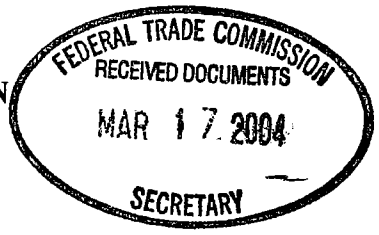
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**RESPONDENTS' MOTION TO DISMISS**
**COUNT II FOR FAILURE TO STATE A CLAIM**

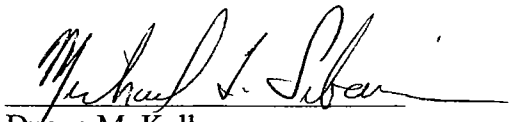
Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.22, Respondents Evanston Northwestern Healthcare Corporation ("ENH") and ENH Medical Group, Inc. ("ENH Medical Group"), by counsel, move to dismiss Count II of the complaint, which alleges that ENH's January 2000 merger with Highland Park Hospital violated Section 7 of the Clayton Act.[1]

In support, Respondents ENH and ENH Medical Group respectfully refer the Court to the contemporaneously-filed memorandum of points and authorities.

[1] Count II does not purport to state a claim against ENH Medical Group. But because Count II does incorporate allegations directed at ENH Medical Group, it joins in this motion to the extent such a claim is deemed to have been brought. Respondents are filing contemporaneously with this motion their answer to Counts I and III even though no answer is presently due under FTC Rule 3.12(a)(1).

Dated: March 17, 2004

Respectfully Submitted,



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| **Evanston Northwestern Healthcare Corporation,** a corporation, and | ) | Docket No. 9315 **Public** |
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**RESPONDENTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNT II FOR FAILURE TO STATE A CLAIM**

Pursuant to the Federal Trade Commission's Rules of Practice ("FTC Rules"), 16 C.F.R. § 3.22, Respondents Evanston Northwestern Healthcare Corporation ("ENH") and ENH Medical Group, Inc. ("ENH Medical Group"), by counsel, move to dismiss Count II of the complaint ("Count II"), which alleges that ENH's January 2000 merger with Highland Park Hospital ("Highland Park") violated Section 7 of the Clayton Act ("Section 7").

## INTRODUCTION

After years of investigating hospital mergers around the country in an effort to resurrect its enforcement program following a string of defeats in federal court, the Federal Trade Commission ("FTC" or "Commission") has selected the wrong target – a successful, fully integrated merger between a first rate academic teaching hospital (legacy ENH) and a struggling community hospital (legacy Highland Park) just outside of Chicago. The merger was consummated more than four years ago at a time when both institutions were under the umbrella of a common parent entity, the Northwestern Healthcare Network. That entity was itself the product of a transaction involving these and a number of other hospitals that the Antitrust

Division of the Department of Justice had investigated and cleared years earlier under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Counts I and II of the complaint each allege that the hospital merger violated Section 7 of the Clayton Act.[1] Count I includes the traditional elements of a prima facie merger claim – including allegations of a relevant market, high concentration levels and difficult entry. In Count II, complaint counsel asks this Court to adopt an unprecedented theory of Section 7 liability by alleging *neither* a relevant product market *nor* a relevant geographic market.[2] Rather than allege the conditions that courts have repeatedly utilized to establish a prima facie merger case, complaint counsel purports to invent a new cause of action for "competitive effects" based on vague notions that after the merger ENH raised prices by an amount that "[p]rivate payers regarded . . . as unwarranted." Compl. ¶ 30. Such a theory is not only inconsistent with the plain language of the statute, but would effectively overrule a half-century of precedent in both the Supreme Court and the lower courts requiring that relevant markets be pled and proven in a Section 7 case. Despite advancing a completely novel theory, complaint counsel asks for the ultimate consequence known under the antitrust laws – divestiture of Highland Park from ENH – thus undoing the substantial benefits from the merger while also disrupting the lives of ENH's patients, doctors, employees and other effected parties.

As demonstrated below, complaint counsel's failure to plead the requisite relevant product and geographic markets in Count II renders that Section 7 claim deficient as a matter of law.

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[1] Count III of the complaint alleges that ENH Medical Group Inc.'s negotiations on behalf of physicians who were not ENH Medical Group, Inc. employees violated Section 5 of the FTC Act.

[2] See Compl. ¶ 28 (the paragraphs alleging the relevant product and geographic markets in Count I, paragraphs 16-18, are not incorporated by reference into Count II).

## ARGUMENT

Any "complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995).[3] Complaints alleging antitrust violations are no exception:

> When the requisite elements [of an antitrust claim] are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. A contrary view would be tantamount to providing antitrust litigation with an exemption from [Federal] Rule 12(b)(6).

Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106-07 (7th Cir. 1984).

Count II should be dismissed because it fails to allege the requisite relevant product and geographic market elements of a Section 7 claim.[4] This omission was intentional. Count II expressly excludes the relevant markets alleged in Count I, which is a traditional Section 7 claim.[5]

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[3] See also FED. R. CIV. P. 12(b)(6); FEDERAL TRADE COMMISSION'S OPERATING MANUAL FOR ADMINISTRATIVE LITIGATION, § 10.7 (2004) ("[S]ince many adjudicative rules are derived from the Federal Rules of Civil Procedure, the latter may be consulted for guidance and interpretation of Commission rules where no other authority exists").

[4] See, e.g., Pillsbury Mills, Inc., 1953 WL 13116, 50 F.T.C. 555, at *9 (F.T.C. 1953) (Under Section 7, "the Government must define and prove the relevant [geographic] market and the relevant products involved in the acquisitions.") (citation omitted); cf. Apani Southwest, Inc. v. Coca-Cola Enter., Inc., 300 F.3d 620, 624 (5th Cir. 2002) (dismissing § 3 Clayton Act claim for failure to allege a relevant geographic market); Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997) (affirming district court dismissal of antitrust claim for failure to plead a relevant market); Evac, LLC v. Pataki, 89 F. Supp. 2d 250, 261 (N.D.N.Y. 2000) ("[The complaint] does not define a specific geographic market or explain how the Court should draw geographic boundaries. Without this definition, [plaintiff] cannot bring the instant claim.").

[5] See Compl. ¶ 28; see also Fed. R. Civ. P. 10(c); Marvullo v. Gruner & Jahr, 105 F. Supp.2d 225, 229 n.4 (S.D.N.Y. 2000) (finding that court was barred "from inferring elements of claim from other sections of pleading absent explicit incorporation") (citations omitted).

## I. Section 7 Requires Complaint Counsel To Plead A Relevant Market.

Section 7 prohibits only those mergers that "substantially . . . lessen competition" *in a relevant market*:

> [N]o person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged in commerce or in any activity affecting commerce, *where in any line of commerce or in any activity affecting 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 (emphasis added).[6] Congress thus requires complaint counsel to allege and prove in Count II that the underlying merger substantially lessened competition in: (1) a particular "line of commerce" or "activity affecting commerce" (*i.e.*, a relevant product market); *and* (2) a particular "section of the country" (*i.e.*, a relevant geographic market).[7]

The Supreme Court has repeatedly confirmed this statutory interpretation. For example, in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), the Court found that "the ultimate question under § 7 [was] whether the effect of the merger 'may be substantially to lessen competition' *in the relevant market*." Id. at 362 (emphasis added). The Court thus appraised the "probable competitive effects of [the] proposed merger" in the context of the pertinent "'line of commerce' (relevant product or services market) and 'section of the country' (relevant geographic market)." Id. at 356. According to the Court, the relevant product market

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[6] According to the legislative history, Congress intentionally viewed a properly defined relevant market as a necessary element of a Section 7 Claim. See, e.g., S. REP. 81-1775 at 6 (1950) ("In determining the area of effective competition for a given product, it will be *necessary* to decide what comprises an appreciable segment of the market.") (emphasis added); 51 CONG. REC. 15830 (1914) ("Notice that the lessening of competition or the tendency to create monopoly in one section or city is not enough. *The line of commerce, taken as a whole, must be substantially involved.*") (statement of Senator Reed) (emphasis added).

[7] See, e.g., F.T.C. v. Staples, 970 F. Supp. 1066, 1072-73 (D.D.C. 1997) (Section 7 "[a]nalysis of the likely competitive effects of a merger requires determinations of (1) the 'line of commerce' or product market in which to assess the transaction, (2) the 'section of the country' or geographic market in which to assess the transaction, and (3) the transaction's probable effect on competition in the product and geographic markets.").

must be defined as "a market 'sufficiently inclusive to be meaningful in terms of trade realities,'" and the relevant geographic market must ascertain "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." Id. at 357 (citations omitted).

The Supreme Court has reaffirmed this doctrine in a series of merger cases since the Philadelphia National Bank era.[8] And lower courts have followed this precedent,[9] which was forged at a time when the "sole consistency" in Section 7 law was that "the Government always wins." United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). It is difficult to see why holding complaint counsel to these basic tenants of market definition would in any way prejudice the government.

Complaint counsel may assert that its burden of establishing a prima facie case should be lower because, unlike in pre-consummation cases, the complaint purports to allege direct evidence of anticompetitive effects following the January 2000 merger. Such an argument, however, would be misplaced because the elements of a Section 7 claim are identical

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[8] See, e.g., United States v. Conn. Nat'l Bank, 418 U.S. 656, 669-73 (1974) (emphasizing that it was "the Government's role to come forward with evidence delineating the" relevant market, and finding that the Government failed to meet its burden); United States v. Marine Bancorp Inc., 418 U.S. 602, 618 (1974) ("Determination of the relevant product market and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.") (citations omitted); Brown Shoe Co. v. United States, 370 U.S. 294, 334-39 (1962) (holding that "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," and construing relevant product and geographic markets "within which the effects of th[e] merger are to be measured"); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957) (same).

[9] See, e.g., Kaiser Aluminum & Chem. Co. v. F.T.C., 652 F.2d 1324, 1329 (7th Cir. 1981) (holding that "[d]efinition of relevant markets is necessary in order to measure the effect upon competition of" one firm's "acquisition of" another); United States v. Rockford Mem'l Corp., 717 F. Supp. 1251, 1258 (N.D. Ill. 1989), aff'd, 98 F.2d 1278 (7th Cir. 1990) ("An analysis of an alleged Section 7 violation requires a determination of the relevant 'line of commerce,' or product market, in which competition is to be allegedly lessened" as well as "the appropriate geographic market [that identifies] the relevant competitors who could constrain the merging firms from exercising market power."); Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 491 (5th Cir. 1984) (holding that "the first step in analyzing a Section Seven claim is defining the relevant product and geographic markets"); Berlyn, Inc. v. The Gazette Newspapers, Inc., 157 F. Supp. 2d 609, 622 (D. Md. 2001) (same); Cal. v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1118 (N.D. Cal. 2001) (same).

in the post-consummation context. In United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957), the federal government brought a Section 7 claim to challenge the merger between E.I du Pont and General Motors thirty years after-the-fact. Id. at 587. The Court emphasized that its consideration of whether the merger substantially lessened competition "can be determined only in terms" of the relevant market:

> Determination of the relevant market is 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 'within the area of effective competition.' *Substantiality can be determined only in terms of the market affected.*

Id. at 593 (emphasis added). More recent post-consummation cases have also required proof of the relevant market. See R.R. Donnelley & Sons Co., 120 F.T.C. 36, 204 (1995) (dismissing complaint where proposed market definition was "too narrowly drawn"); Seeburg Corp. v. F.T.C., 425 F.2d 124, 128-129 (6th Cir. 1970) (finding that the language of Section 7 makes it "necessary to examine the effects of a merger" in the context of a relevant market); see also United States v. Gen. Dynamics Corp. 415 U.S. 486, 510 (1974) (The "delineation of proper geographic and product markets is a necessary precondition to assessment of the probabilities of a substantial effect on competition within them[.]"); Chicago Bridge & Iron Co., Docket No. 9300, Slip Op. at 85 (June 18, 2003) (Initial Decision, J. Chappell) (same).

Anticipating problems in proving its theory under well-established merger law, complaint counsel seeks to alter the elements of a Section 7 claim. This is not surprising, given that courts have consistently found fault with the government's efforts to establish the relevant market in hospital merger cases in recent years. See e.g., F.T.C. v. Tenet Health Care Corp., 186 F.3d 1045, 1053 (8th Cir. 1999) (FTC's failure to produce sufficient evidence of a well-defined relevant geographic market was "fatal to its motion for injunctive relief"); F.T.C. v. Freeman Hosp., 69 F.3d 260, 268 (8th Cir. 1995) (FTC failed to establish relevant market in support of

Clayton Act claim); California v. Sutter Health System, 130 F. Supp. 2d 1109, 1132 (N.D. Cal. 2001) (Plaintiff failed "to meet its burden of proving a well-defined geographic market encompassing the practical alternative sources of acute inpatient services[.]"); United States v. Long Island Jewish Medical Ctr., 983 F. Supp. 121, 140 (E.D.N.Y. 1997) ("[T]he Government failed to establish its definition of the relevant product market as an anchor hospital providing primary/secondary service."); Advocacy Org. for Patients and Providers v. Mercy Health Services, 987 F. Supp. 967, 973 (E.D. Mich. 1997) ("[P]laintiffs' market definition is wholly inadequate, and thus their likelihood of success on their § 7 claim is minimal."); In re Adventist Health Sys., 117 F.T.C. 224, 288, 297 (1994) (Complaint counsel's failure to support the relevant geographic markets alleged in the complaint was fatal given that the Supreme "Court has held that the question whether a merger substantially lessens competition can only be answered in terms of a relevant antitrust market."). Complaint counsel has no legal basis to rewrite Section 7 in the hope of preventing history from repeating itself.

## II. There Is No Sound Legal Or Policy Reason To Permit Complaint Counsel To Establish A Prima Facie Case Based On The Facts Alleged In Count II.

Complaint counsel essentially asserts in Count II that a prima facie Section 7 case *should* be recognized based solely on the following allegations: (1) post-merger price increases as measured by large insurance companies; (2) a lack of merger efficiencies leading to lower prices for unidentified consumers, and an increase after the merger for an unspecified period of time in operating costs at two of the three hospitals in the system greater than experienced at some other unspecified "area" and "comparable" hospitals; and (3) entry into *an undefined* market is difficult. Compl. ¶¶ 19-26, 28, 29-31. Even putting aside the fact that only Congress could amend Section 7 to adopt such a new pleading standard, there is no policy basis to discard a half-century of well-established precedent and adopt complaint counsel's novel theory that

post-merger price increases viewed in a vacuum can provide the basis for divesting a successful merger years after-the-fact.

This Court should adhere to the "basic outline" articulated by then-Judge Thomas of the D.C. Circuit of how the burden of proof in a Section 7 case should be allocated:

> The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration *in the market for a particular product in a particular geographic area*, the government establishes a presumption that the transaction will substantially lessen competition. . . . The burden of producing evidence to rebut this presumption then shifts to the defendant. . . . If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.

United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990) (Supreme Court and other citations omitted) (emphasis added).

Complaint counsel will no doubt brush aside this "basic outline" and assert that proof of a relevant market should not be necessary where there is direct evidence of anticompetitive effects. Whatever the value, if any, of such a premise in other areas of antitrust law (e.g. the Sherman Act), there is no legal support for such a doctrine in federal merger law. Unlike Section 7 of the Clayton Act, the Sherman Act does not have the same statutory language requiring that an analysis be made in any relevant line of commerce in any section of the country. Hence, Sherman Act cases do not support the proposition that a violation of Section 7 can be shown with direct evidence of purported anticompetitive effects.

Nor is there any sound policy argument for supporting complaint counsel's unprecedented view. One commentator put it best when explaining that "common sense" requires courts to view anticompetitive effects in the context of a properly defined relevant market to guard against remedies that would not be "correct":

> Despite the many criticisms of the relevant market concept as it has been applied in the case law, the concept is not necessarily unsound and may indeed be necessary for merger analysis. Common sense suggests that competition issues must be addressed in the context of some market, and no alternative that promises to be appreciably more precise, predictable, or workable has yet emerged. Moreover, the very vagueness of the relevant market concept may be viewed by some as desirable. Distinguishing between procompetitive and anticompetitive mergers is by nature an inexact task. Use of a non-specific concept such as "relevant market" may reflect a faith in the courts to resolve difficult questions in the best manner and to reach the "correct" result in any given case.

AM. BAR ASS'N, ANTITRUST SECTION, MONOGRAPH NO. 12, HORIZONTAL MERGERS: LAW AND POLICY 67 (1986); see also Philadelphia Nat'l Bank, 374 U.S. at 362 ("[U]nless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded."); Tenet Health Care Corp., 186 F.3d at 1051 ("Without a well-defined relevant market, a merger's effect on competition cannot be evaluated."); Freeman Hosp., 69 F.3d at 268 ("Without a well-defined relevant market, an examination of a transaction's competitive effects is without context or meaning."); discussion, supra, regarding post-consummation cases.

With this in mind, it bears repeating that complaint counsel – not ENH – carries the burden of demonstrating that *the merger* substantially lessened competition. The allegations in Count II, even if accepted as true, fall far short of meeting this burden. Even assuming, for the sake of argument, that "ENH raised prices more than the price increases implemented by other comparable hospitals" after the merger (Compl. ¶ 30), this allegation, standing alone (that is, without properly defined product or geographic markets), is not sufficient to establish anticompetitive effects. To the extent ENH's prices increased, such increases could have been due to a host of reasons unrelated to the merger, such as changes in demand for the hospitals' services, improvements in the quality of care, or "cost shifting" to cope with reductions in

revenues received from federal government programs. Alternatively, the contracts may have been outdated and due for renegotiation. In short, there are any number of reasons why prices may have increased having nothing to do with any alleged increase in market power arising from the merger.

Count II fails to allege the requisite nexus between the merger and ENH's purported post-merger price increases. Sustaining this Section 7 claim would thus amount to a dangerous departure from settled law, under which complaint counsel may establish a presumption that the transaction will substantially lessen competition *only* upon a showing of proof of the relevant product market, relevant geographic market, high markets shares and high entry barriers. The burden to rebut this presumption shifts to the respondent if and only if complaint counsel proves its *entire* prima facie case. The D.C. Circuit in Baker Hughes rejected an earlier effort by the government to increase the defendant's burden in a Section 7 case:

> If the burden of production imposed on a defendant is unduly onerous, the distinction between that burden and the ultimate burden of persuasion – always an elusive distinction in practice – disintegrates completely. A defendant required to produce evidence "clearly" disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case – whether a transaction is likely to lessen competition substantially. Absent express instructions to the contrary, we are loath to depart from settled principles and impose such a heavy burden.

Baker Hughes, Inc., 908 F.2d at 991 (citations omitted). Similarly, permitting complaint counsel to establish a prima facie case based on the scant allegations in Count II risks placing the burden of proving the ultimate issue in the case – namely, whether the merger substantially lessened competition – on Respondents.

As noted above, there are many possible alternative explanations as to why one might see a price increase in a post-consummation case. Against a backdrop of almost 50 years

of merger cases interpreting a statute first adopted 90 years ago, neither the Commission nor the judiciary have experience in the many errors and dangers of going down a path of permitting the government to challenge a merger based on some select new group of elements that would be deemed a reliable proxy for demonstrating that a merger had anticompetitive effects. The complaint itself is internally inconsistent – alleging in Count II that "[e]ntry into *the market* . . . is difficult" while, at the same time, refusing to define this "market."[10] Such inconsistency underscores the confusion complaint counsel invites by asking this Court to accept its new pleading standard.

In the end, complaint counsel should have to prove each and every element of a traditional Section 7 claim, including a properly defined relevant market within which to analyze the alleged anticompetitive effects of the merger. This Court should resist the invitation to usurp the clear language of the statute as interpreted by the federal courts over many decades.

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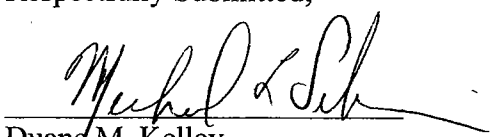
[10] Compl. ¶ 19 (emphasis added); Compl. ¶ 28 (incorporating paragraph 19 into Count II); see also United States. v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 149 (E.D.N.Y. 1997) (Entry is defined as the ability of other participants to "enter the *relevant markets* and reduce the likelihood of a price increase above competitive levels.") (emphasis added).

## CONCLUSION

For the foregoing reasons, Respondents ENH and ENH Medical Group respectfully request that Count II be dismissed with prejudice.

Dated: March 17, 2004

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2004, a copy of the foregoing Respondents' Motion to Dismiss Count II for Failure to State a Claim, supporting memorandum and proposed order were served by hand delivery on:

The Honorable Stephen J. McGuire
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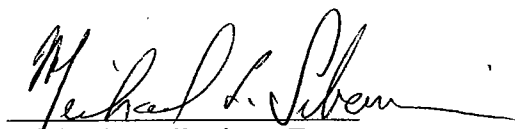

Michael L. Sibarium, Esq.

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**ORDER**

Upon consideration of Respondents' Motion to Dismiss Count II for Failure to State a Claim and complaint counsel's response thereto, and the Court being fully informed, it is this _____ day of _____, 2004 hereby

ORDERED, that the Motion is GRANTED; and it is further

ORDERED, that Count II of the complaint is dismissed with prejudice.

The Honorable Stephen J. McGuire
CHIEF ADMINISTRATIVE LAW JUDGE
Federal Trade Commission