PRODUCT MARKET

16. The relevant product market is general acute care inpatient hospital services sold to private payers, including commercial payers, managed care plans, and self-insurance plans (collectively, “private payers”). General acute care inpatient hospital services are a broad cluster of basic medical and surgical diagnostic and treatment services that include an overnight stay in the hospital by the patient. General acute care inpatient hospital services exclude (i) services at hospitals that serve solely military and veterans; (ii) services at outpatient facilities that provide same-day service only; (iii) sophisticated services known in the industry as “tertiary services” that include such services as open heart surgery and transplants; and (iv) psychiatric, substance abuse, and rehabilitation services.

ANSWER: Paragraph 16 attempts to states a legal conclusion to which no response is required.

To the extent that a response to this paragraph is deemed necessary, the allegations are denied.

GEOGRAPHIC MARKET

17. The relevant geographic market in which to analyze the merger is the geographic area directly proximate to the three ENH hospitals and contiguous geographic areas in northeast Cook County and southeast Lake County, Illinois. This geographic area, in which a significant number of individuals who seek hospital care at the three ENH hospitals reside, spans (and may be narrower than) the densely populated suburban corridor that runs for about 15 miles north-south along the shore of Lake Michigan, and extends roughly ten miles west of the Lake. The existence of this relevant geographic market is evidenced, among other things, by the ability of ENH, once it controlled Highland Park as well as the Evanston and Glenbrook hospitals, profitably to impose significant and non-transitory price increases upon private payers in their purchase of acute care hospital services at those hospitals.

ANSWER: Paragraph 17 attempts to state a legal conclusion to which no response is required.

To the extent that a response to this paragraph is deemed necessary, the allegations are denied.

CONCENTRATION

18. As a result of the merger, ENH has been able to exercise market power in the relevant market. The merger of ENH and Highland Park created the largest hospital system in the relevant market. This market is highly concentrated and the combination significantly increased market concentration. The merger resulted in a post-merger HHI increase in excess of 500 points to a level exceeding 3000 points.

ANSWER: Paragraph 18 attempts to state a legal conclusion to which no response is required.

To the extent that a response to this paragraph is deemed necessary, the allegations are denied.

Respondents answer further that the procompetitive benefits of the merger, including, but not

limited to, improvements in the quality of patient care throughout the ENH system, outweigh any alleged anticompetitive effects.

ENTRY CONDITIONS

19. It is unlikely that entry into the market would remedy, in a timely manner, the anticompetitive effects from the merger. Entry is difficult and likely to take more than two years because of the time required to plan for and to complete construction of an acute care hospital.

ANSWER: Paragraph 19 contains allegations entirely premised on attempts to state legal conclusions in preceding paragraphs of the complaint, and to which no response is required. To the extent that a response to this paragraph is deemed necessary, the allegations are denied.

20. Government regulations also make entry difficult. The Illinois Health Facilities Planning Act, 20 Illinois Code § 3960, restricts entry in this market. The Act prevents firms from entering the market by building a hospital without first obtaining a permit from the Illinois Health Facilities Planning Board (“Planning Board”), which administers the Act. The Planning Board has issued detailed regulations, 77 Illinois Administrative Code § 1100, governing the administration of the Act.

ANSWER: Paragraph 20 contains allegations entirely premised on attempts to state legal conclusions in preceding paragraphs of the complaint and to which no response is required. To the extent that a response to this paragraph is deemed necessary, Respondents state that the referenced statutory and regulatory provisions speak for themselves. Respondents deny the remaining allegations in this paragraph.

21. For a prospective entrant, the prospects for receiving from the Planning Board a permit to build a new hospital are highly uncertain. The Illinois Health Facilities Planning Act, along with the regulations issued by the Planning Board, authorize the Planning Board to deny applications for permits based on various factors. These include, among others, the potential for duplication of health care services; the desire for orderly development of health care facilities; and the background, character, and financial fitness of the applicant.

ANSWER: Paragraph 21 contains allegations premised on attempts to state legal conclusions in the preceding paragraphs of the complaint and to which no response is required. To the extent

that a response to this paragraph is deemed necessary, Respondents state that they are without information sufficient to admit or to deny the hypothetical allegations in the first sentence of this paragraph. Respondents state further that the referenced statutory and regulatory provisions speak for themselves. Respondents lack information sufficient to admit or to deny the remaining allegations in this paragraph, and therefore deny the same.

22. Obtaining a permit to build a new hospital may take several years. The Illinois Health Facilities Planning Act authorizes adversely affected companies to seek judicial review under Illinois Administrative Review Law of any final decision of the Planning Board. The regulations of the Planning Board define adversely affected persons to include the incumbent hospitals in the area. These hospitals have a right to intervene in the Planning Board proceedings and to seek judicial review. The time period from application at the Planning Board to completion of judicial review can take several years.

ANSWER: Respondents lack information sufficient to admit or to deny the first sentence in paragraph 22, and therefore deny the same. The remaining allegations in this paragraph are entirely premised on attempts to state legal conclusions in preceding paragraphs of the complaint and thus do not require a response. To the extent that a response to these allegations is deemed necessary, Respondents state that the referenced statutory and regulatory provisions speak for themselves. Respondents deny the remaining allegations in this paragraph.

23. The Illinois Health Facilities Planning Act also restricts expansion by current market participants. It requires a permit to expand capacity by more than 10 beds or more than 10 percent of current capacity, whichever is less.

ANSWER: Paragraph 23 contains allegations entirely premised on attempts to state legal conclusions in preceding paragraphs of the complaint and to which no response is required. To the extent that a response to this paragraph is deemed necessary, Respondents state that the referenced statutory provisions speak for themselves. Respondents deny the remaining allegations in this paragraph.

LACK OF MERGER EFFICIENCIES

24. The merger was not necessary to permit the parties to achieve overriding efficiencies to vindicate the merger. Should the matter of efficiencies be placed properly in issue, the evidence establishes that the merger has not led to lower costs at ENH that led to lower prices for consumers. Rather, the merger has led to large cost increases at ENH that coincided with large price increases for consumers. The ability of ENH and Glenbrook hospitals to increase these operating costs and their charges for general acute care inpatient hospital services, without a corresponding improvement in quality of care, further reflects the market power exercised by the hospitals after the merger.

ANSWER: Paragraph 24 contains allegations entirely premised on attempts to state legal conclusions in preceding paragraphs of the complaint and to which no response is required. To the extent that a response to this paragraph is deemed necessary, Respondents deny the allegations in this paragraph.

25. Prior to the merger, ENH's Evanston and Glenbrook hospitals had operating costs comparable to area hospitals and other comparable hospitals. Following the merger, the operating costs at the Evanston and Glenbrook hospitals increased substantially, and much more than experienced by area hospitals and other comparable hospitals.

ANSWER: Respondents deny that, "[f]ollowing the merger, the operating costs at the Evanston and Glenbrook hospitals increased substantially." Respondents are without information sufficient to admit or deny the remaining allegations in paragraph 25, and therefore deny the same.

26. Salaries account for the largest portion of operating costs. Following the merger, salary expenses at ENH's Evanston and Glenbrook hospitals increased substantially, and much more than experienced by area hospitals and other comparable hospitals.

ANSWER: Respondents admit that salaries account for the largest portion of ENH's operating costs. Respondents deny that, "[f]ollowing the merger, salary expenses at ENH's Evanston and Glenbrook hospitals increased substantially." Respondents are without information sufficient to admit or deny the remaining allegations in paragraph 26, and therefore deny the same.

VIOLATION

27. The merger of ENH and Highland Park has substantially lessened competition in the relevant market, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

ANSWER: Paragraph 27 states a legal conclusion to which no response is required. To the extent that a response to this paragraph is deemed necessary, Respondents deny the allegations in this paragraph.

COUNT II: MERGER OF HOSPITALS IN VIOLATION OF CLAYTON ACT §7

28. The allegations of paragraphs 1 through 14 and 19 through 26.

ANSWER: Respondents incorporate by reference their answers to paragraphs 1 through 14 and 19 through 26.

29. Following the merger, ENH established a strategy of negotiating with private payers on behalf of the three hospitals as a single system. In many instances, this policy, with the addition of Highland Park to ENH, effectively forced private payers to accept price increases that were significantly higher than the price increases of other comparable hospitals, or face the loss of all three hospitals from their networks. Such a loss would have a significant adverse impact on their ability to market their managed care products.

ANSWER: Respondents admit that following the merger ENH negotiated with private payors on behalf the three hospitals as a single system. Respondents deny the remaining allegations in paragraph 29.

30. Following the merger, ENH raised prices more than the price increases implemented by other comparable hospitals. Private payers regarded the ENH price increases as unwarranted. ENH also required many private payers to agree to pay prices set at a discount off of ENH's list prices in lieu of predetermined per diem prices for each day of inpatient care, a feature of many of the hospitals' pre-merger contracts with their major payers. Any pricing system based on list prices makes hospital payments less predictable for private payers and facilitates the hospitals' ability to impose unilateral price increases (by raising list prices). ENH raised its list prices several times following the merger.

ANSWER: Respondents lack information sufficient to admit or deny the alleged comparison of ENH's contract prices to "comparable hospitals." Respondents also lack information sufficient to

admit or deny the allegations regarding the reaction of payors to ENH's prices. Respondents admit that several of ENH's pre-merger contracts with private payors were based on pre-determined per diem prices for each day of inpatient care, and that ENH raised its list prices several times following the merger. Respondents deny the remaining allegations in paragraph 30.

31. Following the merger, ENH proposed large price increases to its major private payers. All but one of these large customers accepted ENH's significant postmerger increases rather than try to sell a health plan without any of the three ENH hospitals. In each of the following cases in which it sought to raise prices, ENH also negotiated with the payer hospital and physician services as a package, requiring each payer to accept ENH's terms for the package or otherwise lose both contracts.

ANSWER: Respondents admit that, following the merger, ENH proposed certain price increases to its major private payors, but the alleged "price increases" in paragraph 31 are not identified. Respondents deny the remaining allegations in paragraph 31.

(a) United Healthcare of Illinois, Inc. ("United") is a commercial payer that conducts business in the state of Illinois. As a result of the merger, United faced significantly higher prices for inpatient care. In 2000, ENH raised United's (i) health maintenance organization ("HMO") rates by about 52% at the Evanston and Glenbrook hospitals and 38% at Highland Park and (ii) preferred-provider-organization ("PPO") rates by about 190% for the Evanston and Glenbrook hospitals and 20% for Highland Park as measured by United. As is typical for commercial payers, the vast majority of United's payments to ENH and other local hospitals are made at HMO or PPO rates. ENH also forced United to pay on the basis of discounts from list prices, which makes payments for hospital services less predictable and potentially even more costly.

ANSWER: Respondents admit that United is a commercial payer that conducts business in the state of Illinois. Respondents further admit that ENH renegotiated its contract with United after the merger, and that such contract documents speak for themselves. Respondents deny the characterizations of those contract negotiations, including the allegation that ENH forced United to pay on the basis of discounts from list prices. Respondents lack information sufficient to admit or deny the remaining allegations in paragraph 31(a), and therefore deny the same.

(b) Private HealthCare Systems (“Private HealthCare”) is a commercial payer that conducts business in the state of Illinois. As a result of the merger, Private HealthCare faced significantly higher prices for inpatient care. In 2000, ENH raised Private HealthCare’s rates at the Evanston and Glenbrook hospitals by about 40% as measured by Private HealthCare. Evanston also forced Private HealthCare to pay for some services on the basis of discounts from list prices, which makes payments for hospital services less predictable and potentially even more costly.

ANSWER: Respondents admit that Private HealthCare is a commercial payor that conducts business in the state of Illinois. Respondents further admit that ENH renegotiated its contract with Private HealthCare after the merger, and that such contract documents speak for themselves. Respondents deny the characterizations of those contract negotiations, including the allegation that ENH forced Private HealthCare to pay for some services on the basis of discounts from list prices. Respondents lack information sufficient to admit or deny the remaining allegations in paragraph 31(b), and therefore deny the same.

(c) CIGNA Corporation (“CIGNA”) is a commercial payer that conducts business in the state of Illinois. As a result of the merger, CIGNA faced significantly higher prices for inpatient care. In 2000, ENH raised CIGNA’s (i) HMO rates by about 15-20% and (ii) PPO rates by about 30% as measured by CIGNA. Evanston also forced CIGNA to pay on the basis of discounts from list prices, which makes payments for hospital services less predictable and potentially even more costly.

ANSWER: Respondents admit that CIGNA is a commercial payor that conducts business in the State of Illinois. Respondents further admit that ENH renegotiated its contract with CIGNA after the merger, and that such contract documents speak for themselves. Respondents deny the characterizations of those contract negotiations, including the allegation that ENH forced CIGNA to pay on the basis of discounts from list prices. Respondents lack information sufficient to admit or deny the remaining allegations in paragraph 31(c), and therefore deny the same.

(d) Aetna Inc. (“Aetna”) is a commercial payer that conducts business in the state of Illinois. As a result of the merger, Aetna faced significantly higher prices for inpatient care. In 2000, ENH raised Aetna’s rates by about 45-50% over three years or about 15% per year as measured by Aetna.

ANSWER: Respondents admit that Aetna is a commercial payor that conducts business in the state of Illinois. Respondents further admit that ENH renegotiated its contract with Aetna after the merger, and that such contract documents speak for themselves. Respondents deny the characterizations of those contract negotiations. Respondents lack information sufficient to admit or deny the remaining allegations in paragraph 31(d), and therefore deny the same.

(e) Humana Inc. (“Humana”) is a commercial payer that conducts business in the state of Illinois. As a result of the merger, Humana faced significantly higher prices for inpatient care. In 2000, ENH raised Humana’s PPO rates by about 50-60% as measured by Humana.

ANSWER: Respondents admit that Humana is a commercial payor that conducts business in the state of Illinois. Respondents further admit that ENH renegotiated its contract with Humana after the merger, and that such contract documents speak for themselves. Respondents deny the characterizations of those contract negotiations. Respondents lack information sufficient to admit or deny the remaining allegations in paragraph 31(e), and therefore deny the same.

(f) Preferred Plan, Inc. (“Preferred Plan”) is a commercial payer that conducts business in the state of Illinois. As a result of the merger, Preferred Plan faced significantly higher prices for inpatient care. In 2000, ENH raised Preferred Plan’s rates by about 24% as measured by Preferred Plan. ENH also forced Preferred Plan to pay on the basis of discounts from list prices, which makes payments for hospital services less predictable and potentially even more costly.

ANSWER: Respondents admit that Preferred Plan is a commercial payor that conducts business in the state of Illinois. Respondents further admit that ENH renegotiated its contract with Preferred Plan after the merger, and that such contract documents speak for themselves. Respondents deny the characterizations of those contract negotiations, including the allegation that ENH forced Preferred Plan to pay on the basis of discounts from list prices. Respondents lack information sufficient to admit or deny the remaining allegations in paragraph 31(f), and therefore deny the same.

(g) HFN, Inc. (“HFN”) is a commercial payer that conducts business in the state of Illinois. As a result of the merger, HFN faced significantly higher prices for inpatient care. In 2000, ENH raised HFN’s exclusive provider organization (“EPO”) rates by about 21% for Highland Park and 25% at Evanston and Glenbrook hospitals and raised HFN’s PPO rates by higher amounts as measured by HFN.

ANSWER: Respondents admit that HFN is a commercial payor that conducts business in the state of Illinois. Respondents further admit that ENH renegotiated its contract with HFN after the merger, and that such contract documents speak for themselves. Respondents deny the characterizations of those contract negotiations. Respondents lack information sufficient to admit or deny the remaining allegations in paragraph 31(g), and therefore deny the same.

(h) Blue Cross is a commercial payer that conducts business in the state of Illinois, and the largest commercial payer in the Chicago area. Following the merger, ENH proposed a large price increase in both inpatient care and physician services to Blue Cross. Blue Cross challenged ENH’s physician pricing practices as illegal, after which ENH withdrew the proposed price increases to Blue Cross.

ANSWER: Respondents admit that Blue Cross is a commercial payor that conducts business in the state of Illinois. Respondents lack information sufficient to admit or to deny the allegation that Blue Cross is the largest commercial payor in the Chicago area, and therefore deny the same. Respondents deny the remaining allegations in paragraph 31(h).

32. The merger of ENH and Highland Park enabled EHN to raise its prices to private payers above the prices that the hospitals would have charged absent the merger. Consequently, the merger has substantially lessened competition in a line of commerce in a section of the country, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

ANSWER: Paragraph 32 states a legal conclusion to which no response is required. To the extent that a response to this paragraph is deemed necessary, Respondents deny the allegations in this paragraph.

**COUNT III: PRICE FIXING OF PHYSICIAN SERVICES
IN VIOLATION OF FTC ACT § 5**

33. The allegations of paragraphs 1 through 14, 26 and 31 are incorporated by reference as though fully set forth herein.

ANSWER: Respondents incorporate by reference their answers to paragraphs 1 through 14, 26 and 31.

34. In many instances, ENH also followed a strategy of negotiating hospital services and physician services (through ENH Medical Group) as a package deal, requiring private payers to accept the terms offered for both hospital and physician services, or face termination of both.

ANSWER: Respondents deny the allegations in paragraph 34.

35. Faculty Practice Associates, which ENH controls, employs about 460 physicians. These salaried physicians have medical offices in several locations in Cook and Lake counties. For these salaried physicians, Faculty Practice Associates or ENH owns or rents office space for them, employs nurses and other staff that work at the offices, purchases computer technology and other office equipment, and purchases malpractice insurance. ENH Medical Group negotiates prices for the services performed by these salaried physicians. These salaried physicians provide services for a fee charged to commercial payers that ENH Medical Group collects.

ANSWER: The allegation in paragraph 35 that ENH controls Faculty Practice Associates states a legal conclusion to which no response is required. To the extent that a response to this allegation is deemed necessary, such allegation is denied. Respondents admit the remaining allegations in paragraph 35, except that (1) the Faculty Practice Associates employs about 445 physicians, and (2) ENH does not purchase malpractice insurance for salaried physicians.

36. ENH Medical Group also negotiates prices on behalf of about 450 non-salaried or independent physicians. ENH refers publicly to these physicians as affiliated physicians in contrast to the salaried physicians. These independent or affiliated physicians work at several dozen medical offices in Cook and Lake counties. The independent physicians rent their own office space, hire nurses and other staff, pay for their own computer technology and other office equipment, and purchase their malpractice insurance. The independent physicians provide services for a fee charged to commercial payers that they collect through their own office personnel or administrators.

ANSWER: Respondents admit that ENH Medical group negotiates prices for capitated contracts on behalf of 471 independent physicians. Respondents deny the remaining allegations in the first sentence of paragraph 36. Respondents admit the allegations in the second and third sentences of this paragraph. Respondents lack information sufficient to admit or to deny the remaining allegations in this paragraph, and therefore deny the same.

37. Both the salaried physicians and independent physicians include specialists and primary care physicians that provide comparable services in the same geographic area. In the absence of the price fixing described herein, the salaried physicians and the independent physicians compete in the sale of physician services. This competition reduces the cost of physician services charged to commercial payers that offer health plans to employers and individuals. This competition also improves the quality of services.

ANSWER: Respondents admit that both the salaried and independent physicians include specialists and primary care physicians. Respondents deny the remaining allegations in paragraph 37.

38. The ENH Medical Group has negotiated and entered into commercial contracts that contain uniform price terms that cover the services of both the salaried physicians and the independent physicians. Nearly all of the commercial contracts provide for reimbursement on the basis of fee-for-service, as opposed to capitation or other alternative reimbursement methods. For these commercial contracts, the salaried physicians and the independent physicians do not share expenses, revenues, or profits, or otherwise share any financial risk.

ANSWER: Respondents admit that ENH Medical Group has negotiated and entered into commercial contracts and that those documents speak for themselves. ENH Medical Group denies the remaining allegations in paragraph 38.

39. The salaried physicians and the independent physicians have not engaged in any meaningful efficiency-enhancing integration. They do not share information technology systems to enhance services. Nor do they comply or seek to comply with common performance standards or clinical protocols to enhance services.

ANSWER: Respondents deny the allegations in paragraph 39.

40. About 300 of the 450 independent or affiliated physicians formerly contracted through the Highland Park IPA. Following the merger, the ENH Medical Group established prices for about 910 physicians - about 460 salaried physicians and 450 independent physicians, including about 300 formerly affiliated with the Highland Park IPA. Following the merger, the ENH Medical Group raised prices.

ANSWER: Respondents deny the remaining allegations in paragraph 40.

41. The prices charged for physician services are often set by reference to Medicare's Resource Based Relative Value System ("RBRVS"), a system used by the U.S. Centers for Medicare and Medicaid Services to determine the amount to pay for physician services to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. Commercial payers often contract with individual physicians or physician groups at a price level specified as some percentage of the RBRVS fee for a particular year, such as 110% of RBRVS.

ANSWER: Respondents admit the allegations in paragraph 41, except that Respondents deny that commercial payers often contract with individual physicians or physician groups at 110% of RBRVS to the extent this paragraph purports to make this allegation.

42. An alternative reimbursement method is for physicians to charge on the basis of capitation. Under capitation, the physician or physician group charges a set per-member-per month fee rather than separate fees for specific services.

ANSWER: Respondents admit the allegations in paragraph 42.

43. In 2000, ENH Medical Group negotiated price increases for the salaried physicians and independent physicians. In some instances, ENH Medical Group converted capitated contracts to fee-for-service contracts with higher effective rates. In other instances, ENH Medical Group raised the amount of the fee-for-service reimbursement. The price increases negotiated and implemented in 2000 after the merger include the following:

ANSWER: Respondents admit that, in 2000, ENH Medical Group negotiated price increases for the salaried physicians and independent physicians. Respondents also admit that, in some instances, ENH Medical Group converted capitated contracts to fee-for-service contracts. Respondents deny the remaining allegations in paragraph 43.

(a) ENH Medical Group negotiated an increase in the price for Private HealthCare's PPO from 125% of Medicare RBRVS to 140%.

ANSWER: Respondents admit that the rate negotiated between ENH Medical Group and Private HealthCare and implemented, in 2000, for Private HealthCare's PPO was 140% of Medicare RBRVS. Respondents deny the remaining allegations in paragraph 43(a).

(b) ENH Medical Group negotiated an increase in the price for United's PPO from 125% of Medicare RBRVS to 140%, and for United's HMO from a capitated rate that was comparable to 110% of Medicare RBRVS to 125%.

ANSWER: Respondents admit that the rate negotiated between ENH Medical Group and United and implemented, in 2000, for United's PPO was 140% of Medicare RBRVS. Respondents also admit that the rate negotiated between ENH Medical Group and United and implemented, in 2000, for United's HMO was 125% of Medicare RBRVS. Respondents deny the remaining allegations in paragraph 43(b).

(c) ENH Medical Group negotiated an increase in the price for Aetna's PPO from 110% of Medicare RBRVS to 140%.

ANSWER: Respondents admit that the rate negotiated between Aetna and ENH Medical Group and implemented, in 2000, for Aetna's PPO was 140% of Medicare RBRVS. Respondents deny the remaining allegations in paragraph 43(c).

(d) ENH Medical Group negotiated an increase in the price of CIGNA's PPO from 135% of Medicare RBRVS to 150%, and for CIGNA's HMO from 115% of Medicare RBRVS to 135%.

ANSWER: Respondents admit that the rate in force for CIGNA's PPO product between CIGNA and ENH Medical Group and between CIGNA and the Highland Park IPA prior to the merger was 135% of Medicare RBRVS. Respondents also admit that the rate negotiated between ENH Medical Group and CIGNA and implemented, in 2000, for CIGNA's PPO was 150% of Medicare RBRVS. Respondents further admit that the rate negotiated between ENH Medical

Group and CIGNA and implemented, in 2000, for CIGNA's HMO was 135% of Medicare RBRVS. Respondents deny the remaining allegations in paragraph 43(d).

(e) ENH Medical Group negotiated an increase in the price for One Health's HMO from 125% of Medicare RBRVS to 140%, and for One Health's PPO from 130% of Medicare RBRVS to 152.5%.

ANSWER: Respondents admit that the rate negotiated, between ENH Medical Group and One Health, and implemented, in 2000, for One Health's HMO was 140% of Medicare RBRVS. Respondents further admit that the rate negotiated between ENH Medical Group and One Health and implemented, in 2000, for One Health's PPO was 152.5% of Medicare RBRVS. Respondents deny the remaining allegations in paragraph 43(e).

44. By establishing these and other price increases on behalf of the salaried physicians and the independent physicians, ENH Medical Group engaged in illegal price fixing in restraint of trade. This conduct deprived commercial payers, employers, and individuals of the benefits of competition among physicians.

ANSWER: Paragraph 44 states a legal conclusion to which no response is required. To the extent that a response to this paragraph is deemed necessary, Respondents deny the allegations in this paragraph.

VIOLATION

45. The contracting for physician services engaged in by ENH Medical Group on behalf of its independent physicians constitutes unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

ANSWER: Paragraph 45 states a legal conclusion to which no response is required. To the extent that a response to this paragraph is deemed necessary, Respondents deny the allegations in this paragraph.

NOTICE OF CONTEMPLATED RELIEF

Respondents deny that the FTC is entitled to any relief and deny all the allegations contained in the FTC's Notice of Contemplated Relief.

GROUND OF DEFENSE

Without assuming any burden they would not otherwise bear, Respondents assert the following defenses and reserve their right to raise additional defenses if and when deemed appropriate as the case progresses:

First Defense

The Commission's complaint, in whole or in part, fails to state a claim upon which relief can be granted.

Second Defense

Prior to the merger, ENH and Highland Park were not separate persons as required for the application of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and the merger was exempt from antitrust scrutiny under the *Copperweld* doctrine.

Third Defense

The Commission lacks subject matter jurisdiction over ENH because ENH, as a non-profit entity, "is not a person subject to the jurisdiction" of the Commission as defined by Section 4 of the FTC Act, 15 U.S.C. § 44.

Fourth Defense

Relief is barred in this action under the doctrine of laches.

Fifth Defense

The complaint fails to comply with the requirements of Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), because the issuance of the complaint and relief sought are not in the public interest.

Sixth Defense

The merger of Highland Park into ENH yielded significant procompetitive efficiencies that outweigh any alleged anticompetitive effects.

Seventh Defense

The merger of Highland Park into ENH facilitated significant improvements in the quality of patient care throughout the ENH system that outweigh any alleged anticompetitive effects.

Eighth Defense

Prior to the merger, Highland Park was a failing firm.

Ninth Defense

The merger of Highland Park into ENH was approved by the State of Illinois and is protected under the State Action doctrine.

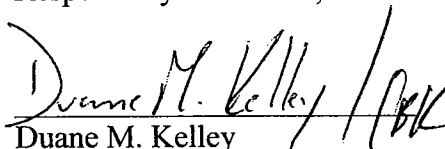
Tenth Defense

Payors voluntarily entered into the contractual arrangements challenged in Count III. Because ENH Medical Group and the payors have voluntarily ceased the conduct alleged in Count III, there presently exists no actual or potential violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Therefore, Count III of the Commission's complaint is moot.

WHEREFORE, Respondents demand judgment dismissing the Complaint with prejudice and awarding costs and such other relief as deemed just and proper.

Dated: July 12, 2004

Respectfully Submitted,

A handwritten signature in black ink that reads "Duane M. Kelley" followed by a stylized flourish or initials.

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CERTIFICATE OF SERVICE


I hereby certify that on July 12, 2004, a copy of the foregoing Respondents' First Amended Answer was served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

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