

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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In the matter of)

) Docket No. 9315

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Evanston Northwestern)
Healthcare Corporation)
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_____)

) Public Record

**MOTION OF THE CITY OF HIGHLAND PARK
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION**

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Dated: December 16, 2005

Pursuant to 16 C.F.R. § 3.52(j), 1/ the City of Highland Park (“Highland Park”) respectfully moves for leave to file the accompanying brief *amicus curiae* in support of Evanston Northwestern Healthcare Corporation (“ENH”).

Highland Park is a residential community of approximately 32,000 residents located 23 miles north of Chicago on Lake Michigan’s North Shore. Highland Park is also the home of Highland Park Hospital, which merged with ENH in 2000.


Highland Park believes that a full and fair analysis of the issues facing the Commission requires careful consideration of the impact of any decision on the community that will be most directly affected. The merger of Highland Park Hospital and ENH in 2000 produced significant benefits to the residents of Highland Park, and the Administrative Law Judge’s (“ALJ’s”) divestiture order has created the significant possibility that those benefits will be lost. And even if many or most of those benefits are ultimately retained, the uncertainty of the hospital’s future caused by the ALJ’s order has already taken and will continue to take a toll on the community until the litigation is concluded and any divestiture is completed – a process that will take several more years at least.

Highland Park respectfully suggests that the attached brief will aid the Commission in understanding the potential effects of divestiture on the local community.

For these reasons, Highland park respectfully requests that the Commission grant its motion to file the attached brief *amicus curiae*.

1/ 16 C.F.R. § 3.52(j) provides that “A motion for leave shall identify the interest of the applicant and state how a Commission decision in the matter would affect the applicant or persons its represents. The motion shall also state the reasons why a brief of an *amicus curiae* is desirable.”

Respectfully submitted,



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ORDER

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

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

By the Commission

Issued:

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

In the matter of)

Docket No. 9315)

Evanston Northwestern)
Healthcare Corporation)

Public Record)
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AMICUS CURIAE BRIEF IN SUPPORT OF
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION**

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I. INTRODUCTION

The City of Highland Park (“Highland Park”) is a residential community of approximately 32,000 residents located 23 miles north of Chicago on Lake Michigan’s North Shore. Highland Park is also the home of Highland Park Hospital, which merged with Evanston Northwestern Healthcare Corporation (“ENH”) in 2000. Highland Park believes that a full and fair analysis of the issues facing the Commission requires careful consideration of the impact of any decision on the community that will be most directly affected. Highland Park therefore submits this brief to express the concerns of the community regarding the Administrative Law Judge’s (“ALJ’s”) order that Highland Park Hospital be divested from ENH and to request that the Commission reverse that order.

The merger of Highland Park Hospital and ENH in 2000 produced significant benefits to the residents of Highland Park. Prior to the merger, Highland Park Hospital was a community hospital that provided only a basic set of general primary and secondary services, lacked the financial resources and patient volume to provide more complex services, and faced a number of administrative problems. Today, the hospital has an academic affiliation and provides several tertiary-level services at state-of-the-art facilities. These improvements would not have occurred if not for the merger and the dedication and investment in the community made by ENH.

The ALJ’s divestiture order has created the significant possibility that the benefits of the merger to the Highland Park community will be lost. Should the Commission affirm the ALJ’s remedy, a divested Highland Park Hospital may well be unable, for any of a number of reasons, to maintain or continue the progress it has made over the past six years. Highland Park Hospital has been so thoroughly integrated into ENH that its divestiture would be difficult and costly. Moreover, given how many hospital mergers have failed, it is questionable that a divestiture and

subsequent merger of Highland Park Hospital with another hospital would be as successful as the current ENH arrangement. And given the frequency with which post-consummation forced sales fail to achieve their objectives, there is certainly no assurance that a divestiture will restore whatever competition the ALJ believes may have been lost.

Finally, even if Highland Park Hospital is successfully divested from ENH, the uncertainty of the hospital's future caused by the ALJ's order has already taken and will continue to take a toll on the community until further litigation is concluded and a divestiture is completed – a process that will take several more years at least. During this time, ENH's incentives to continue to invest in Highland Park Hospital will be seriously reduced, and a shadow of uncertainty will hang over physicians, patients, and others in the Highland Park community regarding the future of the hospital.

Simply put, divestiture likely would do more harm than good. For this reason, Highland Park respectfully requests that, if the Commission affirms the ALJ's decision with respect to liability, it reject the Initial Decision's remedy and not require divestiture in this case.

II. ARGUMENT

A. The Merger of Highland Park Hospital and ENH Produced Significant Benefits to the Highland Park Community.

As the ALJ's Findings of Fact make clear, the Highland Park Hospital that exists today is very different from the pre-merger Highland Park Hospital. Before the merger, Highland Park Hospital was a community hospital that offered a basic set of services. Initial Decision, Findings

of Fact (hereinafter “FF”) ¶ 24. Community opinion was that “if you were really sick, you went somewhere else.” Spaeth, Tr. 2243-44; 1/ *see also* Belsky, Tr. 4901. 2/

The purpose of the merger was to add and improve certain key services. FF ¶ 848. In response to the Highland Park community’s “various serious concerns about Evanston’s commitment to Highland Park,” Styer, Tr. 4966, 3/ ENH made specific commitments “to expand Highland Park Hospital to become a major critical care facility in the area, bring the Kellogg Cancer Center to Highland Park Hospital, to establish a heart program [for] open heart surgery, and to expand the facilities and improve the facilities of Highland Park Hospital.” Styer, Tr. 4968; *see also* RX 567 at ENH MN 1374, 1376.

ENH delivered on each of these commitments. ENH dramatically improved the hospital’s physical plant by, among other things, constructing a new ambulatory care center, a new cardiac catheterization lab, a new central plant, and a new parking garage, and by remodeling patient rooms and the hospital lobby. FF ¶¶ 911-920. ENH also transformed Highland Park Hospital’s oncology capabilities by establishing the Kellogg Cancer Center on campus. *Id.* ¶ 921. Whereas Highland Park’s cancer patients previously had to travel to Evanston, Condell, or some other hospital to receive care, they now have access to all the resources they require in a single location in their community. *Id.* (“Through the Kellogg Cancer

1/ Ron Spaeth was the Chief Financial Officer of Highland Park Hospital prior to the merger and is currently the President of Evanston Northwestern Healthcare Foundation and a Trustee of the Healthcare Foundation of Highland Park.

2/ Michael Belsky is Mayor of Highland Park, has been a resident of Highland Park since 1990, and previously served two terms on Highland Park’s City Council. Mayor Belsky testified at trial as to both the community’s appreciation for the investment that had been made by ENH in Highland Park Hospital as well as the community’s concern over the uncertainty regarding whether the improvements facilitated by those investments would be lost in a divestiture. The Initial Decision contains no reference to this testimony, and this brief is being filed in part to ensure that the community’s voice is heard.

3/ James Styer is the current Chairman of the Healthcare Foundation of Highland Park and is a former Trustee of Highland Park Hospital.

Center at Highland Park, ENH . . . brought together an oncology team . . . who were available to treat patients at one location.”). This has changed and improved lives.

ENH also instituted cardiac surgery and interventional cardiac programs. FF ¶¶ 952-964. Prior to the merger, Highland Park residents who suffered heart attacks had to be transferred to other hospitals, which significantly increased the mortality risk for those patients. The merger provided Highland Park Hospital access to ENH’s resources and an increased patient volume that permitted the implementation of cardiac programs on its own campus. As a result, Highland Park heart attack patients can obtain emergency and elective cardiac procedures at Highland Park Hospital, thus avoiding the risks of transfer to another hospital. Divestiture would cut off the necessary resources and reduce the patient volume and, in doing so, would remove these life-saving services from our community. ^{4/}

ENH’s total investment in and success at Highland Park Hospital have far surpassed even its original, aggressive goals. ENH has significantly improved the hospital’s recruitment, training, and management of nurses, FF ¶¶ 903-905, the physical layout and service components of the hospital’s emergency department, FF ¶¶ 935-936, and the hospital’s adolescent psychiatry units. FF ¶¶ 965-969. These benefits have been significant, even if they are not quantifiable. Anyone who has been to a hospital knows that the quality of the nursing staff and the physical space contribute immeasurably to the patient’s experience and well-being. And Highland Park’s children with psychiatric problems now have access to a safer, larger, and more focused

^{4/} There are several changes, including the addition of cardiac surgery and the structural and service changes to Highland Park Hospital’s adolescent psychology unit, that have been possible only because patient volumes have increased at Highland Park Hospital. Many of these additional patients would otherwise have been treated at Evanston Hospital or Glenbrook Hospital, and will likely resume using those hospitals in the event of a divestiture. *See* Neaman, Tr. 1324-25 (patient volume is critical to certain services); Respondent’s Proposed Post-Trial Findings of Fact (hereinafter “RPFF”) ¶¶ 289-290.

adolescent psychiatry unit in the community. ENH has also introduced electronic medical records (through the EPIC system) to the hospital, FF ¶¶ 976-987, and integrated the hospital's medical staff into ENH's academic and research environments, with all of the benefits they produce. FF ¶¶ 988-992. In total, ENH has invested over \$120 million in Highland Park Hospital, far exceeding the community's expectations. Styer, Tr. 4982-83.

The ALJ's characterization of many of these improvements as not merger-specific gives too little credit to ENH and too much credit to the pre-merger aspirations of Highland Park Hospital. Highland Park Hospital undoubtedly hoped and planned to improve its services and facilities as a stand-alone hospital, or even pursuant to a different merger. But goals often go unrealized, and, as discussed at greater length below, there is reason to believe that Highland Park Hospital would not have improved in the ways or to the extent it did if not for ENH. Luckily for the residents of Highland Park, such speculation is unnecessary because the merger permitted Highland Park Hospital to improve the services and facilities it had found wanting, as well as others it had not even considered.

In short, the merger of ENH is an incredible success story. The residents of Highland Park now have more and better health care services available nearby in their own community. Moreover, such success is rare with hospital mergers. As discussed at greater length below, hospital mergers often fail or fall short of their promised benefits. In contrast, this merger has surpassed all expectations and in doing so has benefited the Highland Park community immeasurably.

B. A Forced Divestiture is Likely to Leave Highland Park Worse Off.

The ALJ's divestiture order rests on the assumption that the acquisition of a divested Highland Park Hospital by another hospital would produce positive results and facilitate the

retention of many of the gains made as a result of the original merger. But several facts cast serious doubt on that assumption. First, the ALJ himself acknowledged that with a divestiture, certain key benefits would be lost. Second, Highland Park Hospital's operations have been so thoroughly integrated into ENH that it would be difficult, if not impossible, to separate the hospitals without diminishing Highland Park Hospital and harming consumers, who are the main beneficiaries of Highland Park Hospital's improved services. Third, hospital mergers are very difficult, and it is questionable that a forced divestiture and subsequent merger with another hospital would be as successful as the current merged enterprise. Finally, post-consummation divestitures have particularly poor success rates. There is therefore a significant chance that the divestiture would fail to restore whatever competition the ALJ believes may have been lost from the merger.

1. Valuable Gains From the Merger Could Be Lost or Diminished.

The ALJ acknowledged that "some benefits of the merger will be lost, including the current electronic medical records system, EPIC; academic affiliation and clinical integration; and cardiac surgery." Initial Decision at 205. The ALJ grossly miscalculated, however, in concluding that "these benefits are insubstantial in relation to the anticompetitive harm resulting from the merger." *Id.* While Highland Park believes that several other improvements could be lost or diminished in a divestiture, even these three highlight the significant potential impact on the community.

Highland Park Hospital's potential loss of its academic affiliation could have far-reaching effects on the local medical community. Highland Park Hospital's academic affiliation has provided opportunities for physicians to conduct clinical research that simply did not exist before the merger. It has also significantly increased the hospital's ability to recruit and retain high quality physicians and administrators. Chassin, Tr. 5600; Harris, Tr. 4251; Spaeth, Tr. 2246-47;

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

The loss of its academic affiliation could also lead to Highland Park Hospital's loss of physicians whose practices and opportunities have changed significantly since the merger. Since Highland Park Hospital was integrated into ENH, 60 Highland Park Hospital physicians who previously did not have academic appointments have obtained appointments at Northwestern Medical School. Chassin, Tr. 5376; O'Brien, Tr. 3540; RPF 2163. These appointments have improved the physicians' opportunities to pursue research and have drawn many of them into teaching roles in the ENH residency program. Chassin, Tr. 5376; Harris, Tr. 4252; RPF 2163. Should the divestiture order be affirmed, it is likely that some, if not many, of these physicians will elect to remain with ENH to ensure that they can retain their academic appointments and continue their clinical research. This not only could reduce the number of physicians available at Highland Park Hospital and in the community generally, but could also lessen the attractiveness of the hospital to potential acquirers. The Initial Decision contains provisions intended to facilitate the retention or addition of Highland Park Hospital employees, but as the Commission recognized in another recent divestiture case "apart from directing [the respondent] to provide incentives and remove obstacles to facilitate employee transfers, [it] cannot control the degree to which those transfers occur." *In the Matter of Chicago Bridge & Iron Co.*, Docket No. 9300 at 97 (January 6, 2005). The risk of lost physicians is of serious concern to the Highland Park community.

In addition, the loss of EPIC could significantly impact patient care. Electronic medical records drastically reduce errors and in doing so improve care and save lives. But because there significant financial and organizational barriers to their implementation, community hospitals

have been slow to obtain them. In fact Highland Park Hospital is currently one of only a few community hospitals in the country to have electronic medical records. Wagner, Tr. 3999-4001; Romano, Tr. 3334; RPF ¶ 2474-2475. But ENH holds the EPIC license and it is non-assignable. Wagner, Tr. 3991; RPF ¶ 2526. In the case of a divestiture, Highland Park Hospital would therefore be faced with the decision whether to return to paper records, to purchase (if feasible) EPIC or some other electronic medical records system, or to attempt to integrate into an acquirer's system. Whatever the decision, the conversion process will likely be long and expensive and has the potential to reduce the quality of care and result in unnecessary errors. See Joseph P. Fuhr, Jr., *Failed Hospital Mergers*, 36 J. Health L. 301, 313 (2003) ("Although not unique to the hospital industry, post-merger information technology (IT) coordination problems often pose large cost and coordination issues. . . . As a result, integration of systems can take years and cost millions of dollars, and will only succeed if management has a clear plan for what the new operation should look like.").

Finally, the loss of Highland Park Hospital's cardiac surgery program would be a tremendous loss to the community. As noted above, the merger provided Highland Park Hospital access to ENH's resources and an increased patient volume that permitted the implementation of cardiac programs on its own campus. Divestiture would cut off the resources and reduce the patient volume necessary to maintain these programs and, in doing so, would remove valuable, life-saving services from our community.

The ALJ concluded that "Highland Park, upon divestiture, has the ability to maintain or establish acceptable levels of quality care in most service areas, including the collaborative and multi-disciplinary culture." Initial Opinion at 205. Highland Park respectfully submits that the ALJ set the bar too low. As a result of the merger, Highland Park Hospital has achieved

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

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

One reason why so many benefits from the merger are likely to be lost is that, unlike with many other mergers, the parties have been so successfully integrated with each other that a successful extraction is unlikely. As the saying goes, "the eggs have been scrambled":

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

William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825, 830 (1997).

The ALJ's Findings of Fact recognize several respects in which the eggs have been scrambled in this case. All three hospitals operate as a single entity and share a single Medicare identification number and a single billing system and office. FF ¶¶ 88, 90. The hospitals have also consolidated all corporate activities in Evanston and eliminated all corporate functions at Highland Park Hospital. FF ¶ 89. And the hospitals have also consolidated their medical staffs into a single medical staff. FF ¶ 91. In short, critical elements of Highland Park Hospital's management infrastructure have been dismantled and transferred to ENH. Highland Park Hospital is therefore quite possibly incapable of operating independently, and will either need a substantial infusion of infrastructure and management to do so, or will need to be merged with another hospital. The Initial Decision contains no mention of the potential cost in terms of both money and time that would be required for a successful divestiture, but they will be enormous.

And every dollar spent unraveling Highland Park Hospital from ENH and combining it with another hospital is a dollar that could be better spent on the provision of health care to the members of the Highland Park community.

The ALJ's attempt to facilitate the unscrambling process does not solve the problem. Recognizing the seriousness of this issue, FTC staff proposed "ancillary relief to assist the acquirer to re-establish the consolidated functions and to have access to all of the practices and procedures that ENH currently employs at Highland Park," including provisions addressing clinical practices, intellectual property, transitional services, recruitment of key personnel, and appointment of a Monitor to oversee the divestiture. Complaint Counsel's Post-Trial Brief at 87-88. The ALJ adopted many of these proposed provisions and in doing so placed much of the responsibility for ensuring Highland Park Hospital's viability with ENH. Initial Decision Order ¶¶ II.C-F.

Continued involvement by ENH in a divested Highland Park Hospital, even if necessary in some respects, could have significant deleterious effects. The 1999 Study of the Commission's Divestiture Process by the Staff of the Bureau of Competition of the Federal Trade Commission (hereinafter "Divestiture Report") found that continued post-divestiture involvement by respondents often caused harm. Of nineteen cases studied in which the respondents maintained some sort of continuing relationship with the buyers after divestiture, "in six cases the continuing relationship was so detrimental that it prevented the buyer from operating competitively in the market [and in] an additional seven cases, the continuing relationship was harmful to the buyer, but not so harmful as to prevent the buyer from operating in the market competitively." Divestiture Report at 12; *see also id.* at 18-19 ("[R]espondents have no natural incentive to help the buyers, and that lack of incentive may put the divested

business at risk. Where the respondent's assistance is critical, even indifference by the respondent to the buyer's success may make the divested business fail.”).

This is simply not a case in which divestiture would be “simple, relatively easy to administer, and sure.” *United States v. E.I. du Pont de Nemours*, 366 U.S. 316, 331 (1971). In pre-consummation merger challenges, the parties and the agencies can identify which business units are susceptible to divestiture and decide accordingly whether or not to proceed. And in certain other industries, factories or retail operations can be easily carved out of a business with little or no impact on the whole. But the merger of these hospitals has created a web of relationships – between and among physicians, administrators, patients, and others – that cannot be easily severed or untangled. Even attempting to do so could have significant ripple effects on the community.

Highland Park shares the opinion of one commentator that “[i]n situations where there’s been considerable clinical consolidation . . . unscrambling is [not] a remedy you should get or even ask for.” Federal Trade Commission and Department of Justice Antitrust Division Hearings on Health Care and Competition Law and Policy (hereinafter “FTC/DOJ Hearings”), April 11, 2003 at 264:9-12 (testimony of William G. Kopit). The record shows that this is just such a situation.

3. It is Unlikely that Another Hospital Merger Will Be as Successful.

Another cause for concern to Highland Park is how difficult it is to achieve a successful hospital merger. Highland Park has been extremely fortunate that the merger between ENH and Highland Park Hospital has worked out so well. This is not a case in which the remedy will replace one proposed vision of the future with another equally speculative one. From our community's perspective, we know that the ENH merger not only achieved its goals, but

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

The past several decades have seen an alarming number of failed hospital mergers. *See, e.g., Fuhr, Failed Hospital Mergers*, 36 J. Health L. at 301 (cataloging failed hospital mergers and noting that “few hospital mergers have yielded efficiency gains and many hospitals have actually lost additional money after mergers”); FTC/DOJ Hearings, April 11, 2003 at 162:1-15 (testimony of Robert Taylor) (“One of the easiest things to examine in terms of post-merger conduct is how long have the hospitals gone actually realizing the efficiencies they stated they were going to be able to generate or produce or realize as a result of this merger. And when that’s been done, in general, the hospitals have not fared very well . . . In fact, there aren’t many cases in which you look at post-merger behavior in hospitals and you find not only did they meet their claimed efficiencies, but exceeded them.”). Among the common causes of these failure are: “transitional conflicts; governance problems; organizational culture conflicts; incompatibility of academic medical centers (AMCs) and community hospitals; difficulties in coordinating information technology; and inability to consolidate medical services at one hospital due to physician or community resistance.” *Fuhr, Failed Hospital Mergers*, 36 J. Health L. at 302. Several of these potential obstacles are of particular concern to Highland Park Hospital and the community.

When Highland Park Hospital began considering a potential merger in the late 1990s, it identified several necessary attributes for a successful partner. One of these attributes was lack of religious affiliation. This led the hospital to conclude, for example, that the Advocate Health System, a Lutheran organization, would not be the best fit. *Spaeth*, Tr. 2271-72; RPF ¶ 245. Highland Park Hospital’s board also felt very strongly that it should not become part of a for-

profit corporation. Spaeth, Tr. 2272; RPF ¶ 246. The mission of a non-profit hospital is to serve the health needs of the community, and excess profits will be put to that purpose rather than sent elsewhere. Moreover, not much is known regarding the likely results when a for-profit purchases a non-profit hospital. See FTC/DOJ Hearings, October 1, 2003 at 112-13 (testimony of Jack Bierig).

With these and other criteria in mind, Highland Park Hospital carefully considered potential merger partners and eventually settled on ENH, which provided a particularly good fit because both hospitals were part of the North Shore culture and many of the hospitals' physicians knew each other and trained with each other in the same medical schools. Spaeth, Tr. 2273; RX 288 at ENH RS 1031; RPF ¶ 283. It was also critical to Highland Park Hospital and the community that ENH showed a commitment to preserving the positive aspects of Highland Park Hospital's community hospital past and culture. It appears unlikely that any acquirer will meet the criteria that ENH did and fit so well with Highland Park Hospital's culture, community, and organization.

4. It is Questionable that a Divestiture Will Restore the Competition that the ALJ Believes May Have Been Lost.

An additional cause for Highland Park's concern is the FTC's troubling track record with post-consummation divestitures. The Divestiture Report recounted the frequent failure of the Commission's post-consummation divestiture orders to achieve desirable results. Indeed, the failure of these post-consummation divestitures was one of the catalysts for the enactment of the Hart-Scott-Rodino Act's pre-merger filing requirements. As noted in the Senate Report on the Hart-Scott-Rodino Act, "divestiture of stock or assets after an illegal merger is consummated is frequently an inadequate remedy for a variety of reasons: Assets may be scrambled, making recreation of the acquired firm impossible." Senate Report No. 94-803, 94th Cong., 2d Sess.

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

As the Divestiture Report observed, there are many obstacles to ensuring that a divestiture is a successful remedy to address the perceived competition concerns raised by a merger. These obstacles multiply, however, when a divestiture will not occur until seven or more years after an acquisition. And they multiply even further when, as discussed above, the parties have so integrated their operations that a divestiture will require both substantial unscrambling of operations and continued relationships between the parties for some time to come.

C. The Uncertainty Caused by the Order of Divestiture Will Harm the Community Even if any Divestiture is Ultimately Successful.

Even if the ALJ's Initial Decision is affirmed and divestiture is ultimately successful, the uncertainty caused by the remedy in this case has already taken and will continue to take a toll on the Highland Park community. The record contains evidence that several members of the community forcefully oppose divestiture. Styer, Tr. 4995; HFHP 000106-113 ("We are appalled that our government through its Federal Trade Commission Agency could even consider a divestiture of our hospital from Evanston Northwestern Healthcare."). More than anything, however, the community desires certainty regarding the future of Highland Park Hospital and the services it will provide. Belsky, Tr. 4912-13 ("I am concerned, again, about the commitment that has been made by Evanston Northwestern to these facilities and services, and I think divestiture injects some uncertainty into it. I think the community wants some certainty.").

Because any decision by the Commission in favor of divestiture will almost certainly be appealed, it is likely that any divestiture, if upheld by the Court of Appeals, would not occur until well into 2007 at the earliest. Until the issue is ultimately resolved, ENH will have little

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

In the short run, if divestiture is the only practical remedy, it is unlikely that during the course of the retrospective investigation, that the merging hospitals will continue to invest heavily in new medical equipment and construction, or to add new services. So, just talk about a divestiture could lead to delays or cancellation of ongoing efforts to expand capacity or to invest in infrastructure. And this is a social cost of the post-merger review process.

FTC/DOJ Hearings, April 11, 2003 at 144:21-145:5 (testimony of Lawrence Wu). Put differently, “[s]ucceeding in the changing [hospital] market environment often requires innovation, but it is difficult to be innovative when uncertainty pervades the organization.” Fuhr, *Failed Hospital Mergers*, 36 J. Health L. at 302.

The ALJ has wrongly put theoretical economic gains before tangible community losses in devising his remedy. The ALJ reasoned that because he found a price increase that may trickle down to some consumers “divestiture, on balance, could not be deemed to harm consumers as it would eliminate the competitive harm that has been found to exceed any quality benefits.” Initial Opinion at 204-05. Assuming that there was a price increase, and assuming that “on balance” the average consumer would benefit from a successful and efficient divestiture, these assumptions will provide little comfort to any residents of Highland Park whose health risks may be increased or whose services may be diminished as a result.

D. The ALJ’s Divestiture Order Should Be Reversed Because It Is Not in the Public Interest.

For the reasons addressed above, the ALJ’s order of divestiture should be reversed. Once a violation has been found, the relief ordered by the Commission must meet three criteria: (1) it must effectively redress the violation found; (2) it must not be punitive in nature; and (3) it must be necessary and appropriate in the public interest. *See Ford Motor Co. v. United States*, 405

U.S. 562, 573 (1972). Highland Park respectfully submits that the ALJ failed to adequately consider the public interest.

In considering the nature of its role in devising appropriate remedies, the Commission has likened itself to a court of equity:

This implies not only that the Commission's powers are broad and flexible, but that they are to be exercised in accordance with the principles of fairness and equitable treatment. The historic role of equity has been to mitigate the harshness of legal remedies as well as to supplement and strengthen those remedies. If the Commission enjoys, as we think it does, essentially equitable powers under Section 11 of the Clayton Act, it must, as a corollary, assume equitable responsibilities.

In re Ekco Prods. Co., 65 F.T.C. 1163 (1964) (citation omitted). As described above, the harshness of the divestiture remedy on the members of the Highland Park community far outweighs its strength, which is only speculative, in curing the alleged competitive harm.

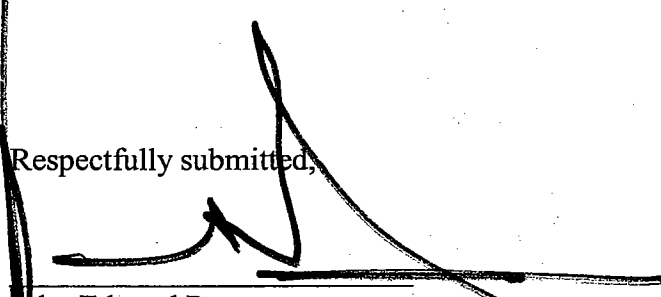
Moreover, the primary justification for divestiture – in simple terms, its tidiness – is not accomplished by the ALJ's order. Agencies and courts have favored divestiture as a remedy in merger cases primarily because “conduct remedies can be difficult to formulate, require ongoing oversight, and may be difficult to modify in response to changed circumstances.” *Improving Health Care: A Dose of Competition*, A Report by the Federal Trade Commission and the Department of Justice, July 2004, at Ch. 6, p. 17. As discussed above, however, to have a chance of success, the divestiture of Highland Park Hospital will require considerable ongoing oversight to ensure that the infrastructure and human assets integrated into ENH can be effectively replaced. Highland Park not only agrees with Respondent that a contracting-related conduct remedy would work in this case, but believes that it would be easier to administer than any divestiture.

Given the high costs of divestiture to the Highland Park community, and given the burdensome oversight that would be necessary for divestiture to have a chance of success, if the Commission does conclude that the merger violated Section 7 of the Clayton Act, equity strongly favors an alternative remedy in this case.

III. CONCLUSION

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

Respectfully submitted,



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