

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

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Evanston Northwestern Healthcare Corporation (“ENH”) has violated and is violating Section 7 of the Clayton Act, and that respondent ENH Medical Group, Inc. (“ENH Medical Group”), has violated and is violating Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect 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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

28. The allegations of paragraphs 1 through 14 and 19 through 26 are incorporated by reference as though fully set forth herein.

COMPETITIVE EFFECTS OF MERGER

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.

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.

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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

VIOLATION

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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:

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

(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%.

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

(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%.

(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%.

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.

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.

NOTICE

Notice is hereby given to the respondents that the tenth day of May, 2004, at 10:00 a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Room 532, Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission and Clayton Acts to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The Administrative Law Judge will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, NW, Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the merger of ENH and Highland Park, or any joint venture that combines them, challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Divestiture of Highland Park, and associated assets, in a manner that restores the hospital as a viable, independent competitor in the relevant market, with the ability to offer such services as Highland Park was offering and planning to offer prior to its acquisition by ENH.
2. A ban, for a period of time, on any transaction between ENH and the restored Highland Park that combines their hospitals or other health facilities in the relevant section of the country, except as may be approved by the Commission.
3. A requirement that, for a period of time, ENH provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of its hospital or other health facilities in the relevant markets with other hospitals or health facilities in the relevant market.
4. A requirement to file periodic compliance reports with the Commission.
5. Any other relief appropriate to correct or remedy the anti-competitive effects of the transaction or to restore Highland Park as a viable, independent competitor in the relevant market.

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that ENH Medical Group is in violation of Section 5 of the Federal Trade Commission Act, as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to, an order that ENH Medical Group shall:

1. Cease and desist from fixing, raising, stabilizing, establishing, maintaining, adjusting, or tampering with any fee or aspect of the fee charged for any physician's service, where the physician is not employed by ENH Faculty Practice Associates, and such conduct is not ancillary to an integrated joint venture.
2. File periodic compliance reports with the Commission.
3. Take other appropriate measures of steps to correct or remedy, or prevent the recurrence of, the anti-competitive practices engaged in by ENH Medical Group.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this tenth day of February, 2004.

By the Commission, Commissioner Harbour dissenting.

Donald S. Clark
Secretary

SEAL