

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of)
)
Evanston Northwestern Healthcare)
Corporation,)
a corporation, and)
)
ENH Medical Group, Inc.,)
a corporation.)
_____)

Docket No. 9315

Public Record

**RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN EXHIBITS**

Pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), Respondents Evanston Northwestern Healthcare, Inc. ("ENH") and ENH Medical Group, Inc. ("ENH Medical Group") respectfully submit this memorandum of law in support of their motion for an order directing *in camera* treatment of certain documents containing highly confidential information produced in this proceeding.

The documents at issue (attached to the underlying motion as Exhibit A) were designated as "Restricted Confidential, Attorney Eyes Only – FTC Docket No. 9315," the highest degree of confidentiality protection under the protective order entered in this proceeding on March 24, 2004. These documents are highly sensitive and proprietary in nature and, if made public, would not only cause irreparable harm to Respondents, but also would likely result in an overall loss of competition, as discussed below. Accordingly, Respondents respectfully request an order requiring these materials to be used at the hearing only *in camera* and maintained under seal.

INTRODUCTION

The matter currently pending before this Court is a post-consummation challenge to a hospital merger under Section 7 of the Clayton Act (Counts I and II), and a challenge to the contracting practices of ENH Medical Group under Section 5 of the FTC Act (Count III). The purpose of the hearing is to determine if ENH's January 2000 merger with Highland Park Hospital substantially lessened competition as alleged in Counts I and II of the Complaint, and whether ENH Medical Group's contract negotiations on behalf of affiliated physicians constitutes unlawful price fixing as alleged in Count III. The categories of sensitive information discussed herein could harm ENH or ENH Medical Group directly or competition in general should *in camera* treatment not be granted.

BACKGROUND

ENH sells hospital services and related goods. Although uninsured patients pay for these services out of pocket, the majority of patients use insurance plans to defray or cover the cost of these services and goods. The federal government, state government and non-governmental entities operate insurance plans. The plans offered by the federal government include Medicare and Medicaid, both of which cover patients who fall into particular categories of age or income. Federal law and regulations determine the rates and schedules at which hospitals are reimbursed for providing goods and services to individuals covered by Medicare and Medicaid. These rates are publicly available and non-negotiable. Non-governmental entities providing medical insurance include commercial payors and managed care organizations (collectively "private payors"), which offer fully-insured and self-insured health plans to employers. Generating a significant source of revenue for ENH and other area hospitals, these private payor contracts are material to the business of Respondents and their competitors.

ENH, like all hospitals, compete to be on the “preferred panel” of private payors’ health plans. Private payors build provider networks to compete effectively with other payors for employer contracts. Employers want to limit the amount they spend on employee health benefits, and, as a result, price competition among payors is important. Therefore, payors are interested in obtaining the lowest rates possible from the providers they include in their networks, which fosters price competition among hospitals (and other providers). However, since employers must themselves compete for qualified labor, they also attempt to assure that their employees are reasonably satisfied with the health plan(s) that they offer. Consequently, they demand adequate provider networks that span the range of basic and specialty services that their employees may need, have good quality reputations, and are geographically convenient to their employees and their families. All of these dimensions can be grouped into a category of attributes that is labeled “choice.” Different networks and plans may provide varying degrees of these dimensions for different prices so that employers make the price-choice tradeoffs that best meet their needs.

ENH Medical Group does not sell the services of its employed and affiliated physicians, but rather has historically served as a conduit through which a private payor could have negotiated certain nonexclusive reimbursement rates on behalf of its member-physicians through a single contract with a given payor.

Private payors’ contracts with hospitals and physicians groups are negotiated confidentially in the healthcare industry. Washa Decl. at ¶ 4. Negotiating in this environment requires months of preparation and analysis. *Id.* ENH and ENH Medical Group deem their respective contract strategies, and their negotiations themselves, to be of crucial importance to ensure that the organizations accurately project and reach contract prices that will reduce the

risk that their costs will exceed reimbursements. Moreover, ENH needs to ensure its financial stability so it can continue to provide medical services to the local communities. Washa Decl. at ¶ 7. The resulting contracts are often in place for several years. Washa Decl. at ¶ 4.

In the course of providing medical services, ENH conducts various studies and reviews of hospital and physician performance to improve the quality of care. These self-assessment efforts are extremely sensitive for two reasons. First, publication of these efforts would provide customers and competitors information on the strengths and weaknesses of ENH and ENH Medical Group physicians that could be used to limit the ability of ENH and ENH Medical Group, respectively, to competitively negotiate future contracts and could depress competition generally. Second, the effectiveness of such self-assessment efforts depends on the candor of contributors to the studies and reports. Such candor would be significantly diminished or even extinguished if these documents were open to public scrutiny.

In the course of serving patients, both ENH and the ENH Medical Group physicians receive detailed and potentially embarrassing patient information. Release of this information would irreparably harm the reputation of ENH and the ENH Medical Group physicians with their patients. Such harm will have a tremendous impact on the ability of ENH and ENH Medical Group to compete. In addition, the release of such information would go against the clear demands of state and federal privacy policy.

The exhibits requiring *in camera* treatment are those that, if made public, would provide private payors and Respondents' competitors with critical knowledge of confidential information proprietary to ENH and ENH Medical Group, as well as confidential patient information. These exhibits at issue include the following materials:

[REDACTED]

[REDACTED]

Providing this information to competitors would irreparably harm Respondents and significantly lessen competition. In addition, policy and privacy interests would be injured by the release of peer review information and patient information. For these reasons and others discussed in detail below, Respondents request *in camera* treatment for the trial exhibits at issue.

ARGUMENT

I. Legal Standards Governing *In Camera* Treatment Of Documents

Rule 3.45 governs *in camera* treatment of materials, stating that materials shall be “placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment.” 16 C.F.R. § 3.45(b). The rule also designates three representative cases that are to

be utilized by administrative law judges when ruling on motions for *in camera* treatment. See *General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *Bristol-Meyers Co.*, 90 F.T.C. 455, 456 (1977); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). According to this authority, applicants for *in camera* treatment must make a “clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *General Foods Corp.*, 95 F.T.C. at 355. This standard best serves the balance between “the need for a public understanding of the Commission’s adjudicative actions and the interest of business in avoiding competitive injury from public disclosure of information.” *Id.*

The Commission has established six factors to consider in determining whether *in camera* treatment is appropriate: (1) the extent to which the information is known outside of the party’s business; (2) the extent to which the information is known by employees and others involved in the business; (3) the extent of measures taken by the party to guard the secrecy of the information; (4) the value of the information to the party and to its competitors – if the information is old, a greater burden is placed on the party to demonstrate its value; (5) the amount of effort or money expended by the party in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Bristol-Meyers Co.*, 90 F.T.C. at 456. In addition, “[t]he likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’” *Hoechst Marion Russell, Inc.*, 2000 F.T.C. LEXIS 138 at *6 (2000) (citing *General Foods*, 95 F.T.C. at 355). The first three factors relate to how closely the information is guarded; the last three factors relate to the value of the information both to the owner of the information and to third parties.

Once the determination has been made that a document will receive *in camera* treatment, the duration of the *in camera* treatment must be determined. 16 C.F.R. § 3.45(b).

II. Documents Requiring In Camera Treatment

ENH requests *in camera* treatment for some documents that have been designated as trial exhibits by Complaint Counsel and/or Respondents. These documents fall into the six categories identified above. To the extent possible, such documents are addressed in groups, rather than individually. Respondents have taken this approach to keep the length of this memorandum to a minimum and to avoid repetitive statements of fact.

A. Contract Pricing Documents

1. General Discussion

As part of their regular businesses, ENH and ENH Medical Group negotiate with private payors to set reimbursement levels for the provision of hospital and physician products and services, respectively. These negotiations are conducted in secret often over a period of many months. Washa Decl. at ¶ 4. The negotiations result in contracts that determine the reimbursement levels that ENH and ENH Medical Group receive for the provision of hospital and physician products, respectively, for years to come. Washa Decl. at ¶ 4.

[REDACTED]

[REDACTED]

ENH and ENH Medical Group treat these documents related to pricing as highly confidential. In addition, most private payors and hospitals agree that reimbursement rates are extremely sensitive and not widely distributed in their own companies. *See, e.g., In the Matter of North Texas Specialty Physicians*, 2004 FTC LEXIS 109 (April 23, 2004) (finding that Aetna reimbursement data and Humana fee schedules and rates were

competitively sensitive information entitled to *in camera* treatment). As such, access to pricing documents is restricted within ENH, ENH Medical Group, and at the private payors. ENH and ENH Medical Group employees do not generally have access to documents containing this type of pricing information.

[REDACTED]

2. **Specific Documents – Contract Pricing Negotiations Information**

As discussed above, contract negotiation strategies are closely guarded at ENH. The amount of effort and cost that is invested to analyze and formulate a negotiation strategy and ultimate price range for each payor is lengthy and expensive.

[REDACTED]

3. **Specific Documents – Internal Costs**

[REDACTED]

Examples of such sensitive information are located at CX 0719, CX 1435. (*See Golbus Decl. at 6.*)

Public disclosure of ENH's internal cost analyses would leave it exposed in future negotiations with private payors. It would render it very difficult for ENH to negotiate rates and would negate the time and expense currently invested in months of negotiation preparation by ENH. In addition, competition would be diminished as ENH's competitors would have a clear view into ENH's cost structure.

ENH's internal cost information is closely held by ENH and would be extremely difficult for private payors and competitors to duplicate. While competitors may have an understanding of their own costs and margins, they have no way of independently determining ENH's cost structure. (*See Hodges Decl. at 7.*)

B. Documents Containing Current Business Plans and Strategies

ENH executives, senior managers, and certain consultants often generate corporate strategy documents, such as Board Reports, PowerPoint presentations, spreadsheets, quarterly financial reports, assessments of competitors, statements of company goals, and other similar indications of ENH's current business plans and market strategies. (*See Hillebrand Decl. at 7.*) Because of the length of negotiations and longevity of contracts, even documents that were drafted several years ago may in some instances reflect continuing plans and strategies. These documents are closely held by ENH, have great value to ENH and, if disclosed, would have enormous value to customers and competitors.

[REDACTED]

[REDACTED]

Such corporate plans are critical to ENH's success.

[REDACTED]

Because of the sensitive nature of these documents, ENH makes every effort to make certain that these documents are not leaked to competitors – primarily by the access restrictions set forth above. (Hillebrand Decl. at 9.)

[REDACTED]

Because ENH restricts access to these documents even internally, competitors and payors could not legitimately obtain the information they contain.

If these documents were not given *in camera* treatment, ENH would be placed in an anomalous position in which its strategic plans would be publicly known, whereas the strategic plans of ENH's competitors would be confidential. Such a scenario would place ENH at a significant competitive disadvantage. (Hillebrand Decl. at 8)

C. **Documents Containing Current Financial Information**

[REDACTED]

D. **Documents Containing Market Assessment Information**

1. **General Discussion**

As part of their ongoing effort to attract more patients, ENH's marketing staff continually engages in assessment of the marketplace. These assessments are both specific and general. For example, the Marketing Department might commission a consultant to research the market information about a particular procedure. These observations are found in a variety of marketing strategy documents throughout the exhibits in this case. Due to the longevity of private payor contracts, market assessments remain relevant and critical to business analysis for many years.

[REDACTED]

Such documents are valuable to ENH because they permit its employees to share assessments of the marketplace with each other.

[REDACTED]

Market assessment documents constitute the intellectual property of ENH. They are the result of extensive experience, time spent with patients and affiliated physicians, and analysis of the markets. Because this information is confidential within ENH, it is unlikely that this information could be obtained by lawful means other than through this litigation. Without *in camera* protection for these documents, ENH would essentially be stripped of the competitive intelligence it has invested heavily in developing. (*See* Loveland Decl. at 9.)

2. **Specific documents**

[REDACTED]

E. Documents Containing Employee Performance and Peer Review Information

Employee performance and peer review information are competitively sensitive and would damage ENH specifically and competition generally if disclosed to customers and competitors. In addition, law and policy considerations demand that employee performance and peer review information receive the protection of *in camera* treatment. These documents contain both confidential patient information as well as frank assessments of the performance of services provided at or by ENH. Examples of these documents include:

[REDACTED]

Publication of these documents, like all those discussed above, would place ENH at a significant competitive disadvantage and could harm competition generally. Without *in camera* protection, these documents will expose ENH's internal concerns – as well as its recommendations for improvements – to its competitors and private payors. Such disclosure could substantially impair ENH's ability to negotiate in the future because it would lay out for every customer every current or past operational issue encountered by ENH.

Employee performance and peer review documents also contain frank assessments of the performance in the ENH system – information protected under the Illinois Medical Studies Act. Medical Studies Act, 735 ILCS 5/8-2101 (2003).¹

¹ The Medical Studies Act states: “All information, interviews, reports, statements, memoranda, recommendations, letters of reference or other third party confidential assessments of a health care practitioner’s professional competence, or other data of the Illinois Department of Public Health, local health departments, the Department of Human Services (as successor to the Department of Mental Health and Developmental Disabilities), the Mental Health and Developmental Disabilities Medical Review Board, Illinois State Medical Society, allied medical societies, health maintenance organizations, medical organizations under contract with

[REDACTED]

The purpose of the Illinois Medical Studies Act is “to ensure that members of the medical profession will effectively engage in self-evaluation of their peers in the interest of advancing the quality of health care.” *Roach v. Springfield Clinic*, 623 N.E.2d 246, 251 (Ill. 1993); *Green v. Lake Forest Hosp.*, 781 N.E.2d 658, 661 (Ill. App. Ct. 2002). The Act creates a state-law privilege that applies to documents prepared by a licensed or accredited hospital staff or committees “used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation.” Medical Studies Act, 735 ILCS 5/8-2101. Federal Courts have recognized the important policy behind this act. *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1062 (7th Cir. 1981) (“By providing that information obtained by such committees would be kept confidential, the Illinois legislature [in enacting the Illinois Medical Studies Act] intended to encourage individuals with relevant information to speak freely so that the committees could more easily perform their function.”).

health maintenance organizations or with insurance or other health care delivery entities or facilities, tissue banks, organ procurement agencies, physician-owned insurance companies and their agents, committees of ambulatory surgical treatment centers or post-surgical recovery centers or their medical staffs, or committees of licensed or accredited hospitals or their medical staffs, including Patient Care Audit Committees, Medical Care Evaluation Committees, Utilization Review Committees, Credential Committees and Executive Committees, or their designees (but not the medical records pertaining to the patient), used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation, shall be privileged, strictly confidential and shall be used only for medical research, increasing organ and tissue donation, the evaluation and improvement of quality care, or granting, limiting or revoking staff privileges or agreements for services, except that in any health maintenance organization proceeding to decide upon a physician’s services or any hospital or ambulatory surgical treatment center proceeding to decide upon a physician’s staff privileges, or in any judicial review of either, the claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such a decision was based.” 735 ILCS 5/8-2101 (2003).

Federal courts have been deferential in protecting documents falling under the Illinois Medical Studies Act whenever possible to avoid disrupting the course of the litigation. *Id.* at 1061 (“A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy.”) (internal quotations omitted); *see also Northwestern Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 932 (7th Cir. 2004) (quoting and reaffirming *Memorial Hospital for McHenry County*); *Lora v. Board of Education*, 74 F.R.D. 565 (E.D.N.Y. 1977) (And where a “state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule.”). The Act covers information, records, reports, statements, notes, memoranda or data generated specifically for the use of hospital peer review committees. *Green v. Lake Forest Hosp.*, 781 N.E.2d at 662 (Ill. App. Ct. 2002); *Chicago Trust Co. v. Cook County Hosp.*, 698 N.E.2d 641, 646 (Ill. App. Ct. 1998).

Over the years, ENH has engaged in continual efforts to improve patient care. ENH has created documents related to these efforts.

[REDACTED]

[REDACTED]

Respondents request that peer review and employee performance documents be kept *in camera* indefinitely because of the continued sensitivity and relevance of such documents. At a minimum, these documents should be kept *in camera* for five (5) years.

F. Documents Containing Patient Information

As part of its business, and under state laws governing reporting, ENH employees collect and record detailed patient treatment information that their patients trust will remain protected from public disclosure. Such information has extremely restricted access within ENH.

[REDACTED]

In addition, law and privacy policy concerns demand *in camera* protection of this type of information.

Because of patient confidentiality concerns, documents containing patient information should receive *in camera* treatment. Other FTC administrative law judges have granted *in camera* treatment of similar information. Order on Non-Parties' Motions for In Camera Treatment of Documents Listed on Parties' Exhibit Lists, *In the Matter of North Texas Specialty Physicians*, 2004 FTC LEXIS 109 (April 23, 2004) ("Due to the sensitive nature of such personal financial information and the potential damage to those individuals if their personal financial information were disclosed to the public – which sensitivity and potential damage will not decrease over time" Judge Chappel granted motion for in camera treatment indefinitely.). In addition, the regulations promulgated by the U.S. Department of Health and

Human Services under the Health Information Privacy Act, a party requesting individual health information must secure a protective order or endeavor to contact all patients whose information would be disclosed. 45 C.F.R. § 164.512(e)(1)(v). Although the definition of a qualified protective order does not specifically call for *in camera* treatment of the information, fulfillment of the intent of the regulation clearly demands it.

G. Expert Reports

Each of Respondents' expert reports contains highly sensitive and proprietary information. These reports are based on, describe, and analyze, the same data and documents discussed in the categories above. Thus, if the Court rules that those documents and data discussed above should be granted *in camera* treatment, then the same *in camera* treatment should be accorded Respondents' expert reports. The same is true for the expert reports submitted by Complaint Counsel, and the cited support for these Reports.²

A brief examination of Respondents' expert reports will demonstrate the need for *in camera* treatment.

[REDACTED]

² Complaint Counsel did not mark the Expert Reports as trial exhibits. But the supporting documents detailing ENH sensitive contract pricing and strategy, as well as performance information, were marked as trial exhibits. For consistency, we are including the unmarked expert reports submitted by Complaint Counsel in this motion since they should receive consistent *in camera* protection.

[REDACTED]

Peer review and patient information should also be protected by *in camera* review. Two of Respondents' expert reports discuss employee performance, peer review, and patient information. For the same reasons stated above, this information is extremely confidential and sensitive, and could chill future reporting if such information was made public.

[REDACTED]

[REDACTED]

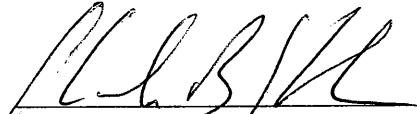
These facts demonstrate the measures taken by ENH to protect the secrecy of its peer review and patient information. As the documents and information produced by ENH should be granted *in camera* review, so should Respondents' expert reports that analyze and describe the documents and information produced.

CONCLUSION

For the foregoing reasons, Respondent request that the Court grant Respondents' Motion for *In Camera* Treatment of Certain Exhibits.

Dated: January 7, 2005

Respectfully Submitted,



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

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)	
)	
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ORDER

Upon consideration of Respondents' Motion for *In Camera* Treatment of Certain Exhibits, any opposition thereto, any hearing thereon, and the entire record in this action, it is hereby

ORDERED, that the Motion is GRANTED, and it is further

ORDERED, that pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), the documents identified in the index attached as Exhibit A to the Motion shall be subject to the requested *in camera* treatment and will be kept confidential and not placed on the public record of this proceeding.

The Honorable Stephen J. McGuire
Chief Administrative Law Judge

Date: _____, 2005

CERTIFICATE OF SERVICE

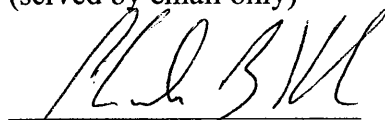
I hereby certify that on January 7, 2005, copies of the foregoing Respondents' Memorandum of Law in Support of Their Motion for *In Camera* Treatment of Certain Exhibits and a proposed order **{Public Record Version}** were served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

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**All Attached
Declarations and
Exhibit A's**

REDACTED