UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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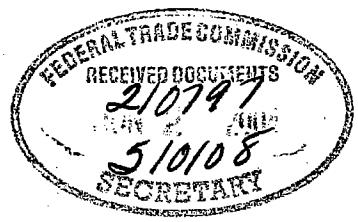

In the Matter of	)	
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION,	)	
and	)	Docket No. 9315
ENH MEDICAL GROUP, INC., Respondents.	)	

ORDER DENYING RESPONDENTS' MOTION TO DISMISS COUNT II OF THE COMPLAINT

I. PROCEDURAL BACKGROUND

On March 17, 2004, Respondents Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc. (collectively referred to as "ENH") filed a motion to dismiss Count II of the Complaint for failure to state a claim upon which relief could be granted ("Motion"). On April 2, 2004, Complaint Counsel filed an opposition ("Opposition").

For the reasons set forth below, Respondents' motion is **DENIED**.

II. RELEVANT ALLEGATIONS OF THE COMPLAINT

The Complaint includes factual allegations regarding the nature of the case, background on the ENH hospitals and medical group, jurisdiction, the merger, and factual allegations presented in support of three separate counts. Count I alleges that 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. Complaint ¶ 27. Count II alleges that the merger of ENH and Highland Park enabled ENH to raise its prices to private payers above the prices that the hospitals would have charged absent the merger, and that 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. Complaint ¶ 32. Count III alleges that 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. Complaint ¶ 45.

Specific allegations relevant to this motion are:

1. The Complaint identifies the geographic locations of the hospitals involved in the merger as being in and near Evanston and Cook County in Illinois. Complaint ¶¶ 1, 4, 5.

2. The Complaint states that each of the hospitals at issue is an "acute care hospital" and alleges "higher prices for inpatient care." Complaint ¶¶ 5, 31.

3. The Complaint alleges that "the merger of ENH and Highland Park enabled ENH 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." Complaint ¶ 32.

III. ARGUMENTS OF THE PARTIES

Respondents urge dismissal of Count II on the ground that it fails to state a claim upon which relief could be granted. Respondents assert that Count II should be dismissed because it fails to allege the requisite relevant product and geographic market elements of a Section 7 claim. Respondents argue that Section 7 requires Complaint Counsel to plead a relevant market and that 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 responds that motions to dismiss are disfavored and are to be granted only if the moving party can demonstrate beyond doubt that the plaintiff can prove no set of facts that will support the claim; that Count II sufficiently alleges a section 7 violation and does not require explicit allegations defining a relevant product and geographic market; and, in the alternative, that Count II adequately alleges the "line of commerce" and "the section of the country" in which the merger is alleged to have had anticompetitive effects.

IV. MOTION TO DISMISS STANDARD

Respondents' motion is filed pursuant to Section 3.22(e) of the Commission's Rules of Practice which authorizes the filing of a motion to dismiss a complaint. 16 C.F.R. § 3.22(e). Although the Commission's Rules of Practice do not have a rule identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Commission has acknowledged a party's right to file, and the Administrative Law Judge's authority to rule on, a motion to dismiss for failure to state a

claim upon which relief could be granted. *See, e.g., In re the Times-Mirror Co.*, 92 F.T.C. 230, 230 (July 25, 1978); *In re Florida Citrus Mutual*, 50 F.T.C. 959, 961 (May 10, 1954) (ALJ may "dismiss a complaint if in his opinion the facts alleged do not state a cause of action.").

Section 3.11(b)(2) of the Commission's Rules of Practice sets forth that the Commission's complaint shall contain a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R. § 3.11(b)(2). This rule requires only that the complaint contain "a factual statement sufficiently clear and concise to inform respondent with reasonable definiteness of the types of acts or practices alleged to be in violation of law, and to enable respondent to frame a responsive answer." *In re New England Motor Rate Bureau, Inc.*, 1986 FTC LEXIS 5, *114 (Dec. 12, 1986). "Commission complaints, like those in the federal courts, are designed only to give a respondent 'fair notice of what . . . the claim is and the grounds upon which it rests.'" *Id.* (*quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

A motion to dismiss for failure to state a claim upon which relief can be granted is judged by whether a review of the complaint allegations clearly shows that the allegations, if proven, are sufficient to make out the violation. *In re TK-7 Corp.*, 1989 FTC LEXIS 32, *3 (May 3, 1989). For purposes of a motion to dismiss, the factual allegations of the complaint are presumed to be true and all reasonable inferences are to be made in favor of complaint counsel. *Id.* (*citing Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Jenkins v. McKeitchen*, 395 U.S. 411, 421-22 (1969)).

If the motion to dismiss raises issues of fact which are in dispute, dismissal is not appropriate. *In re Herbert R. Gibson*, 1976 FTC LEXIS 378, *1 (April 23, 1976); *In re Jewell Companies, Inc.* 81 F.T.C. 1034, 1035 (Nov. 10, 1972) (denying motion to dismiss where there was a substantial dispute on questions of fact); *see also In re College Football Assoc.*, 1990 FTC LEXIS 485, *3-4 (Dec. 27, 1990) (Where facts are needed to make determination on a "close question," the motion to dismiss will be denied.).

The standard used in Commission proceedings mirrors the standard used for evaluating motions to dismiss raised in federal courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Supreme Court has held that it "is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Moreover, it is well established that, in ruling on a motion to dismiss, allegations in the complaint must be accepted as true and construed favorably to the plaintiff. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 769 (1993); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 493 (1986). "[I]n antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 746 (1976) (*quoting Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962)).

An antitrust plaintiff is not required to plead the particulars of the claim. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994); *Griffiths v. Blue Cross and Blue Shield of Alabama*, 147 F. Supp.2d 1203, 1214 (N.D. Ala. 2001). A "short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases." *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 554 (2d Cir. 1977).

V. ANALYSIS

Section 7 of the Clayton Act prohibits acquisitions "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 tend to create a monopoly." 15 U.S.C. § 18. The relevant market in a Section 7 case consists of the product market (the "line of commerce") and the geographic market (the "section of the country"). *U.S. v. Philadelphia National Bank*, 374 U.S. 321, 356 (1963); *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602, 620 (1974); *In re Adventist Health Sys.*, 117 F.T.C. 224, 287-90 (April 1, 1994).

Complaint Counsel argues that because Count II is based on the actual anticompetitive effects of a merger, it is unnecessary to include a detailed market definition in the Complaint. Opposition at 2. Complaint Counsel further asserts that the allegations in Count II necessarily imply that the anticompetitive "effects have occurred in a product market that includes the services sold by Respondents, and in a geographic market that includes the area in which Respondents do business." Opposition at 2. Complaint Counsel then urges that the "commerce that is identified – the acute care hospital services – and the area of the country that is identified – Evanston, Illinois – establish sufficient information for Respondents to answer the allegations of Count II." Opposition at 14.

"[E]ven in cases in which the relevant market must be shown, such is essentially a question of fact, which may be properly developed and refined through the discovery process." *Griffiths*, 147 F. Supp.2d at 1213 (citations omitted) (finding allegations of complaint put defendant on notice of the nature of claim). Courts have declined to grant a motion to dismiss where the plaintiff has pled sufficient facts regarding the relevant market to give notice of the claim. *See, e.g., Ready-Mixed Concrete*, 554 F.2d at 553 (finding sufficient notice of the claim where the complaint indicated that the markets involved were those for gravel and ready-mixed concrete in the Buffalo or Western New York area); *North American Produce Corp. v. Nick Penachio Co., Inc.*, 705 F. Supp. 746 (E.D. N.Y. 1988) (denying motion to dismiss in part based upon the early stage of litigation).

A motion to dismiss for failure to sufficiently allege the relevant market may be granted where the proposed relevant market is legally insufficient. *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 633 (5th Cir. 2002); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3rd Cir. 1997). For example, a motion to dismiss may be granted where

the proposed relevant market is defined too narrowly. *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir. 1992). A complaint may also be dismissed where there are no factual allegations from which the relevant market could be determined. *Ajax/Acorn Mfr., Inc. v. Berman Sales Co., Inc.*, 1991 WL 224997, at *3 (E.D. Pa. 1991); *Curvcraft, Inc. v. Chromcraft, Inc.*, 193 U.S.P.Q. 371, 373 (E.D. Pa 1976). *See also, Rolite, Inc. v. Wheelabrator Envtl. Systems, Inc.*, 958 F. Supp. 992, 996-99 (E.D. Pa. 1997) (identifying four categories of cases dismissed for failure to allege a relevant product market: failure to plead facts that would support a narrow relevant market definition; pleading a relevant market which was implausible or not viable; pleading a relevant market defined by a franchise agreement; and, cases in which "no attempt whatsoever" was made in the pleadings to define the relevant market.).

In the present case, Respondents have not argued that the relevant market is too narrow, or that the relevant market is implausible or not viable. Respondents do not object to Complaint Counsel's definition of the relevant markets in Count I, which also alleges a violation of section 7 of the Clayton Act. Respondents base their argument instead on Complaint Counsel's alleged failure to explicitly identify the relevant market. In *Queen City Pizza*, however, the Tenth Circuit merely mentioned that the plaintiffs did not explicitly identify the relevant product and geographic markets in their amended complaint, but focused its analysis on the merits of the proposed relevant market as gleaned from the context and the Plaintiff's opposition to the motion to dismiss. *Queen City Pizza*, 124 F.3d at 435.

In this case, there are facts in the Complaint which put Respondents on notice of the claimed relevant market, and it cannot be said that there is no factual support "whatsoever" for Complaint Counsel's argument. The Complaint identifies the geographic locations of the hospitals involved in the merger as being in and near Evanston and Cook County in Illinois. Complaint ¶¶ 1, 4, 5. The Complaint states that each of the hospitals at issue is an "acute care hospital" and alleges "higher prices for inpatient care." Complaint ¶¶ 5, 31. This proposed market is consistent with the proposed product market of general acute care inpatient hospital and geographic market of Cook and southeast Lake counties that are identified in Count I of the Complaint. Moreover, in its Opposition, Complaint Counsel asserts that the "commerce that is identified – the acute care hospital services – and the area of the country that is identified – Evanston, Illinois – establish sufficient information for Respondents to answer the allegations of Count II." Opposition at 14.

Thus, the facts alleged in the Complaint, if taken as true, and the reasonable inferences therefrom when drawn in favor of Complaint Counsel, the non-moving party, sufficiently allege the relevant product and geographic markets. Accordingly, Respondents have not demonstrated sufficient grounds to dismiss Count II at this stage of the proceedings.

VI. CONCLUSION

For the above stated reasons, Respondents' motion to dismiss Count II of the Complaint is **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: June 2, 2004