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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
10 FRESNO DIVISION

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12 UNITED STATES OF AMERICA, )  
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Plaintiff,

v.

NATIONAL MEDICAL ENTERPRISES,  
INC., and  
NME HOSPITALS, INC.,

Defendants.

Civil No. CV-F-83-481 REC

COMPETITIVE IMPACT STATEMENT

4/8/87

19 The United States, pursuant to Section 2(b) of the  
20 Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C.  
21 § 16(b)-(h), files this Competitive Impact Statement relative  
22 to the proposed final judgment submitted for entry in this  
23 antitrust proceeding.

1           I.   Nature and Purpose of the Proceeding

2           On October 31, 1983, the United States filed a civil  
3 antitrust complaint under Section 15 of the Clayton Act, 15  
4 U.S.C. § 25, challenging the December 30, 1982 acquisition of  
5 Modesto City Hospital by National Medical Enterprises, Inc.  
6 ("NME"), through its subsidiary, NME Hospitals, Inc., as a  
7 violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The  
8 complaint (which was later amended) charged that the effect of  
9 the acquisition may be substantially to lessen competition  
10 among providers of general acute care hospital services in the  
11 Modesto area market. The amended complaint sought defendants'  
12 divestiture of Modesto City Hospital and an injunction against  
13 any future acquisitions by defendants without prior notice to  
14 the government or approval by the Court.

15           The government and the defendants have stipulated that the  
16 proposed final judgment may be entered after compliance with  
17 the APPA. Entry of the proposed final judgment would terminate  
18 this action, except that the Court would retain jurisdiction to  
19 construe, modify and enforce the proposed final judgment and to  
20 punish violations of it.

21           II.   Background Events

22           On December 30, 1982, NME, through its subsidiary, NME  
23 Hospitals, Inc., acquired the assets of Modesto City Hospital,  
24 of Modesto, California, from Modesto City Hospital, Inc., for  
25 approximately \$8 million in cash. At the time of the  
26 acquisition, NME also owned Doctors Medical Center, the largest

1 hospital in Modesto. Before the acquisition, Doctors Medical  
2 Center directly competed with Modesto City Hospital in the  
3 provision of general acute care hospital services in the  
4 Modesto area market, 1/ an area which includes Modesto and most  
5 of Stanislaus County, California (except the communities of  
6 Turlock and Denair), as well as the communities of Ripon and  
7 Escalon in southern San Joaquin County, California. This is  
8 the geographic area from which the hospitals attract the vast  
9 majority of their patients.

10 General acute care hospitals provide a broad range of  
11 integrated and interrelated health care services, unduplicated  
12 by any other health care provider. General acute care hospital  
13 services include most complex surgical and diagnostic  
14 procedures and many medical procedures requiring general  
15 anesthesia or continuous monitoring of a patient's condition.  
16 In many cases, these services can be safely, conveniently, and  
17 economically performed only in a hospital setting. These and  
18 other unique characteristics distinguish general acute care

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21 1/ Defendants have since announced plans to consolidate  
22 Modesto City Hospital with Doctors Medical Center. Under the  
23 consolidation, which is in progress, most of Modesto City  
24 Hospital's general acute care services will be transferred to  
25 Doctors Medical Center and Modesto City Hospital will be  
converted to alternative uses (including ambulatory care,  
geriatric medicine, and an expansion of its adolescent chemical  
dependency unit).

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1 hospital services from services provided by other health care  
2 providers such as clinics, freestanding ambulatory surgery  
3 centers, and doctors' offices.

4 Prior to the defendants' acquisition of Modesto City  
5 Hospital, the Modesto area market for the provision of general  
6 acute care hospital services was highly concentrated. NME's  
7 Doctors Medical Center controlled approximately 34 percent of  
8 the licensed general acute care hospital beds, and Modesto City  
9 Hospital had approximately 14 percent of the licensed hospital  
10 beds. The remaining beds were divided among four other  
11 hospital competitors.

12 As a result of the December 30, 1982 acquisition of Modesto  
13 City Hospital by NME, Doctors Medical Center and Modesto City  
14 Hospital are under the common control of NME, and NME controls  
15 about half of the hospital beds in the Modesto area market.  
16 The Herfindahl-Hirschman Index (a measure of market  
17 concentration calculated by squaring the market share of each  
18 firm competing in the market and then summing the resulting  
19 numbers) rose at least 900 points, from 2376 to at least 3336,  
20 a strong indication that the market became even more highly  
21 concentrated as a consequence of the acquisition. 2/

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24 2/ As the amended complaint makes clear, the market shares of  
25 the hospitals can also be measured by annual inpatient days and  
26 by gross patient revenues. Under either measure, the  
post-merger HHI is in excess of 3800, and the change in the HHI  
exceeds 1100 points.

1       Based upon these and other facts, the amended complaint  
2 alleges that the effect of the defendants' acquisition of  
3 Modesto City Hospital may be substantially to lessen  
4 competition in the provision of general acute care hospital  
5 services in the Modesto area market in violation of Section 7  
6 of the Clayton Act.

7       The defendants have contested the government's case. They  
8 have argued that the relevant product market not only includes  
9 general acute care hospital services, but also services  
10 provided by other health care providers, such as doctors'  
11 offices and ambulatory surgery centers. They have also argued  
12 that the relevant geographic market for the provision of these  
13 services extends as far north as Stockton and as far south as  
14 Merced, California. In the defendants' view, the relevant  
15 market was unconcentrated before their acquisition of Modesto  
16 City Hospital, and the acquisition only nominally increased  
17 market concentration.

18       Trial of the case commenced on July 9, 1985. On July 18,  
19 1985, during the presentation of the government's evidence, the  
20 presiding judge announced his intention to dismiss the case  
21 with prejudice because of misconduct by government attorneys.  
22 The dismissal order was entered on July 24, 1985. United  
23 States v. National Medical Enterprises, Inc., 107 F.R.D. 628  
24 (E.D. Cal. 1985). The government appealed, and on June 23,  
25 1986, the Ninth Circuit vacated the dismissal of the action so

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1 that the district court judge could reconsider the motion to  
2 dismiss pursuant to certain standards set out in the opinion.  
3 Id., 792 F.2d 906, 914 (9th Cir. 1986). The Ninth Circuit's  
4 opinion was amended on September 9, 1986, and in late 1986 the  
5 case was returned to the district court for further proceedings.

6 III. Explanation of The Proposed Final Judgment

7 The government and the defendants have stipulated that the  
8 proposed final judgment may be entered by the Court at any time  
9 after compliance with the APPA. The proposed final judgment  
10 does not constitute an admission by any party as to any issue  
11 of fact or law. Under the provisions of Section 2(e) of the  
12 APPA, entry of the proposed final judgment is conditioned upon  
13 a determination by the Court that it is in the public interest  
14 to do so.

15 The proposed final judgment enjoins the defendants, for a  
16 ten-year period after entry of the judgment, from acquiring any  
17 general acute care hospital in the Modesto area market without  
18 the prior approval of the Department of Justice or the Court.  
19 Acquisitions having a significant adverse effect on competition  
20 in this market can involve dollar amounts that do not require  
21 reporting under the premerger reporting program created by  
22 Section 7A of the Clayton Act, 15 U.S.C. § 18(a). The proposed  
23 final judgment eliminates the possibility that defendants could  
24 make such acquisitions without notice to the government for the  
25 next ten years. Should the defendants seek Court approval of

1 such an acquisition, they must affirmatively demonstrate to the  
2 Court that the acquisition would not substantially lessen  
3 competition in any line of commerce in any section of the  
4 country.

5 The proposed judgment also requires the defendants to  
6 produce to the Department upon request certain information  
7 concerning their compliance with the judgment.

8 IV. Remedies Available to Potential Private Litigants

9 Section 4 of the Clayton Act (15 U.S.C. § 15) provides that  
10 any person who has been injured as a result of conduct  
11 prohibited by the antitrust laws may bring suit in federal  
12 court to recover three times the damages the person has  
13 suffered, as well as costs and reasonable attorney fees. Entry  
14 of the final judgment will neither impair nor assist the  
15 bringing of any private antitrust damage action. Under the  
16 provisions of Section 5(a) of the Clayton Act (15 U.S.C.  
17 § 16(a)), the final judgment has no prima facie effect in any  
18 private lawsuit that may be brought against the defendants.

19 V. Procedures Available For Modification  
20 of The Proposed Final Judgment

21 As provided by the APPA, any person wishing to comment upon  
22 the final judgment may within the statutory 60-day comment  
23 period submit written comments to John W. Clark, Chief,  
24 Professions & Intellectual Property Section, Antitrust  
25 Division, United States Department of Justice, 555 4th Street,

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1 N.W., Room 9903, Washington, D.C. 20001. These comments and  
2 the Department's responses will be filed with the Court and  
3 published in the Federal Register. All comments will be given  
4 due consideration by the Department, which remains free to  
5 withdraw its consent to the judgment at any time prior to  
6 entry. The judgment provides that the Court retains  
7 jurisdiction over this action and that any party may apply to  
8 the Court for any order necessary or appropriate for its  
9 modification, interpretation, or enforcement.

10 VI. Alternatives to the Proposed Final Judgment

11 The government considered requiring the divestiture of an  
12 NME-owned hospital but was unable to achieve that result in  
13 negotiations, and it became apparent that divestiture could be  
14 accomplished only after a successful completion of the  
15 litigation.

16 Given the current posture of the case, it would not be  
17 possible to reach the merits of the government's case until the  
18 defendants' motion to dismiss for prosecutorial misconduct is  
19 resolved. This could involve protracted litigation, which  
20 would be costly and time consuming. Furthermore, once the  
21 motion to dismiss is resolved, resumption of the trial on the  
22 merits, together with possible appeals, would also require the  
23 expenditure of significant time and resources in the face of  
24 substantial uncertainty that the government ultimately would  
25 succeed. The government had presented much of its case at the



1 time the defendants made their motion to dismiss, and the  
2 course of the trial causes the government to be less confident  
3 of its ability to prevail on the merits than it was before the  
4 trial began. Even if the government were ultimately to prevail  
5 on the merits, there would be problems associated with  
6 obtaining adequate relief: as noted earlier, NME currently is  
7 in the process of consolidating Modesto City Hospital with  
8 Doctors Medical Center, which when completed will make it less  
9 certain that two viable independently competing hospitals could  
10 be recreated. Therefore, we concluded that the proposed Final  
11 Judgment was the best alternative available to the government  
12 at the current time and that its entry is in the public  
13 interest.

14 VII. Determinative Materials and Documents

15 There are no materials or documents that the government  
16 considered determinative in formulating the proposed final  
17 judgment. Accordingly, none are being filed with this  
18 Competitive Impact Statement.

19 Dated:

20 Respectfully submitted,

21 *John F. Greaney*  
22 JOHN F. GREANEY

23 *Steven Kramer*  
24 STEVEN B. KRAMER

25 Attorneys  
26 United States Department of Justice  
Antitrust Division