UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR RECONSIDERATION OF MOTION TO COMPEL DISCOVERY

Pursuant to the Federal Trade Commission's Rules of Practice ("Rules"), 16 C.F.R. § 3.22(c), Respondents Evanston Northwestern Healthcare Corporation ("ENH") and ENH Medical Group, Inc., by counsel, hereby oppose Complaint Counsel's motion to reconsider ("Motion to Reconsider") the Court's Order Denying Complaint Counsel's Motion to Compel Discovery and for Extension of Time to File Econometric Rebuttal Report dated November 30, 2004 ("Order Denying Motion to Compel").

INTRODUCTION

The Motion to Reconsider rehashes stale arguments and otherwise fails to provide the Court with any legitimate basis to reconsider its conclusions that: (1) "By November 11, 2004, Complaint Counsel was aware that Respondents provided raw data, not processed data, and that Respondents did not intend to provide the processed data"; and (2) "Complaint Counsel has not explained why they waited two weeks to file [their] motion." Pertinent correspondence confirm that the discovery dispute under scrutiny inexplicably laid dormant for almost two weeks and was resurrected the week before rebuttal econometric reports were due. Thus, the

Court properly concluded that Complaint Counsel's initial motion to compel expert data was untimely and the requested 10-day extension for econometric rebuttal reports unwarranted. Under these circumstances, the Motion to Reconsider should be denied because it fails to meet the strict reconsideration standard.

ARGUMENT

I. Complaint Counsel Ignore The Strict Reconsideration Standard.

When articulating the motion to reconsider standard in *In re Rambus*, Dkt. No. 9302, 2003 FTC LEXIS 49 (Mar. 26, 2003), this Court emphasized that parties may not use such a motion as a vehicle to obtain a "second bite at the apple" or to "relitigate previously decided matters":

> *Motions for reconsideration should be granted only sparingly.* Karr v. Castle, 768 F. Supp. 1087, 1090 (D. Del. 1991). Such motions should be granted only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice. Regency Communications, Inc. v. Cleartel Communications, Inc., 212 F.Supp.2d 1, 3 (D.D.C. 2002). *Reconsideration motions are not intended to be opportunities "to take a second bite at the apple" and relitigate previously decided matters.* Greenwald v. Orb Communications & Marketing, Inc., 2003 WL 660844 at *1 (S.D.N.Y. Feb. 27, 2003).

Id. at *11-*12 (emphases added) (Ex. 1).

There has been no intervening change in controlling law, nor has any new evidence become available since the filing of Complaint Counsel's initial motion to compel. Consequently, any reconsideration by this Court of its Order Denying Motion to Compel must be based on "a need to correct clear error or manifest injustice." *Id.* Complaint Counsel's Motion to Reconsider falls far short of meeting this standard. In fact, as demonstrated below, the Court

got it right the first time. Complaint Counsel improperly relitigate matters already decided by the Court and thus seek, without good cause, "a second bite at the apple." *Id.*[1]

II. Complaint Counsel Cannot Satisfy Their Burden Of Demonstrating "A Need To Correct Clear Error Or Manifest Injustice."

A. The Court Made No "Clear Error" In The Order Granting Motion To Compel.

Complaint Counsel first argue that their delay in filing the initial motion to compel was justified because "very active negotiations" concerning the underlying discovery dispute purportedly continued after November 11, 2004. They next appear to argue that Complaint Counsel's production of expert material was more extensive than that of Respondents (even though the Court did not base its ruling on a contrary finding). Neither argument withstands scrutiny.

1. The Court Properly Found That Complaint Counsel Did Not Establish Good Cause For Their Delay In Moving To Compel.

Complaint Counsel concede, as they must, that "Respondents refused to produce the disputed processed data files on November 11[.]" Mot. to Reconsider at 2. Complaint Counsel nonetheless assert that the parties did not reach a "final impasse" (a term neither used in the scheduling orders nor defined by Complaint Counsel[2]) on November 11 but, to the contrary, were engaged in "very active negotiations regarding this dispute until only 48 hours before

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[1] Complaint Counsel hint that they may come back for a "third bite." Complaint Counsel state twice in their brief that they may attempt to circumvent the Order Denying Motion to Compel, which rejected Complaint Counsel's request for an extension of time to file their econometric rebuttal report, by seeking leave to file an amended expert report. *See* Mot. to Reconsider at 2 ("[W]hile Complaint Counsel may ask the Court for leave for its experts to file amended reports, that request (and any potential impact it might have on the overall schedule for this case) can be separately assessed at an appropriate time."); *id.* at 5 n.6 ("Complaint Counsel reserve the right to petition the Court for further relief in the form of, for example, leave to file supplemental reports as circumstances warrant.").

[2] Paragraph 5 of the scheduling order's additional provisions states, in pertinent part: "Any motion to compel responses to discovery requests shall be filed within 5 days of *impasse* if the parties are negotiating in good faith and are not able to resolve their dispute." (Emphasis added.) The Court did not expressly rely on this 5-day rule when holding: "Complaint Counsel has not established good cause to compel additional discovery or for an extension of time to file an econometric rebuttal report."

Complaint Counsel filed the motion." Mot. to Reconsider at 1, 2. This characterization of the parties' communications are not supported by the pertinent correspondence set forth below. Such correspondence make it clear that negotiations pertaining to Complaint Counsel's request for processed data files ended on November 11, Respondents' refusal to produce such information was left unanswered for almost two weeks, and, when Complaint Counsel finally revisited the issue, Respondents' discovery position was unwavering:

- In an email dated November 10, 2004, Complaint Counsel requested the processed data at issue in the Motion for Reconsideration – namely, "the contents of the folder 'payer_data_final' that was included on the CD with Bates number 'ENH – JBB4.'" Ex. 2.

- In an email dated November 11, 2004, Respondents refused to produce the requested processed data files at issue because similar files were not produced by Complaint Counsel (with the exception of output from the 3M Grouper, a program that Complaint Counsel did not provide to Respondents). Ex. 3. *Complaint Counsel never replied to this email.*

- More than one week later, in a letter dated November 19, 2004, Complaint Counsel requested certain programs used by Dr. Baker that purportedly were missing from his production. This request, however, did *not* seek from Respondents processed data files. Instead, the letter (which is not attached to the Motion to Reconsider) implies that Complaint Counsel were able to replicate such information: "As we noted in a previous communication to you, we did not receive your experts' processed data files *and instead were forced to generate the results in the first instance* before we could even begin to analyze the results." Ex. 4 at 2 (emphasis added).

- Respondents sent an immediate reply by email later in the day on November 19, 2004. This email again confirmed that Respondents' "expert production is consistent with that of Complaint Counsel, which did not provide Respondents with Dr. Haas-Wilson's intermediate databases." Ex. 5.

- In a letter dated November 22, 2004, after letting the request for processed data files lie dormant for 11 days, Complaint Counsel renewed their demand for this information. Ex 6 at 3.

- In an email dated November 24, 2004, Respondents explained, in detail, how their production of expert data was consistent with that of Complaint Counsel. Respondents again refused to produce additional information

pertaining to Dr. Baker's report and notified Complaint Counsel that the requested 10-day extension of time would "have an adverse ripple effect on the remaining scheduling order deadlines." Ex. 7 at 2.

There is no evidence to support Complaint Counsel's summary assertion that there were "very active negotiations regarding *this dispute*," *i.e.*, the dispute over processed data files, after Respondents flatly refused to provide such information on November 11, 2004. Mot. to Reconsider at 1 (emphasis added). Respondents made it clear as of November 11 that their position on the processed data files was *not* "subject to further negotiations." Mot. to Reconsider at 3. Accordingly, there is no "clear error" in the Court's finding that Complaint Counsel's delay of more than two-weeks (from November 11 to November 26) in filing their initial motion to compel was inexcusable.

2. To The Extent It Is Relevant, Respondents' Production Of Expert Information Was Consistent With That Of Complaint Counsel.

Complaint Counsel relies, to no avail, on the Declaration of Michelle Kambara. As an initial matter, Complaint Counsel provide no good cause for failing to submit this declaration with their initial motion to compel. This alone is a sufficient basis to disregard her declaration.

In any event, the Kambara Declaration confirms that Complaint Counsel's initial motion to compel was untimely. Ms. Kambara declares that she quit trying to process data "about November 18," yet Complaint Counsel did not renew their demand for the data sets until November 22, and did not file the motion until November 26, 2004. Kambara Decl. ¶ 8. Neither Ms. Kambara nor Complaint Counsel explain this delay given the tight expert discovery deadlines.

Ms. Kambara's other statements merely confirm the undisputed fact that Complaint Counsel produced with their expert reports output from the 3M Grouper. The

Declaration of David W. Majerus, attached to Respondents' opposition to Complaint Counsel's initial motion to compel, discusses this production by Complaint Counsel and explains: (1) that this production was necessary because Complaint Counsel did not produce the 3M Grouper program; and (2) Complaint Counsel's incomplete production of additional data files caused material delays in Respondents' analyses of the expert reports submitted by Complaint Counsel. Majerus Decl. ¶¶ 4-7. The Court appeared to appreciate these points when, in the Order Denying Motion to Compel, it explained: "Respondents would not turn over processed data files because Complaint Counsel had not turned over their expert's processed data files, with one exception involving a proprietary software program."[3]

In short, the Kambara Declaration cannot establish "clear error" in the Order Denying Motion to Compel because that Order did not turn on any of the issues discussed in either the Kambara Declaration or, for that matter, the Majerus Declaration. And, of course, any unanswered questions concerning Dr. Baker's data and analyses can be addressed in his deposition.[4] Accordingly, the Kambara Declaration is not only untimely but also irrelevant to the Motion for Reconsideration.

B. The Court's Order Denying Motion To Compel Results In No "Manifest Injustice" Warranting Reconsideration.

Complaint Counsel do not expressly argue that the Order Denying Motion to Compel will result in "manifest injustice." Rather, they suggest that the Court's ruling will

[3] Nothing in the untimely Kambara Declaration contradicts the statements in the Majerus Declaration. For example, although Ms. Kambara asserts that she supplied final processed data files to Respondents, she concedes that these files were not really "final" because they still needed to be "converted into Stata." Kambara Decl. ¶ 3. As explained in the Majerus Declaration, this conversion required running 28 additional programs. Majerus Decl. ¶ 7.

[4] Complaint Counsel assert that the costs to Respondents of producing the requested processed data files are minimal. This assertion, however, misses the point. Respondents incurred significant costs in deciphering the error-ridden programs produced by Complaint Counsel with their expert reports. Complaint Counsel, who set the practice for what type of expert information would be produced during expert discovery, must live with that practice.

somehow result in a multitude of discovery motions to the detriment of the "Court's own operational interest." This argument flows from the erroneous inference that the basis for the Court's ruling was that Complaint Counsel merely waited more than the 5-days after "impasse" allowed under the scheduling order to file their motion to compel. Complaint Counsel are as wrong in their reading of the Court's opinion as they are in their dire predictions of the order's consequences.

The Court presumably imposed the 5-day deadline to ensure that discovery disputes are resolved quickly to minimize disruptions to the scheduling order and delays in the hearing. The current situation is a prime example of the sound policy underlying this rule. Respondents staked out their discovery position on November 11, 2004, the date they refused to produce the requested processed data files because similar information was not produced by Complaint Counsel. None of the correspondence cited by Complaint Counsel reflects any indication by Respondents that they intended to soften this position as the days went on. Because Complaint Counsel unduly delayed their filing of the initial motion to compel, they felt compelled to seek a 10-day extension of the econometric rebuttal report deadline. Had that deadline been extended as requested, the parties may not have been able to complete expert depositions within the allotted period, and a further delay in the hearing may have been necessary. Such disruptions might have been avoided, or at least minimized, had Complaint Counsel acted swiftly after Respondents refused, in no uncertain terms, to produce the requested information.

The Order Denying Motion to Compel, therefore, sets a laudable precedent discouraging parties from allowing discovery disputes to linger. Despite Complaint Counsel's

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Respondents are still working with Complaint Counsel to answer their technical questions concerning expert programs and data.

assertion to the contrary, no party needs to rush to Court when, unlike here, disputed issues are still being negotiated.[5] Instead, parties have an obligation to determine when disputes have reached an impasse and to respond promptly at that point to seek Court intervention. To be clear, this is not a situation in which the Court insisted on blind adherence to the 5-day motion to compel deadline. Instead, the delay at issue here was more than two weeks during a tight expert discovery schedule, and the motion to compel was filed just two business days before the deadline for econometric rebuttal reports. The Court's decision was just and correct.

In the end, the Court has wide discretion to issue discovery orders after considering all of the relevant facts and circumstances.[6] Here, the pertinent facts and circumstances fully support the Court's decision: (1) Complaint Counsel already received a two-week extension on econometric rebuttal reports; (2) Complaint Counsel's production of expert data was incomplete and ultimately caused a disruption to the expert discovery schedule and needless additional expense for Respondents; (3) Complaint Counsel served a revised Haas-Wilson report without prior notice to Respondents immediately after the parties filed a joint motion to amend the scheduling order, and without leave of Court; (4) Respondents replied

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[5] Complaint Counsel's effort to fulfill their own prophecy by filing an unrelated motion to compel on December 6, 2004, lends no support to their position. There, Complaint Counsel notified Respondents on November 29, 2004, of their intent to file a motion to compel unless Respondents confirmed that they had produced certain survey documents. After conducting another search for responsive documents, Respondents wrote to Complaint Counsel on December 2, 2004, to advise them that all responsive documents had been produced, with the possible exception of a few documents that were attached to the correspondence. But for an administrative mix-up on Complaint Counsel's end discussed, in part, in Complaint Counsel's withdrawal of their motion on December 7, 2004, no motion to compel would have been necessary or filed.

[6] *See, e.g., In re Rambus*, 2003 FTC LEXIS at *10 ("Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because [they are] particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay."); *In re R.R. Donnelley & Sons Co.*, Dkt. No. 9243, 1991 FTC LEXIS 478 at *1-*2 (Oct. 31, 1991) ("Commission Rules and cases consistently support the Administrative Law Judge's authority in supervising discovery, a function particularly within his trial management discretion. In the interest of expediting complex litigation, the Commission and Administrative Law Judges have traditionally upheld the long-settled practice of disfavoring interlocutory appeals of discovery orders.") (citations omitted) (Ex. 8).

quickly to all of Complaint Counsel's questions and concerns regarding Respondents' expert productions and immediately made clear their position on the production of processed data files; (5) Complaint Counsel provided no legitimate excuse for waiting to file a motion to compel on the processed data files; and (6) Complaint Counsel served *six* rebuttal expert reports in an overkill response to Respondents' four expert reports. Under these circumstances, there is no basis to reconsider the Order Denying Motion to Compel.[7]

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Complaint Counsel's Motion for Reconsideration of Motion to Compel Discovery.

Respectfully Submitted,

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[7] In footnote seven of their brief, Complaint Counsel request "an order on the merits of Complaint Counsel's Motion to Compel" for purposes of appeal. The Order Denying Motion to Compel is sufficient to preserve Complaint Counsel's position for any appeal.

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Dated: December 15, 2004

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2004, a copy of the foregoing ***Respondents' Opposition to Complaint Counsel's Motion for Reconsideration of Motion to Compel Discovery*** was served by email and first class mail, postage prepaid, on:

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ORDER

Upon consideration of Complaint Counsel's Motion for Reconsideration of Motion to Compel Discovery ("Motion") and Respondents' opposition thereto, and the Court being fully informed, it is this _____ day of _____, 2004 hereby

ORDERED, that the Motion is DENIED.

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

Exhibits 1-8

REDACTED