UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of	)	
Evanston Northwestern Healthcare Corporation, a corporation, and	)	Docket No. 9315 **[Public Version]**
ENH Medical Group, Inc., a corporation.	)	

MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION ON COUNT III OF THE COMPLAINT

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INTRODUCTION

Beginning in late 1999, Respondent ENH Medical Group, Inc. ("ENH Medical Group") negotiated fee schedules with health insurance companies on behalf of hundreds of doctors. These doctors included employees of Respondent's parent entity, as well as "independent" doctors that owned their own separate medical practices. These doctors are competitors. The fee schedules that Respondent negotiated charged the insurance companies the same prices for the employee doctors and the independent doctors. This arrangement between the independent doctors, the employed doctors, and Respondent was a "naked" agreement on prices, not ancillary to any integration or cooperative activity among the doctors.

An antitrust violation occurs when (1) competitors reach an agreement that (2) unreasonably restrains trade, and (3) affects interstate commerce. Here, competing doctors and ENH Medical Group agreed to charge common prices; to fix the prices at which they would sell their services to insurance companies; and that agreement affected interstate commerce. In identical circumstances, the Supreme Court condemned price fixing by doctors as a *per se* antitrust violation. *Arizona v. Maricopa County Med. Society*, 457 U.S. 332, 354 (1982). Such price fixing violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953).

The underlying facts are based on documentary evidence. The agreement between the doctors and Respondent, as well as the contracts with insurance companies are recorded in contracts. These documents demonstrate the price fixing, and are uncontroverted. There can be no material issue of fact about these documents. Accordingly, pursuant to Rule 3.24 of the Commission's Rules of Practice, Complaint Counsel respectfully moves the Court for an order

entering partial summary decision on Count III.[1]

STATEMENT OF FACTS

Background -- The Health Care Industry

Most people in the United States, not covered by government health care programs, get health insurance through their employer.[2] Insurance companies develop health plans and market them to employers to meet this need. In developing health plans, insurance companies contract with health providers, including doctors and hospitals, to insure people using the health plans have access to needed health care.[3] The contract between the insurance company and the doctor sets forth the terms under which the doctor will furnish services to an enrolled beneficiary of the health insurance plan and the payment that the doctor will receive for providing those services.

The contracts between insurers and doctors that are at issue here are "fee-for-service" contracts. [4] Under fee-for-service contracts, the doctor charges separately for each service

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[1] By this motion Complaint Counsel only seeks a determination that Respondent ENH Medical Group violated Section 5 of the FTC Act. Complaint Counsel will ask for an order of relief after the disposition of this motion.

[2] Throughout the Statement of Facts portion of this brief, Complaint Counsel provides background information about the industry. The facts regarding the price-fixing, described elsewhere herein, are straightforward, few and undisputed; the background facts are just that – background to help understand the context of the price-fixing scheme.

[3] The term "insurance company" here refers to any entity that offers a private health indemnity plan. This includes those companies who provide administrative services to employers or unions which through a self-insurance plan furnish health care coverage to their employees or members.

[4] Another type of contract used by insurance companies and doctors is one based upon a "capitated" rate. A capitated rate is a fixed, predetermined payment per covered life that the insurance company pays to a physician group in exchange for the group's providing services to the covered individuals for a specified period of time, regardless of the amount of services actually provided. *See* 1996 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002), ¶1563 at 1592 fn 30. ENH Medical Group negotiated only a handful of capitated contracts; Complaint Counsel does not challenge these contracts.

including, for example, a separate charge for each office visit, for each procedure the doctor performs, or for each consultation, no matter how often such service is provided.[5]

A common formula used in fee-for-service contracts for doctors is to set the contract payment at a percentage of Medicare's Resource Based Relative Value System ("RBRVS"), which determines the price Medicare will pay for doctor services.[6] The fee-for-service contract may specify a percentage, for example, "110% of RBRVS," which means the contract price for doctors services is 110% of what Medicare would pay; the higher the percentage of RBRVS, the more money the doctor receives from the insurance company.[7] Doctors and insurance companies negotiate whatever price is mutually acceptable for doctors services.[8]

Some doctors work as employees of a corporation, such as a subsidiary of a hospital.[9] The corporation negotiates the contracts with the insurance companies for the provision of physician services, and pays a salary to the doctors it employs.[10] Other doctors establish their own businesses – usually as sole practitioners or partnerships or professional corporations with other doctors.[11] As separate business entities, these doctors -- just like GM and Ford -- compete

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[5] Gutmann Dep. Tr. at 60 **(Tab 56)**; Hochberg Dep. Tr. at 67-68 **(Tab 61)**; Katz Dep. Tr. 43-44 **(Tab 63)**. Testimony cited in this Memorandum from a transcript is designated by the last name of the witness and either "Dep. Tr." (deposition transcript) or "IH Tr." (investigational hearing transcript).

[6] First Amended Answer ¶ 41 **(Tab 1)**; *see* 42 U.S.C. § 1395w-4.

[7] *Id.*

[8] Mittleman Dep. Tr. at 46-47 **(Tab 57)**.

[9] *See, e.g.*, First Amended Answer at ¶ 35 **(Tab 1)**.

[10] *Id.*

[11] *See, e.g.*, Katz Dep. Tr. at 7-8 **(Tab 63)**; Hochberg Dep. Tr. at 7-9 **(Tab 61)**.

against each other and against doctors employed by hospital corporations, among other things, for patients and prices on fee-for-service contracts.

The ENH Doctors and the Independent Doctors

In January 2000, Respondent Evanston Northwestern Healthcare Corporation ("ENH"), which then owned two hospitals (located in Evanston and Glenbrook, suburbs north of Chicago), merged with Highland Park Hospital (located in Highland Park, which is north of Evanston).[12] ENH owns ENH Faculty Practice Associates, Inc. ("Faculty Practice Associates"), which in turn owns Respondent ENH Medical Group.[13]

ENH Medical Group, a for-profit, independent practice association (or IPA), in 2000 represented approximately 860 doctors.[14] Approximately 400 of these doctors were employees of Faculty Practice Associates (the "ENH Doctors").[15] The remaining 460 doctors in ENH Medical Group were doctors who practice in a host of independent businesses -- as sole practitioners, partnerships or professional corporations (collectively, the "Independent Doctors").[16] Prior to the hospital merger, approximately 320 of the 460 Independent Doctors belonged to Highland Park Independent Practice Associates, Inc. (known as the Highland Park IPA.)[17]

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[12] First Amended Answer at ¶ 1 **(Tab 1)**.

[13] *Id.* at ¶¶ 7-8.

[14] CX 1383 at 4 **(Tab 26)**.

[15] *Id.* at 2.

[16] Golbus IH Tr. at 32-33 **(Tab 70)**; Chan IH Tr. at 26 **(Tab 72)**; Gutmann Dep. Tr. at 20-21 **(Tab 56)**.

[17] CX 1332 at 4 **(Tab 23)**. The approximately 140 of the remaining Independent Doctors were members of ENH Medical Group before the merger and had staff privileges at the Evanston Hospital and Glenbrook Hospital. *See e.g.*, CX 681 at 2 **(Tab 15)**; CX 1503 at 7 **(Tab 33)**.

The ENH Doctors and the Independent Doctors "absolutely" compete against each other, and the Independent Doctors compete among themselves.[18] *First*, they practice in close geographic proximity to each other.[19] There is no other hospital located inside the triangular region formed by the three hospitals at which the doctors practice.[20] Before the price fixing agreement, when the ENH Doctors and the Independent Doctors from Highland Park were in competition, ENH Medical Group sought to expand its reach by acquiring three medical offices in towns in which the Independent Doctors from Highland Park primarily practiced.[21]

Second, the ENH Doctors and the Independent Doctors provide comparable medical services, mostly in primary care medicine but also in specialties such as cardiology, gastroenterology, and infectious disease.[22] Patients are free to choose any of the doctors in ENH Medical Group, including the ENH Doctors and the Independent Doctors (as well as among the Independent Doctors).[23]

Third, prior to the hospital merger, through their separate independent practice associations, the Independent Doctors competed with the ENH Doctors (and among themselves) for business with insurance companies. For example, in October 1998, the Highland Park IPA's

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[18] Levine IH Tr. at 35, 38 **(Tab 71)**. Jodi Levine was the Vice President of ENH Medical Group. *Id.* at 9.

[19] Levine IH Tr. at 32-33 **(Tab 71)**.

[20] Foucre IH Tr. at 68. **(Tab 75)**.

[21] CX 105 **(Tab 6)**; CX 490 **(Tab 14)**. *See also* Neaman Dep. Tr. at 186-87 **(Tab 58)**; Stearns Dep. at 97-98 **(Tab 59)**; Newton Dep. at 123-25 **(Tab 68)**; Golbus IH at 19-29 **(Tab 70)**.

[22] CX 1142 **(Tab 19)**; Gutmann Dep. Tr. at 28-29 **(Tab 56)**; Katz Dep. Tr. at 18-20 **(Tab 63)**; Hochberg Dep. Tr. at 51-52 **(Tab 61)**; Burstein Dep. Tr. at 9 **(Tab 60)**; Moller Dep. Tr. at 126-27 **(Tab 65)**.

[23] Burstein Dep. Tr. at 9 **(Tab 60)**; Hochberg Dep. Tr. at 51-52 **(Tab 61)**; Katz Dep. Tr. at 18-20 **(Tab 63)**; Nora Dep. Tr. at 10-11 **(Tab 66)**; Cohen Dep. Tr. at 30 **(Tab 67)**.

annual report about the state of "competition" observed that {[redacted]} by acquiring nearby sites, the "consequences" of which was that the Highland Park IPA's {[redacted]}[24] In 1997, Highland Park Healthcare's Board noted that among the factors contributing to the recent decline in managed care enrollment for the IPA was {[redacted]}[25]

The Price-Fixing Agreement

Price competition ended and the price fixing began in late 1999 when, just two months before the hospitals merged, the Independent Doctors from Highland Park joined forces with the doctors already in ENH Medical Group.[26] By an "integration" agreement dated November 1, 1999, the Independent Doctors from Highland Park, through their IPA, agreed to {[redacted]}[27] The anticompetitive impact of the "integration" was clear: Dr. Joseph Golbus, President of ENH

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[24] CX 1347 at 7 **(Tab 25)**.

[25] CX 1335 at 11 **(Tab 24)**.

[26] Prior to 2000, the Independent Doctors who practiced at Highland Park Hospital were members of their own IPA, and the Independent Doctors who practiced at ENH were members of their own IPA -- ENH Medical Group. Each organization negotiated fees with insurance companies. It is possible that these arrangements were themselves illegal price fixing agreements. Complaint Counsel did not investigate and do not allege here that the doctors at Highland Park or at ENH were illegally fixing prices before 2000.

[27] CX 1090 at 1-2, 5-7 **(Tab 17)**.

Medical Group and Faculty Practice Associates, agreed that the Independent Doctors would {[redacted]} for business with insurance companies.[28]

As each of the Independent Doctors from Highland Park joined the ENH Medical Group, he or she signed a "Participating Physician Service Agreement" ("Participating Agreement") in order to become "affiliated" with ENH Medical Group.[29] The Participating Agreement had two significant clauses that define the true nature of this "affiliation."

First, {[redacted]}.

Second, {[redacted]}

[28] Golbus Dep. Tr. at 299 (July 8, 2004) **(Tab 53)**.

[29] CX 1147 **(Tab 20)**; CX 1156 **(Tab 21)**; CX 1503 **(Tab 33)**; CX 1504 **(Tab 34)**; CX 1710 at 1 **(Tab 37)**. The form of the Participating Agreement is reflected in CX 1503 and CX 1504. The agreements signed by the Independent Doctors are substantially similar to CX 1503 and CX 1504, including with regard to Sections 2.9, 3.3, 5.8, and Exhibit C. Spriggs-Hutchinson Decl. at ¶ 3 **(Tab 52)**.

[30] *E.g.*, CX 1503 at 7 (Provision 2.9), 9 (Provision 3.3) and 22 (Exhibit C) **(Tab 33)**. The Participating Agreement {[redacted]} of the independent doctors who signed a Participating Agreement with ENH Medical Group chose to participate in the fee-for-service contracts negotiated by ENH Medical Group. Spriggs-Hutchinson Decl. at ¶ 5 **(Tab 52)**.

[redacted][31]

In furtherance of the scheme, the Independent Doctors from Highland Park signed standardized "To Whom It May Concern" letters in 2000.[32] These letters, on ENH Medical Group stationary, state that the signatory doctor terminates his or her current contract with the insurance company and will participate in the insurance company's plan pursuant to the contracts negotiated by ENH Medical Group.[33] [redacted][34]

The co-conspirators understood the agreement would suppress competition. Terry Chan, the chief managed care contract negotiator for the Independent Doctors from Highland Park Hospital, wrote that [redacted][35] The doctors recognized that [redacted]

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[31] *E.g.*, CX 1503 at 12 (Provision 5.8) **(Tab 33)**.

[32] CX 1710 at 1 **(Tab 37)**; CX 1714 **(Tab 38)**; CX 1745 **(Tab 40)**.

[33] *E.g.*, CX 1710 at 2 **(Tab 37)**; CX 1714 **(Tab 38)**; CX 1745 **(Tab 40)**.

[34] Ballengee Dep. Tr. at 227-41 **(Tab 69)** (CX 1201-1243; 1245-1276; 1284-1319; and 1321-1328) **(all Tab 22)**; CX 1749 **(Tab 41)**.

[35] CX 440 at 1 **(Tab 11)**.

[redacted]}[36] Dr. Gutmann, one of the ENH Doctors who has served on several management committees for ENH Medical Group, including a managed care contracting committee, believes that one or two physicians negotiating with a health plan are {[redacted]}[37] And ENH Medical Group personnel were resolute: {[redacted]}[38]

The Fruits of the Price-Fixing Agreement[39]

Immediately upon agreeing to join forces, the doctors, through ENH Medical Group, exchanged their insurance company contracts to see who had the better prices.[40] Based in part on this pricing information exchange, the doctors collectively established negotiating goals of {[redacted]} of the Medicare RBRVS rate and a minimum, acceptable price of {[redacted]} of the Medicare RBRVS rate.[41] These rates were significantly higher than before the price fixing

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[36] Burstein Dep. Tr. at 48 **(Tab 60)**.

[37] Gutmann Dep. Tr. at 156 **(Tab 56)**.

[38] CX 450 at 1 **(Tab 12)**. Indeed, having doctors participate in individual contracts with an insurance company would, as Terry Chan noted in a memo to ENH Medical Group management, {[redacted]} CX 440 at 1 **(Tab 11)**.

[39] Complaint Counsel does not have to show that the conspiracy raised prices in order to find the price fixing violated the antitrust laws. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-24 n 59 (1940). Thus, any factual dispute as to whether or not prices were raised is not a material issue of fact. While not necessary to find a violation, as shown here this conspiracy did raise prices.

[40] CX 1481 at 2-4 **(Tab 31)**; CX 1516 at 16 **(Tab 35)**. *Compare* CX 2202 **(Tab 43)** and CX 1536 **(Tab 36)** (Independent Doctors at Highland Park demanded to be paid under existing contract negotiated by ENH Medical Group) *with* CX 260 **(Tab 8)** and CX 2201 **(Tab 42)** (ENH Doctors demanded to be paid under existing contract negotiated by Independent Doctors at Highland Park).

[41] CX 416 at 1 **(Tab 9)**; Golbus IH Tr. at 152-53 **(Tab 70)**; Levine IH Tr. at 198-200 **(Tab 71)**.

agreement.[42]

In January of 2000, pursuant to the price fixing agreement, ENH Medical Group then began to renegotiate fee-for-service contracts with insurance companies.[43] From ENH Medical Group's perspective, these renegotiations resulted in {[redacted]}[44] {[redacted]} was the first insurance company to acquiesce: its new terms would increase doctor revenues by about {[redacted]} per year.[45] Over the next six months, ENH Medical Group successfully renegotiated more contracts.[46] The price increases amounted to approximately {[redacted]} million in increased annual revenues for the doctors.[47] {[redacted]}[48]

In sum, competing doctors reached an agreement to fix the prices that they charged for their services, and ENH Medical Group successfully negotiated fee-for-service contracts with insurance companies that resulted in higher prices for the conspiring doctors.

There Is No Integration among the Doctors Except for Price Fixing

The doctors' price fixing scheme was not ancillary to any integration or cooperative activity. Not a single contemporaneous business document from the doctors or ENH Medical

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[42] CX 27 at 6 **(Tab 4)**; CX 28 **(Tab 5)**.

[43] First Amended Answer at ¶ 43 **(Tab 1)**; CX 1156 **(Tab 21)**; Burstein Dep. Tr. at 54-55 **(Tab 60)**.

[44] CX 1385 at 1 **(Tab 27)**.

[45] CX 27 at 6 **(Tab 4)**; CX 28 **(Tab 5)**; CX 416 **(Tab 9)**; CX 2208 **(Tab 45)**.

[46] *E.g.*, CX 27 at 6 **(Tab 4)**; CX 2206 **(Tab 44)**; CX 2211 **(Tab 46)**.

[47] CX 17 at 1 **(Tab 3)**.

[48] Katz Dep. Tr. at 59 **(Tab 63)**; Hochberg Dep. Tr. at 78 **(Tab 61)**.

Group suggests that the price-fixing agreement was designed to achieve anything other than higher prices. No document hints at a pro-competitive rationale, and no document tracks, quantifies or analyzes what, if any, pro-competitive outcomes have been achieved. Indeed, three years into the price fixing, ENH Medical Group realized it did not even have a plan as to how the doctors might be able to achieve pro-competitive results. It was not until near the end of 2002, at which time ENH had been notified of the FTC's investigation, that ENH Medical Group began to explore the feasibility of integration.[49]

First, the doctors of ENH Medical Group are not "financially integrated." The ENH Medical Group negotiated fee-for-service contracts, and fee-for-service contract do not create financial integration among the participating doctors. Rather, in a fee-for-service contract, since the doctor is paid for each type of service provided, it is the insurance company -- and not the doctor – who retains the risk that its enrollees will need covered medical services and that the insurance company will be liable for the costs of those medical services.[50] Indeed, ENH Medical Group refers to fee-for-service contracts as {[redacted]} contracts.[51]

Moreover, the ENH Doctors and the Independent Doctors do not share costs, profits, losses or risk under the fee-for-service contracts, and the compensation that the Independent

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[49] The FTC notified ENH on approximately {[redacted]} that the commission was conducting a non-public investigation relating to the merger of ENH and Highland Park Hospital. CX 2213. On approximately {[redacted]} the FTC also contacted ENH in connection with draft specifications for a subpoena duces tecum and civil investigative demand that included a request for {[redacted]} CX 2214. ENH Medical Group was certainly aware of the investigation no later than September 26, 2002. CX 139.

[50] Coyle Dep. Tr. at 22-23 **(Tab 64)**. *See also Maricopa*, 457 U.S. at 340 n 7. In contrast, in an integrated risk-sharing arrangement, the doctors as a group collectively receive a fixed payment for all services the enrollees may require, regardless of the aggregate services the enrollees ultimately need.

[51] CX 1113 at 2 **(Tab 18)**; Golbus Dep. Tr. at 114 (July 8, 2004)**(Tab 53)**; Mittleman Dep. Tr. at 172-73 **(Tab 57)**.

Doctors receive under the fee-for-service contract does not depend on the performance of either an ENH Doctor or the other Independent Doctors.[52] Conversely, the compensation that an ENH Doctor receives does not depend on the performance of the Independent Doctors. In 2003, ENH Medical Group itself saw the inevitable conclusion that {[redacted]}[53]

As a result, ENH Medical Group committed itself to negotiate non-risk-sharing, fee-for-service contracts on behalf of the conspiring doctors. ENH Medical Group has decided that it {[redacted]}[54] By June 2003, ENH Medical Group had {[redacted]} fee-for-service contracts and only {[redacted]} risk-sharing contracts.[55] In other words, very few of the contracts of ENH Medical Group were risk sharing contracts, and fee-for-service contracts constituted at least {[redacted]} of the revenues of ENH Medical Group.[56]

Second, at the time of the price fixing agreement in 1999, ENH Medical Group did not broach the topic of "clinical integration" among the ENH Doctors and the Independent Doctors.[57] Finally, in November of 2002, ENH Medical Group first thought about developing at least an

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[52] Golbus IH Tr. at 41-43 **(Tab 70)**; *see also* CX 1503 at 4 **(Tab 33)**.

[53] CX 1113 at 2 **(Tab 18)**.

[54] CX 455 at 1 **(Tab 13)**.

[55] Golbus IH Tr. at 38 **(Tab 70)**.

[56] *Id.* at 61.

[57] CX 1457 **(Tab 30)**; CX 1433 **(Tab 28)**; CX 1113 **(Tab 18)**; Golbus Dep. Tr. at 115-16 (July 8, 2004)**(Tab 53)**

{[redacted]}[58] In December of 2002, an {[redacted]} was introduced to management, but the memo states that ENH Medical Group did {[redacted]}[59] In other words, from November 1999 through December 2002, ENH Medical Group and its doctors engaged in naked price fixing.

It was not until March of 2003 that the Participation Agreement with new Independent Doctors nominally required participation in any clinical integration programs that ENH Medical Group might adopt and implement.[60] Even after this "requirement" was instituted, however, doctors were still not aware that ENH Medical Group had any clinical integration programs.[61] Efforts to develop and implement clinical integration plans ultimately failed, and in early 2004, ENH Medical Group abandoned the clinical integration efforts.[62]

ARGUMENT

I. COMPLAINT COUNSEL IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW IF THERE IS NO MATERIAL FACTUAL DISPUTE

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[58] CX 1500 at 2 **(Tab 32)**.

[59] CX 1457 at 1 **(Tab 30)**.

[60] *E.g.*, CX 1742 at 12 (Provision 2.13)**(Tab 39)**.

[61] L. Benson IH Tr. at 45-48 **(Tab 74)**; M. Benson IH Tr. at 78-80 **(Tab 73)**.

[62] Gutmann Dep. Tr. at 128-29 **(Tab 56)**. {[redacted]} CX 1433 **(Tab 28)**; CX 1456 **(Tab 29)**; CX 1457 **(Tab 30)**. {[redacted]} Gutmann Dep. Tr. at 136 **(Tab 56)**. {[redacted]} Golbus IH Tr. at 193-96 **(Tab 70)**.

A plaintiff is entitled to summary decision on all or part of its case if the "pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." 16 C.F.R. § 3.24(a)(2).[63] This is equally true when the litigation involves an antitrust claim. "[E]ven in antitrust litigation, if the pertinent area of law is well developed and the case turns on documentary evidence, disposition by summary judgment may be appropriate." *SEC v. Geyser Minerals Corp.*, 452 F.2d 876, 881 (10th Cir.1971). This case, like the Supreme Court's controlling precedent, *Maricopa*, meets these two conditions and, like *Maricopa*, summary judgment is appropriate here. *Maricopa*, 457 U.S. at 336.

Once the moving party has made its showing, the party opposing the motion "may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. § 3.24(a)(3). That is, the nonmoving party must do "more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

II. THERE IS NO GENUINE ISSUE OF MATERIAL FACT THAT ENH MEDICAL GROUP ENGAGED IN PRICE FIXING

Count III of the Complaint alleges that Respondent ENH Medical Group engaged in price fixing in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. There are three elements to a price-fixing violation of Section 5: (1) the existence of a contract, combination, or conspiracy

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[63] The Commission's Rules are derived from the Federal Rules of Civil Procedure, which may be consulted for guidance and interpretation. Here, the Court and the parties may reference Rule 56, Fed. R. Civ. P., and the cases decided under Rule 56.

among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or foreign commerce.[64] ABA Section of Antitrust Law, Antitrust Law Development (4th ed. 1977) at 2; *see, e.g. American Ad Mgmt., Inc. v. GTE*, 92 F.3d 781, 788 (9th Cir. 1996); *Maric v. St. Agnes Hosp. Corp.*, 65 F.3d 310, 313 (2d Cir. 1995), *cert. denied,* 115 S. Ct. 917 (1996); *Austin v. McNamara*, 979 F.2d 728, 738 (9th Cir. 1992); *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991), *cert. denied*, 505 U.S. 1221 (1992). There are no genuine issues of material fact regarding any of these three elements.

A. Respondent, the ENH Doctors and the Independent Doctors Entered into a "Contract, Combination, or Conspiracy"

The first element of a Section 5 violation – a contract, combination or conspiracy among separate entities – is clearly present here. We have separate entities. The ENH Doctors are employees of Respondent's parent entity, Faculty Practice Associates, which is a subsidiary of ENH. All of the Independent Doctors were sole practitioners, partnerships, or professional corporations. ENH had no ownership interest in the Independent Doctors. Therefore, the ENH Doctors and the Independent Doctors were separate entities. Moreover, the Independent Doctors were distinct business entities, separate from one another. Absent the conspiracy to fix prices, the ENH Doctors and the Independent Doctors would otherwise have been competing against each other on the prices that they would charge insurance companies in fee-for-service contracts.

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[64] Respondents are charged in Count III of the Complaint with violating Section 5(a)(1) of the Federal Trade Commission Act. *See* Complaint Count III ¶ 45. Section 5 provides as follows: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1). It is black letter law that a violation of Section 1 of the Sherman Act also violates Section 5 of the FTC Act. "[A]lthough the Commission may not directly enforce the Sherman Act, it may proceed under Section 5 of the FTC Act against any conduct that violates the Sherman Act." ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002) at 607. Section 1 of the Sherman Act provides as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 15.

We have direct evidence of a conspiracy. The open and notorious Participating Agreements among ENH Medical Group, the ENH Doctors and the Independent Doctors established the agreement.[65] Each of the Independent Doctors signed the Participating Agreement, thereby permitting ENH Medical Group to negotiate on their behalf with insurance companies, and agreeing to abide by the terms of fee-for-service contracts negotiated by ENH Medical Group. Through these agreements, the Independent Doctors, the ENH Doctors and ENH Medical Group jointly agreed to set the prices they would charge insurance companies in fee-for-service contracts.

The Independent Doctors' willingness to participate in the price-fixing scheme was further documented by the "To Whom It May Concern" letters.[66] These letters – on ENH Medical Group stationary and prepared by the ENH Medical Group staff – gave notice that the signatory Independent Doctor refused to participate in the insurance companies medical plans except at the rates negotiated by ENH Medical Group.

Once ENH Medical Group had the price-fixing agreement among the doctors, it furthered the conspiracy by negotiating fee-for-service contracts with insurance companies. From 2000 through 2003, ENH Medical Group successfully negotiated fee-for-service contracts with uniform prices for all the doctors.[67] Thus, doctors supposedly in competition with each other received the same prices on fee-for-service contracts regardless of each doctor's skill, experience,

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[65] An illegal agreement may be proved by direct or circumstantial evidence of "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray Rite Rev. Corp.*, 465 U.S. 752, 764 (1984)(quoting *Edward J. Sweeney & Sons v. Texaco, Inc.* 637 F.3d 105, 111 n. 2 (3rd Cir. 1980).

[66] *E.g.*, CX 1710 **(Tab 37)**; CX 1714 **(Tab 38)**; CX 1745 **(Tab 40)**.

[67] CX 2206 **(Tab 44)**; CX 2208 **(Tab 45)**; CX 2211 **(Tab 46)**.

willingness to employ innovative medical procedures, or even willingness to accept lower rates.

Under the antitrust laws, it is inconsequential that the doctors themselves did not agree on particular prices but instead appointed ENH Medical Group to negotiate prices that they would then all accept. An agreement among competitors to appoint a third party – here ENH Medical Group – to set the prices for all the conspirators is illegal, just like an agreement among competitors to charge a particular price. *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978); *California Dental Ass'n v. FTC,* 526 U.S. 756 (1999).[68]

B. Respondent's Price Fixing Conspiracy Unreasonably Restrained Trade

The second element of a Section 5 violation – a conspiracy that unreasonably restrains trade – is clearly present here.

1. *Collusive price fixing is per se illegal in the absence of a legitimate pro-competitive justification for the activity*

In the Matter of PolyGram Holding, Inc., 2003 FTC LEXIS 120 (July 24, 2003), the Commission enunciated a multi-step analytical process to determine whether a restraint unreasonably restrains trade. *First*, a plaintiff may avoid "full rule of reason analysis, including the pleading and proof of market power, if it demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition." *Id.* at 61. "Inherently suspect" conduct "ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation." *Id. Second*, if the conduct is

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[68] An organization controlled by a group of competitors is treated as the competitors' agent, and the organization itself is a participant in the conspiracy of its members. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 455 (1986). The Commission has found "ample precedent for finding that individual professionals, acting through their organizations, can conspire or combine to violate the antitrust laws." *Michigan State Medical Soc'y*, 101 F.T.C. 191, 286 (1983). *See generally* VII Areeda, Antitrust Law §1477, at 343 (third parties like trade associations are routinely treated as continuing the conspiracies of or on behalf of their members in violation of the antitrust laws).

"inherently suspect" and the defendant "makes no effort to advance any competitive justification for its practices, then the case is at an end and the practices are condemned." *Id.* In other words, if the conduct is "inherently suspect," the defendant "can avoid summary condemnation only by advancing a legitimate justification for those practices." *Id.* at 62.

Price fixing is the "paradigm" of anticompetitive conduct, and has been the subject of so much "past judicial experience" that courts view it as the classic example of "per se" illegality. *Nat'l Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). In *PolyGram*, the Commission deemed price fixing "presumptively anticompetitive" and "inherently suspect."[69]

Under Supreme Court precedent involving price fixing by doctors, there is no "doctor" or "health care" exception to the per se rule against price fixing. *Maricopa*, 457 U.S. at 348-49. Indeed, in *Maricopa*, the Court rejected at the summary judgment stage, the defendants' argument that their fee schedule made it possible to provide a uniquely desirable form of insurance coverage that could not alternatively exist. *Id.* at 351. Instead, the Court found that "nothing in the record even arguably supports the conclusion that this type of insurance program could not function if the fee schedules were set in a different way." *Id.* at 353. Having found no plausible evidence that the restraint was reasonably necessary to any pro-competitive purpose, the Court held that the doctors' arrangement could be condemned or *per se* illegal price fixing at summary judgement.

Because price fixing by doctors is "per se" illegal and "inherently suspect," pursuant to *Maricopa* and *PolyGram*, there is no need to inquire whether ENH Medical Group had market

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[69] *PolyGram*, 2003 FTC LEXIS at 72.

power, and no need to determine relevant markets or market shares; these issues are irrelevant.[70]

2. *There are limited legitimate justifications for otherwise illegal collusive conduct, none of which are present here*

Respondent can avoid summary condemnation for the price fixing "only by advancing a legitimate justification for those practices." *PolyGram*, 2003 FTC LEXIS at 61. To be legitimate, a justification must be both "cognizable" under the antitrust laws and at least facially "plausible." *Id.* at 62. The first element, cognizability, allows the court to reject a justification if it contradicts the pro-competition aims of the antitrust laws. *Id.* For example, a claim that competition is inappropriate or inefficient in the particular industry under examination, would not be cognizable under the antitrust laws. The second element, plausibility, is one that requires a specific link between the challenged restraint and the proposed justification, so as to merit a more detailed inquiry into whether the restraint may enhance competition.[71] *Id.* at 66.

Complaint Counsel know of no court which has accepted any justification for price fixing among independent doctors for fee-for-service contracts with insurance companies. The Supreme Court rejected the proffered justifications in *Maricopa*. 457 U.S. at 351.

Possible justifications for price fixing among doctors are set forth in the "Eighth Statement" in the 1996 Department of Justice and Federal Trade Commission Statements of

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[70] Likewise, because it is unnecessary to inquire into whether the co-conspirators had market power, it is unnecessary to define the product or geographic markets in which they operate. The market definitions, when used, are simply a tool for assessing market shares and the market power, when that is necessary. Federal Trade Commission v. Indiana of Dentists, 476 U.S. 447, 460-461 (1986). 7 P. Areeda, Antitrust Law ¶ 1511, at 421 (2003).

[71] If a defendant advances a cognizable and plausible justification, the plaintiff must make a "more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition." *PolyGram*, 2003 FTC LEXIS at 66. This showing, however, does not require proof of actual anticompetitive effects or entail the fullest market inquiry. *Id.* The plaintiff may also offer evidence that pro-competitive effects of the proffered justification could be achieved through some other means that are less restrictive of competition. *Id.*

Antitrust Enforcement Policy in Health Care (hereinafter "Health Care Statements").[72] The Eighth Statement defines a "physician network joint venture" as a group of doctors who join together and agree on prices or price related terms and jointly market their services.[73] ENH Medical Group would fall in that definition. The Eighth Statement notes that such a venture will be deemed *per se* illegal unless "the physicians' integration through the network is likely to produce significant efficiencies that benefit consumers, and any price agreements . . . by the network physicians are reasonably necessary to realize those efficiencies."[74]

A physician network joint venture may achieve significant efficiencies "[w]here the participants in a physician network joint venture have agreed to share substantial financial risk."[75] A physician network joint venture may also achieve significant efficiencies where the joint venture involves "significant clinical integration" – "sufficient integration to demonstrate that the venture is likely to produce significant efficiencies."[76] The agreement among Respondent, the ENH Doctors and the Independent Doctors does not meet either of these tests.

a. ***Respondent, the ENH Doctors and the Independent Doctors Did Not Share "Substantial Financial Risk"***

Sharing substantial financial risk refers to ways in which otherwise competing doctors can share the risk of financial loss or reward, based on their collective performance in achieving

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[72] *See* http://www.ftc.gov/reports/hlth3s.htm#8.

[73] *Id.* Introduction.

[74] *Id.* § B.1.

[75] *Id.*

[76] *Id.*

efficiencies. Such risk sharing, if substantial, can create the incentive for doctors to cooperate in controlling costs and improving quality by managing the provision of services by members.[77]

This justification is not present here. The Independent Doctors were independent and separate business units, and did not share financial risk either among themselves or with the ENH Doctors under the fee-for-service contracts. In fact, under fee-for-service contracts, the doctor is paid for each service he or she provides, no matter how often such service is provided. By definition, fee-for-service contracts do not require doctors to share any risk of financial loss or reward. This is why ENH Medical Group referred to fee-for-service contracts as {[redacted]}[78] The amounts that insurance companies paid to each doctor under the fee-for-service contracts was fixed and did not depend on the performance of either the ENH Doctors or the Independent Doctors.[79] Hence, ENH Medical Group admitted that {[redacted]}[80]

b. ***Respondent, the ENH Doctors and the Independent Doctors Did Not Engage in Any Clinical Integration***

"Clinical integration" refers to a binding commitment among competing doctors to

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[77] *Id.* § A.4.

[78] CX 1113 at 2 **(Tab 18)**; Golbus Dep. Tr. at 114 (July 8, 2004)**(Tab 53)**; Mittleman Dep. Tr. at 172-73 **(Tab 57)**.

[79] Unlike a fee-for-service contract, a contract in which the participating doctor shares "substantial financial risk" is one in which the financial gains or losses of each participating doctor depends significantly on the performance of the other doctors in the network. The best example of "substantial financial risk" is an agreement under which physicians agree to provide services at a "capitated" rate. *See* Eighth Statement § A.4. Under a capitated contract, the doctor network receives a fixed, predetermined payment (on the basis of the number of enrollees in a plan) from the managed care organization in exchange for services to the plan's enrollees over a period of time, regardless of the quantity of services needed by the enrollees. *Id.*

[80] CX 1113 at 2 **(Tab 18)**.

practice under established standards with a degree of interdependence that generates efficiencies.[81] Significant, efficiency-generating clinical integration requires "an active and ongoing program to evaluate and modify practice patterns by the network's physician participants and create a high degree of interdependence and cooperation among the physicians to control costs and ensure quality."[82]

ENH Medical Group, the ENH Doctors and the Independent Doctors did not engage in any clinical integration. In late 2002, three years after it had started price fixing, and only after the FTC had notified ENH of the investigation, did ENH Medical Group takes nominal steps to integrate the doctors in a way that might protect them from antitrust liability.[83] Recognizing that the doctors would never engage in financial integration with regard to fee-for-service contracts, Respondent rushed to cobble together some semblance of a {[redacted]}[84] The effort was nominal because Respondent admitted that it {[redacted]}[85] In the end, Respondent and the co-conspirators never implemented true clinical integration.

There being no pro-competitive justification for the price fixing by ENH Medical Group and its co-conspirators, the conduct must be summarily condemned as an illegal restraint of trade

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[81] *See generally,* Letter from Jeffrey W. Brennan, Assistant Director, Health Care Services and Products Division, Bureau of Competition to John J. Miles, dated Feb. 19, 2002, at http://www.ftc.gov/bc/adops/medsouth.htm

[82] *Id.* § B.1.

[83] CX 1457 **(Tab 30)**; CX 1433 **(Tab 28)**; CX 1113 **(Tab 18)**; Golbus Dep. Tr. at 115-16 (July 8, 2004)**(Tab 53)**.

[84] CX 1500 at 2 **(Tab 32)**.

[85] CX 1457 at 1 **(Tab 30)**.

in violation of Section 5 of the FTC Act.

C. The Price Fixing Conspiracy Affected Interstate Commerce

The third and final element of a Section 5 violation – the jurisdictional requirement that the conspiracy affect interstate commerce – has been satisfied through the August 30, 2004 stipulation of the parties. Complaint Counsel and counsel for Respondents have stipulated that Respondents (i) were engaged in interstate commerce and activities affecting interstate commerce; (ii) received payments "well in excess" of $10 million annually from companies located in Connecticut, Pennsylvania, Kentucky, Minnesota, Massachusetts, Colorado, and Ohio; (iii) received significant payments from the federal Medicare program and the federal/state Medicaid program, 42 U.S.C. §§ 1395 *et seq.*, 42 U.S.C. §§ 1396 *et seq.*; and (iv) continued to engage in commerce, as that term is defined by section 4 of the FTC Act, 15 U.S.C. § 44.[86]

III. EQUITABLE RELIEF IS NECESSARY BECAUSE EVENTS HAVE NOT "IRREVOCABLY ERADICATED" THE EFFECTS OF RESPONDENT'S PRICE FIXING CONSPIRACY

In their Tenth Defense set forth in the First Amended Answer, Respondents allege that Count III of the Complaint is moot because ENH Medical Group has voluntarily ceased the conduct alleged in Count III.[87] However, {[redacted]}[88] {[redacted]}

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[86] Jurisdiction exists here because ENH Medical Group is a for-profit entity and is properly subject to liability under Section 5 of the FTC Act. 15 U.S.C. § 45(a)(2).

[87] Starting in late 2003, ENH Medical Group sent letters to some insurance companies offering them the option of canceling their existing fee-for-service contracts. CX 2212 **(Tab 47)**. {[redacted]}

[88] Hochberg Dep. Tr. at 77-78 **(Tab 61)**; Katz Dep. Tr. at 58 **(Tab 63)**.

[redacted] Moreover, {[redacted]}[89] By remaining a party to these jointly negotiated contracts, both the ENH Doctors and the Independent Doctors are still engaged in an unlawful conspiracy.

A "case is not moot unless there is a showing 'that there is no reasonable expectation that the alleged violation will recur and that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *In the Matter of Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 615 (1988) (quoting *Conyers v. Reagan*, 765 F.2d 1124, 1128 n.9 (D.C. Cir. 1985). The respondent bears a heavy burden in showing that past conduct will not be repeated. *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1173 (6th Cir. 1978). In addition, a claim of abandonment is "rarely sustainable as a defense to a Commission complaint" where the alleged discontinuance occurred only after the Commission began its investigation. *In the Matter of Int'l Ass'n of Conference Interpreters*, 123 F.T.C. 465, 495 (1997).

Respondent's purported attempt to voluntarily cease its price-fixing scheme with the doctors occurred only after it learned of the FTC's investigation (and only a few months before this Complaint was filed). Even thereafter, the Participating Agreements and the fee-for-service contracts reflecting the fixed prices set by ENH Medical Group and its co-conspirators {[redacted]} It cannot be gainfully said that ENH Medical Group has "completely and irrevocably eradicated the effects of the alleged violation." The Complaint is not moot.

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[89] Hochberg Dep. Tr. at 78 **(Tab 61)**; Katz Dep. Tr. at 59 **(Tab 63)**.

CONCLUSION

There are no genuine issues of material fact that Respondent ENH Medical Group and its co-conspirators engaged in price-fixing that unreasonably restrains trade and affects interstate commerce. Therefore, Complaint Counsel respectfully move the Court for summary judgment that Respondent ENH Medical Group, as set forth in Count III of the Complaint, violated Section 5 of the FTC Act.[90]

October 26, 2004

Respectfully submitted,

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[90] The Commission's Rules clearly contemplate that motions for partial summary decision can be rendered "on the issue of liability alone." Rule 3.24(a)(2). Therefore, consistent with that Rule, upon disposition of this motion, Complaint Counsel will submit a motion setting forth the specific relief that should be granted.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing documents were served on counsel for the respondents by electronic mail and first class mail delivery:

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Oct 27, 2004
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