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

In the matter of	)	
	)	Docket No. 9315
Evanston Northwestern Healthcare Corporation,	)	**Public Record**

RESPONDENT'S REPLIES TO COMPLAINT COUNSEL'S PROPOSED FINDINGS OF FACT

VOLUME IV of XI

WINSTON & STRAWN LLP

35 West Wacker Dr.
Chicago, IL 60601-9703
(312) 558-5764

1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000

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723.

REDACTED

(Haas-Wilson, Tr. 2715, *in camera*, citing Neary, Tr. Tr. 621).

Response to Finding No. 723:

This proposed finding is misleading because his testimony was inaccurate. (RFF-Reply ¶ 1933, 723). According to MedPAC, the federal body that defines such terms, ENH is a "major teaching hospital." (RFF ¶¶ 8, 559, 2168). Also, Neary admitted that he had no idea how many discharges at Chicago hospitals were for organ transplants and burns. (Neary, Tr. 640-43). Neary was not even aware that Evanston Hospital had a burn unit for four of the years he worked in Chicago. (Neary, Tr. 643). Neary further admitted that ENH competed with, and was an alternative to, Northwestern Memorial. (Neary, Tr. 631).

Moreover, Neary has no clinical degree in medicine, so is ill-equipped to make the determination referenced in this proposed finding. (Neary, Tr. 630).

REDACTED

(Haas-Wilson, Tr. 2715, *in camera*).

724.

REDACTED

(Haas-Wilson, Tr. 2716-17, *in camera*, citing Dorsey, Tr. 1443-44).

Response to Finding No. 724:

This proposed finding is misleading because his testimony was inaccurate. (RFF-Reply ¶¶ 1934-1935). ENH is affiliated with the medical school at Northwestern University. (RFF ¶¶ 1, 8-9, 12, 18, 34, 297, 431, 2318). ENH's residents per day figure are consistent with the

MedPAC definition of a "major teaching hospital." (RFF ¶ 2168). MedPAC, a federal body that defines academic medical center and major academic hospital categories, characterizes an academic hospital as a hospital that has at least a 0.25 resident-to-bed ratio. (RFF ¶ 2168). ENH has a 0.29 ratio. (RFF ¶ 2168). In terms of the breadth and complexity of services offered, as measured by DRGs, Evanston Hospital ranks among the other academic hospitals. (RFF ¶¶ 540-549).

REDACTED

(Haas-Wilson, Tr. 2716-17, *in camera*).

725.

REDACTED

(Haas-Wilson, Tr. 2718-20, *in camera*, citing Foucre, Tr. 935-36).

Response to Finding No. 725:

This proposed finding is misleading because her testimony was inaccurate.

(RFF ¶ 456).

REDACTED

(Foucre, Tr. 1112, *in camera*).

REDACTED

; (Haas-Wilson, Tr. 2718-20, *in camera*).

726.

REDACTED

(Haas-Wilson, Tr. 2720, *in camera*).

Response to Finding No. 726:

This proposed finding is false. Using bed size, teaching intensity and breadth of service, Dr. Noether identified a representative group of academic hospitals for comparison with ENH. Dr. Haas-Wilson's criticisms on the basis of case mix, quaternary services, teaching intensity, bed size, public perception and customer documents and testimony are unfounded. (RFF-Reply ¶¶ 705-725).

REDACTED

(Haas-Wilson, Tr. 2868-69, *in camera*).

727. **REDACTED**

(Haas-Wilson, Tr. 2698, *in camera*).

Response to Finding No. 727:

This proposed finding is inaccurate. (RFF-Reply ¶ 726).

3. Even If One Accepts Dr. Noether's Control Group, Dr. Baker's Analysis Shows That the Learning About Demand Claim Is Inconsistent with the Pricing Evidence

728.

REDACTED

(Haas-Wilson, Tr. 2721 (referring to DX 7046, *in camera*), *in camera*).

Response to Finding No. 728:

This proposed finding is incorrect.

REDACTED

(Baker, Tr. 4686-87, *in camera*).

REDACTED

(Baker, Tr. 4663, 4685, *in camera*).

729.

REDACTED

(Haas-Wilson, Tr. 2727-28, *in camera*).

Response to Finding No. 729:

Respondent objects to this proposed finding on the grounds that it has been stricken from the record.

REDACTED

(Haas-Wilson 2727-32, *in camera*). The parties agreed, before trial, that two of Complaint Counsel's expert witnesses, Dr. Orley Ashenfelter and Dr. Haas-Wilson, could prepare supplemented rebuttal reports in response to Dr. Baker's second report. Dr. Ashenfelter produced a supplemented rebuttal report on January 17, 2005. Dr. Haas-Wilson, however, did not produce any supplemented rebuttal report. (Haas-Wilson, Tr. 2936-38).

REDACTED

* * * *

REDACTED

* * * *

REDACTED

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REDACTED

* * * *

REDACTED

(Haas-Wilson, Tr. 2727-29, 2731, *in camera*).

REDACTED

(Haas-Wilson, Tr. 2729, *in camera*).

REDACTED

(Haas-Wilson, Tr. 2731, *in camera*). On March 3, 2005, Respondent again objected to Dr. Haas-Wilson testifying about matters addressed in Dr. Baker's second report and, this time, specifically moved that "all testimony that has been given in this case from Dr. Haas-Wilson responding to anything in Dr. Baker's second report should be stricken." (Haas-Wilson, Tr. 2938). The Court sustained Respondent's objection on that that basis – and ruled that Complaint Counsel must "confine" its questions to matters addressed in Dr. Haas-Wilson's reports. (Haas-Wilson, Tr. 2938). This proposed finding was clearly based on testimony from Dr. Haas-Wilson regarding Professor

Baker's second report, and as such, was stricken on March 3, 2005.[7] Complaint Counsel decided not to call Dr. Ashenfelter to testify at trial, and it must live with that decision.

To the extent that Respondent needs to reply substantively to this proposed finding, however, that proposed finding is inaccurate.

REDACTED

REDACTED (Baker, Tr. 4663, 4685, *in camera*).

(Baker, Tr. 4759, 4699-70, *in camera*).

REDACTED (Baker, Tr. 4699-70, *in camera*).

REDACTED

(Baker, Tr. 4757-59, 4761-62, 4812, *in camera*; Noether, Tr. 6072-73, *in camera*; Sirabian, Tr. 5708).

REDACTED

(Baker, Tr. 4658, 4671, 4811, *in camera*; RFF-Reply ¶ 1952).

730. **REDACTED**

(Haas-Wilson, Tr. 2728, *in camera*).

[7] Respondent also objects to Complaint Counsel's Proposed Findings of Fact ¶¶ 730-736 for the same reason. Each such finding is based solely on testimony by Dr. Haas-Wilson regarding Professor Baker's second report.

Response to Finding No. 730:

REDACTED

(RFF-Reply ¶ 734, *in camera*).

REDACTED

(RFF-Reply ¶ 729, *in camera*).

REDACTED

(RFF-Reply ¶ 729, *in camera*).

731. **REDACTED**

(Haas-Wilson, Tr. 2728 (discussing DX 7062 at 1, *in camera*), *in camera*).

Response to Finding No. 731:

Respondent objects to this proposed finding on the grounds that the cited testimony has been stricken from the record. (RFF-Reply ¶ 729). To the extent that Respondent must reply to this proposed finding, it is incorrect.

REDACTED

(Baker, Tr. 4758, *in camera*). Jack Sirabian, Evanston Hospital's primary MCO contract negotiator before the Merger, testified that, during the 1990s, he focused most of his attention on the Blue Cross contracts and made sure that the Blue Cross contracts were always current and up-to-date. (Sirabian, Tr. 5707).

732. **REDACTED**

REDACTED

(Haas-Wilson, Tr. 2728 (discussing DX 7062 at 1, *in camera*), *in camera*).

Response to Finding No. 732:

Respondent objects to this proposed finding on the grounds that the cited testimony has been stricken from the record. (RFF-Reply ¶ 729). To the extent that Respondent must reply to this proposed finding, it is incomplete and incorrect.

(RFF-Reply ¶

REDACTED

728, *in camera*).

(RFF-Reply

¶ 729, *in camera*).

REDACTED

(RFF-Reply ¶ 729, *in camera*).

REDACTED

(Baker, Tr. 4695-96, *in camera*).

REDACTED

(Baker, Tr. 4695-96, 4742-43, *in camera*).

733.

REDACTED

(Haas-Wilson, Tr. 2728-29

(discussing DX 7062 at 2, *in camera*), *in camera*).

Response to Finding No. 733:

Respondent objects to this proposed finding on the ground that the cited testimony has been stricken from the record. (RFF-Reply ¶ 729). To the extent that Respondent needs to reply substantively to this proposed finding, it is incomplete, misleading and irrelevant.

REDACTED

(RFF-Reply ¶¶ 728-729, *in camera*).

REDACTED

(Baker, Tr. 4663, 4685, *in camera*).

REDACTED

(Noether, Tr. 6079-80, *in camera*).

REDACTED (RFF-Reply ¶ 690, *in camera*).

REDACTED

(Baker, Tr. 4674, 4682-83, *in camera*).

REDACTED

(Noether, Tr. 6075, *in camera*; RFF ¶¶ 1125-30).

734. **REDACTED**

(Haas-Wilson, Tr. 2728-29 (discussing DX 7062 at 2, *in camera*), *in camera*).

Response to Finding No. 734:

Respondent objects to this proposed finding on the grounds that the cited testimony has been stricken from the record. (RFF-Reply ¶ 729). To the extent that Respondent needs to reply substantively to this proposed finding, it is inaccurate.

REDACTED (Baker, Tr. 4671, 4811, *in camera*).

REDACTED

(Baker, Tr. 4669-71, *in camera*).

REDACTED

(Baker, Tr. 4677-4800, *in camera* (*explaining* DX 8047); Haas-Wilson, Tr. 2706, *in camera*).

REDACTED

(RFF-Reply ¶¶ 729, 1952, *in camera*).

735. **REDACTED** (Haas-Wilson, Tr. 2731-32 (discussing DX 7062 at 3, *in camera*), *in camera*).

Response to Finding No. 735:

Respondent objects to this proposed finding on the grounds that the cited testimony has been stricken from the record. (RFF-Reply ¶ 729). To the extent that Respondent must reply to this proposed finding, it is misleading and irrelevant to Professor Baker's conclusion that ENH learned about its demand coincident with the Merger. As discussed above,

(RFF-Reply ¶¶ 728-729, *in camera*).

REDACTED

REDACTED

(RFF-Reply ¶¶ 691, 734, *in camera*).

(Baker, Tr. 4674, *in camera*).

REDACTED

(Noether, Tr. 6081, *in camera*; *see also* RFF ¶¶ 1131-1136).

736. **REDACTED**

(Haas-Wilson, Tr. 2731-32 (discussing DX 7062 at 3, *in camera*), *in camera*).

Response to Finding No. 736:

Respondent objects to this proposed finding on the grounds that the cited testimony has been stricken from the record. (RFF-Reply ¶ 729). To the extent that Respondent needs to reply substantively to this proposed finding, it is inaccurate.

REDACTED (RFF-Reply ¶¶ 728-729, in camera).

REDACTED

REDACTED (RFF-Reply ¶¶ 691, 734, *in camera*).

REDACTED

(RFF-Reply ¶¶ 729, 734, 1952).

4. Changes in Information, One of the Potential Explanations for the Price Increase Observed at ENH After the Merger, Does Not Explain the Price Increase

737. **REDACTED**

(Haas-Wilson, Tr. 2644, *in camera*).

Response to Finding No. 737:

This proposed finding accurately summarized Dr. Haas-Wilson's conclusions. However, her conclusions are not consistent with the evidence or economic theory.

REDACTED

(Haas-Wilson, Tr. 2823-24, **REDACTED** *in camera*).

REDACTED

(Haas-Wilson, Tr. 2832-33, *in camera*; Noether, 5989).

REDACTED

(Haas-Wilson, Tr. 2644-45, *in camera*) **REDACTED**

REDACTED (Haas-Wilson, Tr. 2645, *in camera*).

REDACTED (RFF ¶¶ 656-923).

REDACTED

(Haas-Wilson, Tr. 2697, *in camera*). **REDACTED**

(Haas-Wilson, Tr. 2732, *in camera*).[8] Consequently, there is no basis for Dr. Haas-Wilson's assertion that she was able to rule out the learning about demand explanation.

738. **REDACTED**

(Haas-Wilson, Tr. 2732-33 (referring to DX 7046), *in camera*).

Response to Finding No. 738:

This proposed finding is misleading. Dr. Haas-Wilson had no basis, empirical or otherwise, to reject the learning about demand theory. (Reply-RFF ¶ 737).

G. Conclusion - The Pricing of ENH to Health Plans Following the Merger with Highland Park Provides Direct Evidence of Anticompetitive Effects

739. The merger on January 1, 2000 between Evanston Hospital and Highland Park Hospital enhanced the market power of ENH, the merged entity, and, after the merger, ENH exercised its market power. (Haas-Wilson, Tr. 2657-58).

[8] In one colloquy at trial, Dr. Haas-Wilson purports to criticize Professor Baker's results from his second report. However, since Dr. Haas-Wilson did not write a supplemented rebuttal report to respond to Professor Baker – which she was given the opportunity to do – the Court ruled that "all testimony that has been given in this case from Dr. Haas-Wilson responding to anything in Dr. Baker's second report should be stricken." (Haas-Wilson, Tr. 2938; RFF ¶ 729).

Response to Finding No. 739:

This proposed finding is completely false. Dr. Haas-Wilson failed to rule out all potential explanations for the price increase, both the nine she identified and those she did not consider. Nor was she able to explain away the evidence demonstrating that the price increases could be explained by pro-competitive forces. Accordingly, Complaint Counsel did not meet its ultimate burden in this case through Dr. Haas-Wilson's testimony (or otherwise) of showing that the Merger resulted in the enhancement and exercise of market power. (Noether, Tr. 6216; RFF ¶¶ 656-923; RFF-Reply ¶¶ 740).

740. **REDACTED** (Haas-Wilson, Tr. 2733, *in camera*). **REDACTED** (Haas-Wilson, Tr. 2734, *in camera*).

Response to Finding No. 740:

This proposed finding is incorrect. Dr. Haas-Wilson was not able to rule out the nine potential explanations she identified. (RFF-Reply ¶¶ 594-595, 597-599, 602-608). In particular, she was not able to rule out learning about demand or quality. (RFF-Reply ¶¶ 597-599, 737). This proposed finding is also misleading to the extent it suggests that the nine potential explanations identified by Dr. Haas-Wilson are the only potential explanations for the price increase.

REDACTED

REDACTED (Haas-Wilson, Tr. 2762-63, *in camera*). REDACTED

(Haas-Wilson, Tr. 2763-64, *in camera*).

REDACTED

(Haas-Wilson, Tr. 2765-66, *in camera*).

REDACTED

(Haas-Wilson, Tr. 2766, *in camera*). In addition, this proposed finding is misleading because

REDACTED

(Haas-Wilson, Tr. 2778, *in camera*). For example,

REDACTED

(Ballengee, Tr. 170; Mendonsa, Tr. 562-63, *in camera*; Holt-Darcy, Tr. 1593-94, *in camera*; Dorsey, Tr. 1470-71, *in camera*; Haas-Wilson, Tr. 2788-89 (Preferred Plan); Haas-Wilson, Tr. 2796-98, *in camera* (Humana)).

743

REDACTED

(Haas-Wilson, Tr. 2942, *in camera*).

Response to Finding No. 743:

This proposed finding is inaccurate. Indeed, it is directly contradicted by

REDACTED

(Haas-Wilson, Tr. 2762-63, *in camera*; RFF-Reply ¶ 742). In addition, this proposed finding is misleading to the extent it suggests that Great West's termination was evidence of market power. Great West believed it could still have a sellable network after the

termination. (Neary, Tr. 615). At the time Great West accepted the termination, Lake Forest Hospital, Northwest Community, Advocate Lutheran General, Rush North Shore and St. Francis were all part of the Great West network. (Neary, Tr. 611). Significantly, neither of Complaint Counsel's Great West witnesses could identify a single Great West customer that was lost during the period in which the relationship between Great West and ENH was terminated. (Neary, Tr. 635; Dorsey, Tr. 1479-80, 1481). Neary never saw any letter from any Great West customer complaining about the ENH termination. (Neary, Tr. 635). And Dorsey could not identify any sales that were lost to any specific customer. (Dorsey, Tr. 1481). Nor could Neary quantify the revenue purportedly lost by Great West as a result of the termination. (Neary, Tr. 635). Neary could not even testify whether the purportedly lost customers were large or small customers. (Neary, Tr. 635). Neary's only knowledge of lost customers from the termination came from the sales manager, Don Manno. (Neary, Tr. 636). Great West actually demoted Manno after the Merger. (Neary, Tr. 636-39).

REDACTED

(Noether, Tr. 6104, *in camera*).

REDACTED

(Noether, Tr. 6102, *in camera*). Neither Dorsey nor Neary was responsible for the marketing or sale of Great West's network to its customers and, therefore, their testimony about marketing issues should be given little or no weight. (Neary, Tr. 630; Dorsey, Tr. 1467-68).

3. Contemporaneous Business Documents Support This Conclusion

744.

REDACTED

REDACTED

(Haas-Wilson, Tr. 2738-39 (referring to CX 13), *in camera*).

Response to Finding No. 744:

This proposed finding is misleading to the extent

REDACTED

(Noether, Tr. 6107-08, *in camera*). As Hillebrand testified, ENH achieved the price increases noted in these documents precisely because, in 1999-2000, Evanston Hospital/ENH realized it was not being fairly compensated by many purchasers of care for its clinical services. (Hillebrand, Tr. 2026).

745. **REDACTED**

(Haas-Wilson, Tr. 2739-40 (referring to CX 17), *in camera*).

Response to Finding No. 745:

This proposed finding is misleading to the extent

REDACTED

(RFF-Reply ¶ 744).

X. DIRECT EVIDENCE OF ANTICOMPETITIVE EFFECTS: EXPERIENCES OF HEALTH PLANS

A. Overview of 2000 Contract Negotiations and Price Increases

1. Chronology of Key Events and Identification of Key Players from ENH, Bain and Health Plans

746. In July 1999, Evanston and Highland Park Hospital signed the letter of intent to merge. (RX 567 at ENH MN 001365, ENH MN 001390).

Response to Finding No. 746:

Respondent has no specific response. (RFF ¶ 259).

747. **REDACTED** (Chan, Tr. 833-34, *in camera*; Hillebrand, Tr. 1868-69; Hillebrand 1707).

Response to Finding No. 747:

This proposed finding is incomplete, misleading and vague. ENH's 1999-2000 managed care contract renegotiations took nearly a year and lasted into late summer or early fall2000. (Hillebrand, Tr. 1707). The citation to Chan's testimony does not support this proposed finding. Chan merely agreed that personnel from both HPH and Evanston Hospital discussed strategy pertaining to a particular negotiation shortly before the Merger. (Chan, Tr. 833-34).

748. The merger was consummated on January 1, 2000. (Hillebrand, Tr. 1702; Harris, Tr. 4208).

Response to Finding No. 748:

Respondent has no specific response. (RFF ¶ 301).

749. The president and chief executive officer of ENH is Mark Neaman. Mr. Neaman became the CEO of Evanston in 1992 and remained CEO of the merged entity after 2000. As CEO, he oversees the development of corporate strategy and also oversees the overall development ENH's relationship and strategy with managed care companies. (Neaman, Tr. 953-54).

Response to Finding No. 749:

Respondent has no specific response. (RFF ¶ 6).

750. The chief operating officer of ENH is Jeffrey Hillebrand is the chief operating officer for ENH. (Hillebrand, Tr. 1699). Mr. Hillebrand began supervising contract negotiations for ENH in the mid-80s and became the COO for Evanston in 1998. Mr. Sirabian, who handled the day-to-day contracting duties, reported directly to Mr. Hillebrand on health plan contracting issues. (Hillebrand, Tr. 1699-700). During negotiations with "larger health plans," Mr. Hillebrand became directly involved in face-to-face negotiations. After becoming COO in 1998, he maintained supervisory responsibility for ENH's health plan contracting. (Hillebrand, Tr. 1700-02).

Response to Finding No. 750:

Respondent has no specific response. (RFF ¶¶ 6, 600-604).

751. Jack Sirabian was responsible for ENH's managed care contracting negotiations from approximately 1990 to 2000. (Sirabian, Tr. 5697-98). During this time, Mr. Sirabian reported to Mr. Hillebrand with respect to managed care contracting. (Sirabian, Tr. 5728-29; Hillebrand, Tr. 1700).

Response to Finding No. 751:

Respondent has no specific response except to clarify that Sirabian ceased to be responsible for contracting in January 2000. (RFF ¶¶ 600, 603).

752. In 1999, ENH retained Bain to provide consulting advice related to the Highland Park merger. (Neaman, Tr. 1159-61). The focus of Bain's 1999 merger consulting work for ENH was "growing net income by leveraging contracting and service line opportunities created by the Highland Park merger." (CX 74 at 3). Bain assisted ENH to create a "unified contracting strategy reflecting the combined entities" of Highland Park and ENH. (CX 66 at 2).

Response to Finding No. 752:

This proposed finding is misleading. Evanston Hospital engaged Bain for consulting advice at the time of the Merger. (Neaman, Tr. 1159; RFF ¶ 670). Bain, which was hired to review Evanston Hospital and Glenbrook Hospital's contracting in the Summer of 1999, recommended rate increases regardless of whether the Merger ultimately would be consummated. (Neaman, Tr. 1347; Hillebrand, Tr. 1847; RX 2047 at 24-25 (Ogden, Dep.); RFF

¶ 705). ENH asked Bain to assist it with: (1) managed care contracting and (2) "rationalization of clinical services." (Hillebrand, Tr. 1846; RX 2047 at 10 (Ogden Dep.); RFF ¶ 673). Bain brought more rigor and data to the managed care contracting process. (Hillebrand, Tr. 1846-47; RFF ¶ 710).

753. Bain's merger-related engagement began in the fall of 1999. Charles Farkas and Kim Ogden led the Bain team. (CX 2072 at 3). Bain provided contracting strategy advice for ENH's negotiations with health plans, including individualized plans for each health plan. (CX 67 at 32-44).

Response to Finding No. 753:

This proposed finding is misleading. Ogden, who was an operating Vice President at Bain, oversaw the Evanston Hospital and Glenbrook Hospital project. Portions of her deposition testimony were admitted into evidence. (RX 2047 at 6 (Ogden, Dep.); RFF ¶ 671). While Bain certainly analyzed Evanston Hospital and Glenbrook Hospital's managed care contracts in making its recommendations, it did not create "individualized plans for each health plan" as asserted by Complaint Counsel. (CCFF ¶ 753). Instead, the evidence shows that Bain addressed certain MCOs in detail, such as HMO Illinois and PHCS, but did not provide strategy advice pertaining to every MCO. (CX 67 at 32-44).

754. Bain representatives themselves helped negotiate certain of ENH's managed care contracts in the renegotiations relating to the Highland Park merger. (Neaman, Tr. 1217-18). Bain issued its final report in the merger project on February 1, 2000. (CX 67 at 1).

Response to Finding No. 754:

Respondent has no specific response.

755. } **REDACTED** (Chan, Tr. 834, *in camera*; Hillebrand, Tr. 1868-69).

Response to Finding No. 755:

This proposed finding is incomplete and misleading. As a result of Bain's extensive analysis of Evanston Hospital's and HPH's pre-Merger contracts, Evanston Hospital learned that its contract with United was outdated and under-market and thus pressed for immediate renegotiations with this MCO. (Hillebrand, Tr. 1868-69; CX 75 at 10; RFF ¶¶ 704, 707). In November 1999, ENH learned that United reimbursed Evanston Hospital 45 to 50% less than it paid HPH. (Hillebrand, Tr. 1869; RX 684 at BAIN 43; RFF ¶ 680).

REDACTED

(Hillebrand, Tr. 1870; Neaman, Tr. 1340-41; RX 684 at BAIN 73; Haas-Wilson, Tr. 2851-52, *in camera*; RFF ¶¶ 681, 884, *in camera*). Evanston Hospital was "beyond surprised" and "shocked" to learn that HPH's rates with United were so much more favorable. (Hillebrand, Tr. 1871; Neaman, Tr. 1342, 1344-45; RFF ¶¶ 682-683).

756. In late 1999, United and ENH reached agreement on the new hospital rates with a contract effective date of January 1, 2000. (Hillebrand, Tr. 1875).

Response to Finding No. 756:

Respondent has no specific response.

757. Representing United at trial in this proceeding was Jillian Foucre, regional vice-president for United for the Central Region. Ms. Foucre served as vice-president of operations from 1999 to 2001 and then as chief operating officer from 2001 to 2004. As chief operating officer, she had responsibility for all components of network management. (Foucre, Tr. 877-80). During her tenure as COO, she oversaw the negotiation of 30 to 35 hospital contracts annually. (Foucre, Tr. 883-84).

Response to Finding No. 757:

This proposed finding is incomplete, incorrect and very misleading. Foucre was not hired by United until March 1999. (Foucre, Tr. 878). In that initial role, she was responsible for claims, customer service, grievance and appeals, provider data management and regulatory

compliance. (Foucre, Tr. 878). **REDACTED**

(Foucre, Tr. 878; Foucre, Tr. 1118, *in camera*; Hillebrand, Tr. 1900; RFF ¶ 887, *in camera*). **REDACTED**

(Foucre, Tr. 1118, *in camera*; Hillebrand, Tr. 1900; *see also* RFF ¶ 887, *in camera*). Moreover, even as COO, Foucre has been personally involved in only four managed care contract negotiations in addition to the ENH renegotiation. (Foucre, Tr. 882-884).

758. In December 1999, PHCS began renegotiations with ENH. (Ballengee, Tr. 173-4; CX 171 at 1).

Response to Finding No. 758:

This proposed finding is incomplete and misleading.

REDACTED

(CX 5070 at 9; RX 718 at 7, *in camera*; RFF ¶ 838, *in camera*). As a result of Bain's contract analysis, Evanston Hospital learned that, like its rates for United and others, HPH received higher reimbursement from PHCS than ENH. (Hillebrand, Tr. 1892; RX 684 at BAIN 43; RFF ¶ 685). PHCS paid HPH 30 to 35% more than it paid Evanston Hospital. (Hillebrand, Tr. 1893; RX 684 at BAIN 43; RFF ¶ 685).

759. PHCS's renegotiated contract with ENH went into effect on April 1, 2000. (Ballengee, Tr. 188; CX 5071 at 1).

Response to Finding No. 759:

This proposed finding of fact is incorrect and inconsistent with the record.

REDACTED

REDACTED (CX 5072 at 1, 5, 15, *in camera*; Ballengee, Tr. 249-50, 258, 269, *in camera*).

760. Representing PHCS at trial was Jane Ballengee, regional vice-president for PHCS. Ms. Ballengee was the Chicago territory director for PHCS from 1999 to 2004. As territory director, she was responsible for the contractors that handled the PHCS-provider contract negotiations. (Ballengee, Tr. 146). During most of her employment at PHCS, Ms. Ballengee had direct or supervisory responsibility for negotiations with Highland Park and ENH. (Ballengee, Tr. 165).

Response to Finding No. 760:

This proposed finding is incomplete and misleading.

REDACTED

REDACTED

(Ballengee, Tr. 256-57, *in camera*; CX 5068, *in camera*; CX 5070). For approximately two years, 1997 to 1999, Ballengee worked in PHCS's national office and did not even have any responsibilities pertaining to Chicago area hospitals. (Ballengee, Tr. 146-47). Ballengee had never met Hillebrand before the post-Merger negotiations and, even during those discussions, only met face-to-face with him on one occasion. (Hillebrand, Tr. 1893-94; Ballengee, Tr. 210).

761. In December 1999, ENH contacted One Health to request renegotiation of its hospital contract. (Neary, Tr. 595).

Response to Finding No. 761:

Respondent has no specific response.

762. After negotiations failed and after initially accepting ENH's contract termination, One Health accepted a new agreement with an effective date of January 1, 2001. (Dorsey, Tr. 1439-42; Hillebrand, Tr. 1707-08, 1898; CX 5067 at 4; CX 266 at 1).

Response to Finding No. 762:

This proposed finding is convoluted and incomplete. ENH informed One Health that it wanted to renegotiate at or about the time of the Merger. (RFF ¶ 796). More than five months later, ENH sent a notice of termination giving the parties another three months to negotiate a new contract. (RFF ¶ 799). One Health, however, decided to allow its contract with ENH to lapse. (Neary, Tr. 611). Even when the contract was no longer in effect, the parties reached an interim arrangement. (RFF ¶ 800). The parties ultimately reached a new agreement effective January 1, 2001. (CX 5067 at 4, *in camera*).

763. Representing One Health at trial was Kevin Dorsey, former vice president at One Health. Mr. Dorsey was responsible for developing provider networks during his tenure at One Health. (Dorsey, Tr. 1428-30). Mr. Dorsey was involved in the renegotiations rounds between ENH and One Health in 2000 and 2001. (Dorsey, Tr. 1441-43).

Response to Finding No. 763:

This proposed finding is incomplete and misleading. Importantly, Dorsey was not involved in pre-Merger negotiations with either HPH or Evanston Hospital. (Dorsey, Tr. 1469-70). Dorsey had no responsibilities in either advertising or sales at One Health. (Dorsey, Tr. 1467-68). Currently, Dorsey works for a hospital that competes with the ENH hospitals in the Chicago area. (Dorsey, Tr. 1432).

764. Also representing One Health at trial was Patrick Neary, former director of network development and provider relations at One Health. (Neary, Tr. 581-83). He was responsible for State of Illinois contract negotiations from 1999 onwards. (Neary, Tr. 582-83).

Response to Finding No. 764:

This proposed finding is incomplete and misleading. Like Dorsey, Neary (who reported to Dorsey) was not involved in pre-Merger HPH or Evanston Hospital contracts. (Neary, Tr. 631; Dorsey, Tr. 1469-70). Neary was largely unfamiliar with the market at the time of the

Merger. And he had no responsibilities for contracting in the Chicago area for One Health until October 1999. (Neary, Tr. 582-83). Also like Dorsey, Neary had no responsibilities in either advertising or sales at One Health. (Neary, Tr. 629-30).

765. Aetna's renegotiated contract with ENH became effective June 1, 2000. (CX 5008 at 1).

Response to Finding No. 765:

Respondent has no specific response.

766. Representing Aetna at trial was Robert Mendonsa, general manager at Aetna's Chicago office. He had responsibility for network contracting and provider maintenance from the time he began in the Chicago office in 1997. (Mendonsa, Tr. 475-76).
REDACTED
(Mendonsa, Tr. 521, *in camera*).

Response to Finding No. 766:

This proposed finding is incomplete and misleading. Before May 1997, Mendonsa worked in Aetna's corporate offices hundreds of miles from Chicago, in Connecticut. (Mendonsa, Tr. 475, 477). {
REDACTED
(Mendonsa, Tr. 556, *in camera*). After 2000, Mendonsa's job responsibilities changed such that he has not been involved in managed care contracting in the Chicago area. (Mendonsa, Tr. 476-77). Mendonsa was responsible for contracting in the Chicago area only for a brief window of time.

767. {
REDACTED
} (Holt-Darcy, Tr. 1527, *in camera*; CX 124 at 2, *in camera*).

Response to Finding No. 767:

This proposed finding is misleading. ENH did open renegotiations with Unicare on March 24, 2000. (RFF ¶ 862).
REDACTED

Response to Finding No. 769:

This proposed finding is incomplete and misleading. **REDACTED** (Holt-Darcy, Tr. 1584, *in camera*).

REDACTED (Holt-Darcy, Tr. 1584, *in camera*).

(Holt-Darcy, Tr. 1584, *in camera*).

(Holt-Darcy, Tr. 1584, *in camera*). As a result, Holt-Darcy's speculations as to the demands of customers should be given little or no weight.

2. Per Diem Versus Per Case Versus Discount Off Charges

a. Definitions

770. **REDACTED** (Holt-Darcy, Tr. 1521, *in camera*; Mendonsa, Tr. 524-25, *in camera*; Ballengee, Tr. 228, *in camera*; Sirabian, Tr. 5740; Chan, Tr. 667).

Response to Finding No. 770:

Respondent has no specific response.

771. For example, in 1999 Aetna reimbursed Evanston Hospital $1,010 per day for Medical and Surgical services. (CX 5007 at 4).

Response to Finding No. 771:

This proposed finding is incomplete and misleading. **REDACTED**

REDACTED

(CX 5007 at 1, 4; RFF ¶¶ 744, 754, *in camera*). Further, the Aetna contract included a stop loss provision. (CX 5007 at 5). Under the stop loss provision, if a patient's bill exceeded $50,000,

Aetna reimbursed Evanston Hospital at 75% of billed charges for the patient's services. (CX 5007 at 5; RFF ¶ 93).

772. **REDACTED**

Ballengee, Tr. 229, *in camera*).

Response to Finding No. 772:

Respondent has no specific response. (RFF ¶ 96).

773. For example, under the 1998 PHCS contract, the health plan reimbursed Evanston Hospital $2,652 per case for normal child birth deliveries. (CX 5070 at 30).

Response to Finding No. 773:

This proposed finding is misleading. The PHCS contract with ENH effective February 1, 1998, included an exclusion on the normal delivery case rate of $2,652. (CX 5070 at 30). As indicated by the asterisk on the contract, there are certain exclusions that would be reimbursed on discount-off-charges for normal deliveries. (CX 5070 at 30-31).

774. **REDACTED**

} (Ballengee, Tr. 227, *in camera*; Chan, Tr. 667).

Response to Finding No. 774:

Respondent has no specific response. (RFF ¶¶ 80-85).

775. A chargemaster is a list of 15,000 to 20,000 charges showing a hospital's gross charges for all of its services line-by-line. (Neaman, Tr. 1349; Hillebrand, Tr. 1710; Chan, Tr. 674; D. Jones, Tr. 4143).

Response to Finding No. 775:

This proposed finding is incomplete, incorrect and misleading. Not all hospitals have a chargemaster of 15,000 to 20,000 charges. (RFF ¶ 925). A hospital such as ENH that provides the most complex services would have 15,000 or more line items, whereas a community hospital would have fewer charges. (Porn, Tr. 5647; RFF ¶ 925). A chargemaster is a "fluid document"

that changes monthly as a result of changes instituted by Medicare. (RFF ¶ 927). As Hillebrand explained in the cited testimony, a single line item on the chargemaster, such as "Drugs," could have thousands of variable prices for that single line item. (Hillebrand, Tr. 1710). A chargemaster includes all of the services offered by a hospital, including both inpatient and outpatient care. (Porn, Tr. 5646). Finally, the citation to "D. Jones, Tr. 4143" should read "H. Jones, Tr. 4142-43" as it is taken from the testimony of Harry Jones. (H. Jones, Tr. 4143).

776. REDACTED (Hillebrand, Tr. 1711; Ballengee, Tr. 227, *in camera*; Chan, Tr. 667).

Response to Finding No. 776:

Respondent has no specific response. (RFF ¶ 80).

777. REDACTED } (CX 5075 at 17, *in camera*).

Response to Finding No. 777:

This proposed finding is misleading.

REDACTED

(CX 5075 at 17, *in camera*).

REDACTED

REDACTED } (Holt-Darcy, Tr. 1600, *in camera*; RFF ¶ 87).

b. Pressure from Health Plans Generally Resulted in Fixed Rate Contracts in the Late 1990s in the Chicago Area

778. REDACTED (Sirabian, Tr. 5739, 5704; Chan, Tr. 671; Chan Tr. 795-96, *in camera*).

Response to Finding No. 778:

This proposed finding is not supported by the record. While there was a shift towards per diem and case rates as a reimbursement methodology during the 1990s for inpatient services, Complaint Counsel's attempt to attribute it to "pricing pressure" is unfounded. (RFF ¶ 83).

REDACTED

(Sirabian, Tr. 5704, 5739; Chan, Tr. 671; Chan Tr. 795-96, *in camera*). Additionally, since neither of the witnesses were qualified as expert witnesses, neither has the necessary foundation to testify with respect to global trends in managed care contracting. Chan was employed by HPH for sixteen years and ENH for eight months after the Merger. (Chan, Tr. 650-51, 652-53). Similarly, Sirabian only worked at Evanston Hospital. (Sirabian, Tr. 5691-92). As a result, the witnesses are only competent to testify with respect to those experiences.

Across the country, MCOs had, and continue to have, discount-off-charges arrangements for inpatient services. (RFF ¶¶ 82, 84). Second, trial witnesses from Great West, Aetna and Unicare agreed that discount-off-charges have become increasingly popular since the late 1990s. (RFF ¶¶ 83, 86). Third, the primary payment methodology for outpatient services is the discount-off-charges method. (RFF ¶ 91). Simply because some MCOs asked for per diem or per case rates and hospitals mutually agreed to such an arrangement does not imply that "pricing pressure" was the proximate cause of the shift.

REDACTED

(RX 1393 at ENHL BW 3680, *in camera*).

779.

REDACTED

REDACTED

(Holt-Darcy, Tr. 1521-22, *in camera*).

Response to Finding No. 779:

This proposed finding is not supported by reliable evidence.

REDACTED

(Holt-Darcy, Tr. 1521-22, *in camera*).

780. According to Ms. Schelling who worked for the Northwestern Healthcare Network from 1991 to 1997, the existing contracts for that period between hospitals and payers were predominantly per diem contracts. (CX 6307 at 13-14 (Schelling, Dep.)).

Response to Finding No. 780:

This proposed finding is misleading. (RFF-Reply ¶ 778). Discount-off-charges is the standard reimbursement method for outpatient services. (RFF ¶ 91).

REDACTED (RFF ¶ 82, 84, *in camera*). Moreover, discount-off-charges contracts for inpatient services have become increasingly popular since the late 1990s. (RFF ¶¶ 83, 86).

c. Pre-Merger, Health Plans Successfully Pressured Evanston and Highland Park Hospital for Various Fixed Rate Contracts

781. **REDACTED**

(Chan, Tr. 782-83, 823-24, *in camera*; CX 1095).

Response to Finding No. 781:

This proposed finding is false, not supported by the record and misleading. There is no evidence that "pressure" from MCOs alone caused MCOs and hospitals to agree to fixed-rate reimbursement. (RFF-Reply ¶ 778). **REDACTED**

REDACTED

(RX 1393 at ENHL BW 3680, *in camera*).

782. **REDACTED**

(Chan, Tr. 785, 787, *in camera*; CX 1095 at 6).

Response to Finding No. 782:

This proposed finding is irrelevant, misquoted and misleading. **REDACTED**

(RFF ¶ 85, *in camera*).

REDACTED

(RFF 84).

REDACTED

REDACTED (Chan, Tr. 787, *in camera* (emphasis added); RFF ¶ 86 (adding that since 2000, as a general matter, Chicago area hospitals have negotiated even more aggressively for discounts off charges for inpatient services)).

783. **REDACTED**

(Chan, Tr. 673; Chan, Tr. 787, *in camera*; CX 1095 at 6).

Response to Finding No. 783:

This proposed finding is misleading. (RFF-Reply ¶¶ 781-782).

784. Health plan pressure to renegotiate contracts to per diem arrangements did not diminish as time passed. (CX 439 at 8). In a June 1998 report for the Board's finance committee, Ms. Chan repeated the exact same message regarding "continued pressure from payors." (CX 439 at 8; CX 1095 at 6).

Response to Finding No. 784:

This proposed finding is misleading. (RFF-Reply ¶¶ 781-783). Complaint Counsel relies on a cut-and-pasted annual report that has almost entirely identical text as the previous year. (*Compare* CX 439 at 8 *with* CX 1095 at 6). Instead of representing a continued analysis, the repetition demonstrates that the documents are an unreliable *pro forma* recitation of platitudes.

785.

REDACTED
(Chan, Tr. 794, *in camera*; CX 439 at 8).

Response to Finding No. 785:

This proposed finding is incomplete and misleading. In making her report on managed care contracts, Chan did write that the underlying assumption was that there would be no increase in average per diems and discounts would increase a mere .6%. (CX 439 at 8). This estimated change (.6%) is immaterial.

786.

REDACTED

(Chan, Tr. 794, *in camera*; CX 439 at 8).

Response to Finding No. 786:

Respondent has no specific response. (RFF-Reply ¶ 785).

787. Prior to the merger, Evanston also "stayed within the standards that were being followed" in the industry as pricing for health plans evolved into per diem and per case pricing. (Sirabian, Tr. 5725).

Response to Finding No. 787:

Respondent has no specific response.

788.

REDACTED
(Holt-Darcy, Tr. 1521, *in camera*; Chan, Tr. 786, *in camera*; CX 5091 at 1, Neary, Tr. 775, *in camera*; CX 5059 at 17; CX 5065 at 17; Ballengee, Tr. 253-54, *in camera*; CX 5068 at 27, *in camera*; CX 5070 at 28).

Response to Finding No. 788:

This proposed finding is misleading. The proposed finding ignores that discount-off-charges pricing was, and still is, the standard methodology for reimbursement for outpatient services. (RFF ¶ 91).

REDACTED

(RFF ¶ 85, *in camera*).

(Neary, Tr. 775, *in camera*).

REDACTED

(Chan, Tr. 785-86, 853, *in camera*; CX 5068 at 27, *in camera*). **REDACTED**

(Chan, Tr. 786, *in camera*).

789. { **REDACTED** (Holt-Darcy, Tr. 1526, *in camera*; Noether, Tr. 6090, *in camera*).

Response to Finding No. 789:

This proposed finding is misleading, incomplete and not supported by the cited evidence. As noted above, discount-off-charges is, and always has been, the standard reimbursement for outpatient services. (RFF ¶ 91; RFF-Reply ¶¶ 778, 780, 788).

REDACTED

(RFF ¶ 86; Holt-Darcy, Tr. 1573, *in camera*; Ballengee, Tr. 270-71, *in camera*; Mendonsa, Tr. 526-27, 558-59, *in camera*). The citation to Dr. Noether's testimony does not relate to, nor support, the proposed finding. (Noether, Tr. 6090, *in camera*).

d. Health Plans Typically Prefer Fixed Rates, in Part Because Fixed Rates Are Predictable

790. **REDACTED** (Mendonsa, Tr. 523-25, *in camera*; Ballengee, Tr. 234-35, 255, *in camera*. *See* RX 1414 at PHCS 000102, RX 1615 at 4 (In its annual reports, PHCS tells its customers that "Fixed costs, such as per diem and per case, are the most advantageous because they allow customers to predict claims costs.")).

Response to Finding No. 790:

This proposed finding is misleading.

REDACTED

(Holt-Darcy, Tr. 1573, *in camera*; Ballengee, Tr. 270-71, *in camera*; Mendonsa, Tr. 526-27, 558-59, *in camera*). For outpatient services, discount-off-charges are standard. (RFF ¶ 91). Moreover, MCOs can, and do, negotiate terms into contracts that provide stability under a discount-off-charges reimbursement methodology. (RFF ¶¶ 87-89). The very next sentence of the duplicate PHCS 2003 annual reports cited by Complaint Counsel states that Providers...often request straight discounts or discount off billed charges." (RX 1414 at PHCS 102; RX 1615 at 4).

In sum, PHCS and other MCOs confirmed both at trial and in their documents that requesting, or even securing, discount-off-charges for inpatient services is simply not indicia of anticompetitive effects.

REDACTED

(Holt-Darcy, Tr. 1571, *in camera*).

791. Per diem arrangements protect health plans from unexpected increases in the hospital's chargemaster. (Porn, Tr. 5669-70). Generally, an increase to chargemaster prices will only impact a health care provider's contracts containing a discount-off-charges provision. (Porn, Tr. 5670).

Response to Finding No. 791:

This proposed finding is not supported by the cited testimony and misleading. By its very nature, per diem arrangements do not reflect changes in a hospital's chargemaster. (Porn, Tr. 5669-70). The cited testimony does not support the argument that per diems "protect health plans." (Porn, Tr. 5669-70). In fact, most per diem arrangements include stop loss provisions that revert to discount-off-charges above a certain level. (RFF ¶¶ 93-95). Moreover, discount-off-charges contracts sometimes have escalator clauses or similar provisions that would minimize the impact of adjustments to a chargemaster. (Porn, Tr. 5670-71; RFF ¶¶ 87-90).

792. **REDACTED** (Ballengee, Tr. 234-35, 255, *in camera*; Mendonsa, Tr. 524-25; *in camera*).

Response to Finding No. 792:

This proposed finding is vague and misleading. **REDACTED**

(Ballengee, Tr. 235, *in camera*). **REDACTED** (Ballengee, Tr. 235, *in camera*). Since outpatient services are always reimbursed on a discount-off-charges arrangement, MCOs have experience in budgeting and setting premiums under such methodology. (RFF ¶ 91).

793. **REDACTED** (Mendonsa, Tr. 524, 527-28, *in camera*; Mendonsa, Tr. 488-89).

Response to Finding No. 793:

This proposed finding is misleading and is based on unreliable hearsay. Mendonsa never worked for an employer and, therefore, lacks adequate foundation to testify about what employer groups purported "want[.]" Such testimony, therefore, should be given no weight.

794. For health plans such as Aetna, the ability to accurately predict expenses is "extremely important" because "about 65-70 percent of the business renews in January," which locks in a health plan's revenue stream "for a whole year." (Mendonsa, Tr. 482-83).

Response to Finding No. 794:

Respondent has no specific response except to note that this proposed finding should be limited to Aetna because Mendonsa did not purport to testify on behalf of any other MCO.

795. Once a health plan's revenue stream from contract renewals in January is "locked in," that health plan "really can't . . . go back [to employer groups] in the middle of the year and say, oops, we need more premium." (Mendonsa, Tr. 482-83).

Response to Finding No. 795:

Respondent has no specific response except to note that this proposed finding should be limited to Aetna because Mendonsa did not purport to testify on behalf of any other MCO.

796. In fact, in its 2001 and 2004 SEC statements to the public, Aetna marketed itself as a health plan that "typically enters into contracts that provide for all-inclusive per diem and per case rates." (RX 1047 at 9; RX 1650 at 9).

Response to Finding No. 796:

This proposed finding is incomplete and misleading. The very next sentence of the exhibits reads: "The Company has some hospital contracts that pay a percentage of billed charges." (RX 1047 at 9; RX 1650 at 9). Since Aetna has been able to grow its net income seven-fold from 2000 until 2003, it is clear that having such contracts has not affected its bottom line. (RFF ¶ 123; Mendonsa, Tr. 483).

797. During Evanston contract negotiations pre-merger, Evanston knew that health plans requested per diem and per case rates so that they could fix their costs and price their products accordingly for the coming year. (Sirabian, Tr. 5740).

Response to Finding No. 797:

This proposed finding is misleading. Just as some health plans requested per diem or per case rate structures, some hospitals requested discount-off-charges because that reimbursement methodology offers less risk to the hospital. (Chan, Tr. 673). From the hospitals' perspectives, discount-off-charges contracts also are easier to administer. (RFF ¶ 81).

e. Health Plans Lose Predictability Under a Discount off Charges Arrangement

798. **REDACTED** **REDACTED** (Mendonsa, Tr. 525-27, *in camera*).

Response to Finding No. 798:

This proposed finding is incorrect, irrelevant and misleading. **REDACTED**

REDACTED

(RFF ¶ 751, *in camera*).

REDACTED (Mendonsa, Tr. 526-27, 558, *in camera*).

REDACTED

(Mendonsa, Tr. 558, *in camera*).

REDACTED (RFF ¶ 86; Holt-

Darcy, Tr. 1573, *in camera*; Ballengee, Tr. 270-71, *in camera*; Mendonsa, Tr. 526-27, 558-59, *in camera*).

799.

REDACTED

(Ballengee, Tr. 235, *in camera*; Mendonsa, Tr. 524-28, *in camera*. *See* Holt-Darcy, Tr. 1522 (

REDACTED

), *in camera*. *See also* Sirabian, Tr. 5740-41 (It is "hard for [health plans] to forecast their own costs" under a discount off charges arrangement.); Haas-Wilson, Tr. 2647-48, *in camera*; RX 1414 at PHCS 000102; RX 1615 at 4).

Response to Finding No. 799:

The proposed finding is inaccurate and misleading. Since discount-off-charges are the standard reimbursement methodology for outpatient services, this proposed finding's implication that discount-off-charges contracts, by their very nature, are unmanageable is facially misplaced. (RFF ¶ 91). In fact, every single one of the cited MCOs had discount-off-charges arrangements with Evanston Hospital for outpatient services before the Merger. (CX 216 at 15, *in camera* (Unicare); CX 5070 at 36-37 (PHCS); CX 5007 at 4, 7, 10 (Aetna)). And outpatient services account for an increasing proportion of the care delivered by hospitals. (RFF ¶¶ 73-74).

REDACTED

(Ballengee, Tr. 235, *in camera*). On the other hand, when per diem or case rates are negotiated, hospitals assume the risk of treating MCOs' members. (RFF ¶ 81). Even PHCS's annual reports, cited by Complaint Counsel, recognize that "Providers...often request straight discounts or discount off billed charges." (RX 1414 at PHCS 102; RX 1615 at 4).

REDACTED

(Mendonsa, Tr. 558-59, *in camera*). Finally, MCOs can, and do, use escalator clauses to protect themselves against increasing hospital chargemasters. (RFF-Reply ¶ 800).

800. REDACTED (Neary, Tr. 609; Newton, Tr. 366; Holt-Darcy, Tr. 1522, *in camera*; Foucre, Tr. 889. *See* Mendonsa, Tr. 524-28 (REDACTED), *in camera*).

Response to Finding No. 800:

This proposed finding is false, incomplete, not supported by the record and misleading.

REDACTED

(RFF ¶¶ 87-90, *in camera*). For example, in some negotiations, MCOs negotiate escalator clauses. (RFF ¶ 88).

REDACTED (Holt-Darcy, Tr. 1526, *in camera*).

REDACTED (RFF ¶ 89).

REDACTED (RFF ¶ 90; Hillebrand, Tr. 1938-39, *in camera*).

REDACTED (Mendonsa, Tr. 566-67, *in camera*).

REDACTED (Mendonsa, Tr. 558-59, *in camera*; RFF ¶¶ 750-751).

To the extent this proposed finding relies upon Newton, it should be accorded no weight. Newton was never primarily responsible for managed care contracting. (Spaeth, Tr. 2284). Newton was involved in some HPH managed care activities, specifically with HPH's medical service organization and the IPA, but was not involved with the contracting. (Spaeth, Tr. 2285).

801. Under a discount off charges contract, the higher the chargemaster list price, the more health plans have to pay to the hospital. (Porn, Tr. 5670).

Response to Finding No. 801:

This proposed finding is very misleading. Porn immediately clarified that discount-off-charges contracts often have "ceilings," such that increases in chargemasters beyond the ceiling have no impact. (Porn, Tr. 5670). The referenced testimony explicitly discusses the types of protections MCOs are familiar with and use to control the impact of the discount-off-charges contracts they sign. (RFF ¶¶ 87-89; RFF-Reply ¶ 800).

802. **REDACTED**

(Ballengee, Tr. 235, *in camera*).

Response to Finding No. 802:

This proposed finding is misleading to the extent that it ignores that outpatient services are almost always discount-off-charges reimbursement, so the "build[ing] in assumptions for increased costs" is a common and typical endeavor of a MCO. (RFF ¶ 91; RFF-Reply ¶ 799).

803. **REDACTED**

(Ballengee, Tr. 235, *in camera*; Holt-Darcy, Tr. 1522, *in camera*; Neary, Tr. 609. *See* RX 1414 at PHCS 000102 (Under a discount off charges arrangement, health plan customers become "susceptible to unpredictable increases in costs."); RX 1615 at 4).

Response to Finding No. 803:

This proposed finding is vague, confusing and not supported by the record. First, Complaint Counsel did not call a single employer or customer to testify in this case. Second, discount-off-charges contracts place the risk with the MCO – in many cases, the *insurer* – as opposed to the hospital charged with providing care to every patient who walks through the door. (Chan, Tr. 673; Hillebrand, Tr. 1866-67 (explaining how fixed rates expose hospitals to the risk for treating the sickest patients)). Third, MCOs have always engaged in the practice of estimating the costs associated with discount-off-charges for outpatient services. (RFF ¶ 91; RFF-Reply ¶ 799). Fourth, the most common payment methodology for both inpatient and outpatient services used to be discount-off-charges in the Chicago area. (RFF ¶ 83). Fifth, MCOs, including PHCS, can and do negotiate provisions that provide protection to any charge increases, such as escalator clauses. (RFF ¶¶ 87-90; RFF-Reply ¶¶ 800-801).

f. Health Plans Typically Prefer Fixed Rates, in Part Because Health Plans Achieve Lower Rates Through Such Arrangements

804. Per diem rates are beneficial to health plans in part because they result in greater discounts "up to 50%" for services than do discount off charges arrangements. (Chan, Tr. 675-76).

Response to Finding No. 804:

This proposed finding is incorrect, not supported by the record and misleading. Chan did not testify as indicated in this proposed finding. (Chan, Tr. 675-76). Chan stated only that, as a general matter, some per diem contracts resulted in greater discounts than discount-off-charges arrangements. (Chan, Tr. 675). Chan further testified that if a per diem contract were only generating a 20% effective discount, HPH would initiate renegotiations to try to "reduce the loss to the hospital." (Chan, Tr. 676). **REDACTED**

REDACTED (RFF ¶ 93, *in camera*).

805. Pre-merger, Evanston and Highland Park's fixed rate contracts gave health plans "much higher" discounts than the contracts that were structured in a discount off charges arrangement. (Chan, Tr. 675-76).

Response to Finding No. 805:

Respondent has no specific response.

g. Health Care Providers Prefer Discount off Charges Arrangements Because Such Arrangements Mean Less Risk and More Profit for the Providers

806. Discount off charges arrangements represent "less risk" for a provider and are therefore preferable for the provider over per diem and per case arrangements. (Chan, Tr. 673).

Response to Finding No. 806:

Respondent has no specific response. (RFF ¶ 81).

807. Fixed rate contracts with per diem or per case rates limit the amount that the hospital can be reimbursed when a patient is "very sick and incur[s] a lot more charges." (Chan, Tr. 673).

Response to Finding No. 807:

This proposed finding is incomplete. Fixed rate agreements (without a stop loss) throw all of the risk of a sick patient needing health care on the hospital. (Chan, Tr. 673; Hillebrand, Tr. 1866-67 (explaining how fixed rates expose hospitals to the risk for treating the sickest patients)).

808. A discount off charges contract is also beneficial to a hospital because it reduces the overall discount that a provider gives health plans and represents an opportunity to increase net revenue. (Chan, Tr. 675-76; Newton, Tr. 366).

Response to Finding No. 808:

This finding is based on untrue assumptions and misleading. As Chan explained in the referenced testimony, if a contract's effective discount were greater than approximately 20%, she

would initiate contract renegotiations on behalf of HPH with the MCO to increase rates. (Chan, Tr. 675-76). There is no support for the proposition that, as a general matter, discount-off-charges agreements universally offer lower discounts than per diem arrangements. To the extent that this proposed finding relies to any extent upon the testimony of Newton, it should be disregarded entirely. Newton was never primarily responsible for managed care contracting. (Spaeth, Tr. 2284). Newton was involved in some HPH managed care activities, specifically with HPH's medical service organization and the IPA, but was not involved with the contracting. (Spaeth, Tr. 2285).

809. Once a contract's reimbursement rate is negotiated as a certain percent discount off charges, a hospital can simply "raise [its] gross charges," to increase its net revenue. (Newton, Tr. 366). "There's no limit" on a hospital's ability to "raise gross prices" under a discount-from-charges arrangement. (Newton, Tr. 366).

Response to Finding No. 809:

The proposed finding is incorrect. REDACTED

REDACTED

(RFF ¶ 88, *in camera*).

REDACTED (RFF ¶ 89, *in camera*).

(Ballengee, Tr. 260-61, *in camera*).

REDACTED

(Porn, Tr. 5670; Mendonsa, Tr. 558, 566-67, *in camera*; Hillebrand, Tr. 1938-39; Holt-Darcy, Tr. 1523, 1525-26, *in camera* (

REDACTED

This proposed finding also is not supported by reliable evidence. Newton has never been employed by a managed care company. (Newton, Tr. 452-53). In his early years at HPH,

Newton was aware of, but not directly involved with negotiations with managed care companies. (Newton, Tr. 453-54). Newton was never primarily responsible for managed care contracting. (RFF-Reply ¶ 800).

810. The rates that health plans pay through a discount off charges arrangement are linked to the hospital's chargemaster list pricing. (Porn, Tr. 5670).

Response to Finding No. 810:

Respondent has no specific response. (RFF ¶ 80). In addition, this proposed finding is misleading to the extent that it ignores the fact that rates in a discount off charges arrangement may not be linked to the chargemaster list price under some circumstances such as the presence of an escalator clause. (RFF-Reply ¶ 896).

811. There is "no restraint on a hospital's ability to raise its list pricing." (Newton, Tr. 366).

Response to Finding No. 811:

This proposed finding is repetitive, incorrect and not supported by reliable evidence. (RFF-Reply ¶ 809).

812. The more discount-off-charges contracts a provider has, the more impact a chargemaster increase will have. (Porn, Tr. 5670).

Response to Finding No. 812:

This proposed finding is incomplete and misleading. Many discount-off-charges contracts include provisions that limit the effect of changes to a chargemaster. (Porn, Tr. 5670; RFF ¶¶ 87-89; RFF-Reply ¶¶ 800, 809).

h. With Regard to the Merger, ENH Strategized to Move All Health Plan Contracts to a Discount off Charges Arrangement

813. **REDACTED**

(CX 1373 at 14, *in camera*; RX 2047 at 204-05 (Ogden, Dep.), *in*

camera. *See also* CX 67 at 49; (Bain advised ENH to "Lead with Percent of Charges"); CX 75 at 16).

Response to Finding No. 813:

This proposed finding is not supported by the cited evidence. (RFF ¶ 666).

REDACTED

(CX 1373 at 14, *in camera*; CX 67 at 49; CX 75 at 16).

REDACTED

(RX 2047, *in camera*).

814.

REDACTED

(CX 1373 at 14, *in camera*; Chan, Tr. 673-74, *in camera*).

Response to Finding No. 814:

This proposed finding is misleading. Chan admitted that she expected Evanston Hospital's chargemaster to be higher than HPH's chargemaster because Evanston Hospital was a tertiary care center. But she had no "experience really reviewing those charges." (Chan, Tr. 674). She also never did any work on ENH's chargemaster. (Chan, Tr. 744). The reliable evidence at trial was that ENH's chargemaster was "well below the marketplace." (RFF ¶¶ 932-964).

815. In order to "better the terms" of health plan contracts during the post-merger renegotiations, ENH representatives strategized to "shif[t], whenever possible, to a discount from charges from a per diem." (Newton, Tr. 366; Hillebrand, Tr. 1855. *See* Hillebrand, Tr. 1705-06 (Mr. Hillebrand's "first negotiating step" with health plans in 2000 was to "move to discount off charges.")).

Response to Finding No. 815:

This proposed finding is not based on reliable evidence. Newton was never primarily responsible for managed care contracting. (RFF-Reply ¶ 800). On the advice of Bain, Hillebrand testified that Evanston Hospital sought to propose discount-off-charges rates in

opening offers with the hope that such initial offers would result in agreements on those terms or "having better case rates, per diems, and/or other methodology as [ENH and the MCO] finalized negotiation." (Hillebrand, 1855; RFF ¶ 713). "Some health plans agreed to [move to discount-off-charges]; others did not." (Hillebrand, Tr. 1706; RFF ¶ 713).

816. By switching from a per diem arrangement to a discount off charges arrangement, ENH ensured that it would be reimbursed based upon its chargemaster list prices. (Porn, Tr. 5670; Chan, Tr. 743-44. *See* CCFF 791).

Response to Finding No. 816:

This proposed finding is not supported by the evidence and misleading. (RFF-Reply ¶ 791). Some MCOs negotiated with ENH for per diems and case rates for inpatient services in 2000. (Hillebrand, Tr. 1706). Moreover, many discount-off-charges contracts include provisions such as escalator clauses. (Porn, Tr. 5670; RFF ¶¶ 87-89). And again, discount-off-charges arrangements are universally accepted for outpatient services. (RFF-Reply ¶ 799; RFF ¶ 91).

i. ENH Achieved Discount off Charges Arrangements with Various Health Plans Through the Merger

817. ENH successfully moved a number of health plans to discount off charges arrangements after the merger. (Hillebrand, Tr. 1706).

Response to Finding No. 817:

This proposed finding is misleading. As Hillebrand testified, "[s]ome health plans agreed to [discount-off-charges]; others did not." (Hillebrand, Tr. 1706).

818. **REDACTED**

(Ballengee, Tr. 252, 255, *in camera*; Hillebrand, Tr. 1893; *compare* CX 116 at 2, *in camera*, CX 117 at 1, *in camera*, *and* CX 5072 at 23, *in camera*).

Response to Finding No. 818:

This proposed finding is and misleading. {

REDACTED

(CX 117 at 1, *in camera*; CX 5072 at 23, *in camera*).

Ballengee, Tr. 258-61, *in camera*; CX 5072 at 23, *in camera*).

REDACTED

Ballengee, Tr. 258-59, *in camera*; CX 5072 at 23, *in camera*).

(Ballengee, Tr. 258, *in camera*; CX 5072 at 23, *in camera*).

REDACTED

(Ballengee, Tr. 259-60, *in camera*; CX 5072 at 23, *in camera*).

REDACTED

(CX 117 at 1, *in camera*; Ballengee, Tr. 258-61, *in camera*; CX 5072 at 23, *in camera*).

819.

REDACTED

(Hillebrand, Tr. 1947, *in camera*; *compare* CX 5067 at 15, *in camera*, CX 5059 at 17, *and* CX 5065 at 17).

Response to Finding No. 819:

This proposed finding is incorrect, incomplete and misleading.

REDACTED

(CX 5059 at 18; CX 5065 at 19).

REDACTED

(RFF ¶¶ 73-74).

820. **REDACTED** (Holt-Darcy, Tr. 1536, 1539, 1563, *in camera*; CX 5075 at 17, *in camera*).

Response to Finding No. 820:

This proposed finding is incomplete, and misleading.

REDACTED (CX 216 at 15, *in camera*).

(RFF ¶¶ 73-74)

REDACTED

(CX 5075 at 17, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1541-42, *in camera*; (testifying

); RFF ¶¶ 870-871, *in camera*). **REDACTED**

(RFF ¶ 871, *in camera*).

821. { **REDACTED** ¶.} (CX 1373 at 14, *in camera*. *See* CCFF 898, 901, *in camera*).

Response to Finding No. 821:

This proposed finding is misleading and incomplete. Discount-off-charges arrangements tend to be "more favorable" to and preferred by hospitals, as a general matter, because they shift the risk of health care services to the health insurer. (RFF ¶ 81; RFF-Reply ¶¶ 797, 803, 806-807).

B. With the Merger, ENH Demanded One Price for All Three Hospitals

1. ENH Wanted All Three Hospitals to Be Put on Whichever Pre-Merger Contract for the Particular Health Plan Had Higher Rates, Evanston's or Highland Park's

a. ENH Moved All Three Hospitals to the Same Health Plan Contract

822. During the winter of 1999, ENH senior management met to discuss strategies for integrating the health plan contracts of the merging parties. (Hillebrand, Tr. 1703; Newton, Tr. 363-65).

Response to Finding No. 822:

Respondent has no specific response.

823. Senior management decided that the merged entity would put the three ENH facilities on the same contract and charge the same rate for all three facilities. (Hillebrand, Tr. 1703; Newton, Tr. 365. *See* CX 75 at 12 (Bain advised ENH to "[s]et high targets and preferred structure" for health plan contracts.)).

Response to Finding No. 823:

This proposed finding is misleading. Since one of the principles of the Merger was to create an integrated health care delivery system, ENH decided to cover all three hospitals on the same contract for each MCO at the same prices. (Hillebrand, Tr. 1703; RFF ¶¶ 1, 7, 289, 296, 761, 840).

The testimony of Newton cited by Complaint Counsel does not relate to or support the proposed finding. (Newton, Tr. 365). Further, the quotation from CX 75 does not support or

relate to the text of the proposed finding and, as a result, is confusing and misleading. (CX 75 at 12).

824. **REDACTED** (Holt-Darcy, Tr. 1561, *in camera*; Foucre, Tr. 890; Ballengee, Tr. 176; Neary, Tr. 602; Neary, Tr. 756, *in camera*; Holt-Darcy, Tr. 1528, *in camera*; Dorsey, Tr. 1447; CX 262 at 2, *in camera*).

Response to Finding No. 824:

This proposed finding is misleading. Beginning in the 1970s, Evanston and Glenbrook Hospitals were the first "multi-campus healthcare system" in the United States to have one Medicare identification number. (Hillebrand, Tr. 1840-41). Evanston and Glenbrook Hospitals were also unique because the two hospitals shared a single medical staff. (Hillebrand, Tr. 1840-41). After the Merger, ENH brought to bear these same principles and established a single "medical staff with privileges at all three hospital campuses." (Hillebrand, Tr. 1840). Since the hospitals were all one system and had the same medical staff, it did not make any sense for the rates to be any different across the three campuses. (RFF ¶ 11). Indeed, over time, as ENH was able to bring the higher quality of care and expanded services to HPH, such an approach made even less sense. The unified pricing structure represents one of the cost-saving efficiencies of the Merger. (RFF ¶¶ 2539-2541 (noting that the unified pricing structure and single Medicare provider number accounts for at least $5.2 million in annual cost savings)).

Finally, one citation to Holt-Darcy's testimony does not support nor relate to the proposed finding. (Holt-Darcy, Tr. 1561, *in camera*).

REDACTED

REDACTED

(Foucre, Tr. 1118, *in camera*).

825. Under ENH's proposed billing system, health plans "can't distinguish between services at the three hospitals" to determine which services were rendered at a particular hospital in the system. (Foucre, Tr. 890-92).

Response to Finding No. 825:

This proposed finding is misleading. The Health Care Financing Administration has granted the integrated ENH system a single Medicare identification number. (Hillebrand, Tr. 1840-41). Since April 3, 1977, when this system was established, MCOs have *never* complained about the single Medicare number. (Hillebrand, Tr. 1843). The only evidence offered by Complaint Counsel on this issue is Foucre's summary testimony that this situation was "challenging" – testimony without any further explanation. (Foucre, Tr. 891).

826. United found ENH's insistence on one tax identification number and identical rates for all three hospitals to be "challenging" under the 2000 renegotiated contract. (Foucre, Tr. 890-92).

Response to Finding No. 826:

This proposed finding is misleading and should be afforded no weight. (RFF-Reply ¶ 825).

827. Evanston Hospital, Glenbrook Hospital, and Highland Park hospital did not merit equal reimbursement rates. (Dorsey, Tr. 1446-47).

Response to Finding No. 827:

This proposed finding is not supported by the record and misleading. Since 1977, Evanston and Glenbrook Hospitals have had a single Medicare identification number. (RFF-Reply ¶ 825). Not a single MCO has ever complained, either before or after the Merger, about paying Evanston and Glenbrook Hospitals a single rate because of the unified Medicare identification. (RFF-Reply ¶¶ 825, 828; RFF ¶ 11).

828. Glenbrook Hospital did not have "the same level of service or the same requirement of service . . . as other hospitals within the ENH network." (Dorsey, Tr. 1447).

Reponses to Finding No. 828:

This proposed finding is unsupported by the record. Before the Merger, every MCO reimbursed Glenbrook Hospital at the same rates as Evanston Hospital. (RFF ¶ 11; CX 5065 at 17-20 (proving Great West reimburses Glenbrook at same rates); CX 5007 at 4-12 (same for Aetna); CX 5070 at 10 (same for PHCS)).

829. Evanston Hospital did not "warran[t] the same reimbursement structure as [the health plan was] giving to Highland Park prior to the merger." (Dorsey, Tr. 1447).

Response to Finding No. 829:

Respondent agrees that Evanston Hospital did not warrant the same reimbursement structure as MCOs gave to HPH before the Merger. Nevertheless, this proposed finding is misleading to the extent it suggests that HPH warranted higher rates than Evanston Hospital before the Merger. It was established at trial that Evanston Hospital was (and still is) one of the top academic tertiary hospitals in the country. (RFF ¶¶ 3, 8, 30-32).

REDACTED (Mendonsa, Tr. 565, *in camera*; RFF ¶¶ 102-103, *in camera*).

REDACTED

(Mendonsa, Tr. 565-66, *in camera*).

830. None of the disagreements that health plans had with ENH's proposed contract structure stopped the merged entity from successfully moving all three facilities to the same health plan contract and equalizing the charges for all three sites post-merger. (*See, e.g.*, CX 5174 at 11 ( ), *in camera*; CX 5072 at 11 (*in camera*; CX 5064 at 15, 17 (REDACTED *in camera*; CX 5067 at 15 (REDACTED), *in camera*. *See* Hillebrand, Tr. 1707-08, 1875 (Except for losing One Health for a short period of time, ENH lost no health plan customers over the course of the 2000 renegotiations.); Noether, Tr. 6192-93; CX 5008 at 5 ( ), *in camera*; CX 5075 at 17 (*in camera*; CX 5046 (REDACTED *in camera*). REDACTED

Response to Finding No. 830:

This proposed finding is misleading. As noted earlier, since 1977, no MCO ever complained about contracting and administering claims to the ENH campuses under the same rates and Medicare identification number. (RFF-Reply ¶¶ 823-825, 827-829). The cited evidence shows only that ENH and its MCO customers were able to agree to terms and execute mutually beneficial contracts at or around the time of the Merger. Citations to the executed contracts do not support the proposed finding that MCOs had any disagreements whatsoever that were not mutually resolved through the negotiation process.

831. In December 1999, Evanston's rates were assigned to all three facilities for Aetna, Blue Cross PPO, and CCN health plans. (CX 5940 at 15-16).

Response to Finding No. 831:

Respondent has no specific response except to note that Evanston Hospital requested to assign HPH's rates to Aetna and CCN, but after those MCOs refused, Evanston Hospital's rates were adopted. (RFF ¶¶ 747, 787; RX 779 at ENH JL 2817).

Further, Complaint Counsel relies only on Respondent's interrogatory answers in this proposed finding. However, Respondent's answer to the interrogatory contains several fundamental objections to the interrogatory question and only identifies documents from which the answer may be "derived or ascertained." (CX 5940 at 15).

832. In December 1999, Highland Park's rates were assigned to all three facilties for Preferred Plan, Multiplan PPO, Formost, Admar, Health Marketing, and Beech Street/CAPP Care health plans. (CX 5900 at 1-7; CX 5901 at 1-2; CX 5940 at 15).

Response to Finding No. 832:

The proposed finding is irrelevant and incomplete. Complaint Counsel's case did not focus on these MCOs. Moreover, soon after Preferred Plan's HPH rates were assigned to Evanston Hospital, Preferred Plan renegotiated larger discounts in its favor. (RFF ¶¶ 849-852).

Complaint Counsel relies on Respondent's interrogatory answers in this proposed finding. However, Respondent's answer to the interrogatory contains several fundamental objections to the interrogatory question and only identifies documents from which the answer may be "derived or ascertained." (CX 5940 at 15).

b. ENH Moved Health Plans to Whichever Contract Had Higher Rates, the Evanston Contract or the Highland Park Contract

833. In addition to placing all three facilities on the same contract with the same rate structure, ENH senior management also planned to "use the better of the two [hospital] contracts" for health plans post-merger. (Hillebrand, Tr. 1856, 1705; Neaman, Tr. 1031, 1346-47).

Response to Finding No. 833:

This proposed finding is incomplete and misleading. (RFF ¶ 715). Moreover, this proposed finding ignores that MCOs used the very same practice after their mergers.

REDACTED (Holt-Darcy, Tr. 1547-48, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1548, *in camera*).

834. ENH decided to take whichever was the higher of the two hospital contracts and apply those rates across the board for the post-merger entity. (Hillebrand, Tr. 1705. *See* CX 75 at 8 (Bain advised ENH to "Identify Superior Contracts" between the two hospital contracts and "notify [health plans] that HP is now assigned to ENH" for those contracts in which "HP [rate] is superior.")).

Response to Finding No. 834:

This proposed finding is misleading. ENH used the higher of the two hospital contracts as the starting point in its negotiations. (Hillebrand, Tr. 1856). However, MCOs negotiated different terms and modified rates from ENH's initial proposals, such as escalator clauses, per diem or per case rates and stop loss terms. (RFF ¶¶ 750-752, 783, 788-789, 841, 846-847, 851-852, 871-872, 889-892). **REDACTED**

REDACTED

(RFF ¶¶ 846-847). Moreover, MCOs like United indicated that it was their preference to use the better of the two contracts as a benchmark in negotiations. (CX 111 at 1). Similarly, after Unicare acquired Rush Prudential, it sought to use the better of its two contracts with hospitals. (RFF-Reply ¶ 833).

835. REDACTED

(CX 1373 at 15, *in camera*).

Response to Finding No. 835:

This proposed finding is incomplete and misleading. REDACTED

(CX 1373 at 15, *in camera*; Hillebrand, Tr. 1705). REDACTED

(CX 1373 at 15, *in camera*). It was this realization in the pre-Merger due diligence that has become known as "learning about demand" in this litigation. (RFF ¶¶ 656-669).

836. REDACTED (CX 5900 at 2-7; CX 5901; CX 5902, *in camera*; Hillebrand, Tr. 1705).

Response to Finding No. 836:

This proposed finding is incomplete and misleading. During the negotiations, United even suggested that the parties "utilize the better of [the] existing contracts." (CX 111 at 1).

837. REDACTED

REDACTED (*Compare* CX 5900 at 1 *and* CX 1373 at 14, *in camera*).

Response to Finding No. 837:

This proposed finding is vague, confusing, immaterial and misleading.

REDACTED (RFF ¶¶ 831-832, 834, 836, *in camera*).

838. "Conver[ting] all payer contracts to the most favorable rates" was an "Opportunity Ite[m]" for the merged entity that Ernst and Young projected could provide anywhere from $500,000 to $1,000,000 in possible revenue enhancements. (CX 2386 at 2).

Response to Finding No. 838:

This proposed finding is incomplete and misleading. During the due diligence, Ernst & Young recognized dozens of "Opportunity Items" and "Expense Reductions." (CX 2386 at 2). For instance, by dissolving Consolidated Medical Laboratories ("CML") and using ENH's laboratories, the merged entity anticipated saving up to $1.2 million in annual savings (not to mention the value of the quality improvements in laboratory functions). (CX 2386 at 4; RFF ¶¶ 1791, 1793-1865). Several Merger efficiencies would lead to annual savings and revenue enhancements. (RFF ¶¶ 2539-2541).

839. In fact, as of March 2000, converting the payer contracts to the more favorable rates had exceeded ENH's opportunity targets seven-fold. (CX 2386 at 2). Ernst & Young's March 2000 update showed that ENH had enhanced its revenue by $7 million dollars, a figure that was "ongoing." (CX 2386 at 2. *See* CX 2234 at 2 (An April 2000 Ernst & Young update also showed revenue enhancement achievements from converting the payer contracts to the most favorable rates to be $6 million more than the $1 million target figure.)).

Response to Finding No. 839:

This proposed finding is incomplete and misleading. The fact that by simply moving contracts to the more favorable contract resulted in $7 million in additional revenue highlights how far below market Evanston Hospital's prices were before the Merger. (CX 2386 at 2). As was proven at trial, HPH had more favorable rates and terms than Evanston Hospital. (RFF ¶¶ 677-693, 701-703, 734). [REDACTED] (RFF ¶ 681, *in camera*). The evidence at trial convincingly showed that post-Merger revenue increases were attributable to ENH's learning about the demand for its services and, as a result, pricing accordingly at competitive rates. (RFF ¶¶ 656-893, 1110-1064).

840. One month later, in May 2000, Ernst and Young reported that converting the payer contracts to the more favorable of the Highland Park or Evanston contract had increased ENH's revenue *another* $3 million dollars, for a total of $10 million in revenue enhancements. (CX 23 at 2 (emphasis added)).

Response to Finding No. 840:

This proposed finding is incomplete and misleading. (RFF-Reply ¶ 839).

841. The $10 million revenue enhancement that ENH gained by converting all payer contracts to the most favorable rates was "ongoing" as of May, 2000. (CX 23 at 2).

Response to Finding No. 841:

Respondent has no specific response.

842. The question of whether Highland Park should be put on the Evanston pre-merger contract for a particular health plan or whether Evanston should be put on the Highland Park pre-merger contract for that health plan arose because of the merger. (Hillebrand, Tr. 1703-05; CX 30 at 1, 3; Neaman, Tr. 1031). In short, the shift of all three hospitals to one of the two pre-merger contracts for each health plan and the price increases resulting from the shift to the more favorable contract were both due to the merger. (Hillebrand, Tr. 1703-05; CX 30 at 3; Neaman, Tr. 1031).

Response to Finding No. 842:

This proposed finding is vague and confusing. If there were no Merger, there would be no choice as to which contracts to assign to the merged entity. However, as was shown at trial, renegotiation of the rates with MCOs would have occurred even in the absence of the Merger. (RFF ¶¶ 724, 733). The Merger served as a catalyst for ENH to renegotiate its outdated and under-market contracts. (RFF ¶ 728).

c. Some Health Plans Disagreed with the Automatic Assignment of the Higher-Rate Contract to Cover All Three ENH Hospitals

843. REDACTED

(Neary, Tr. 603, 606; Holt-Darcy, Tr. 1560-61, *in camera*).

Response to Finding No. 843:

This proposed finding is incorrect, not supported by reliable evidence and misleading. The cited testimony of Neary omits the fact that One Health had always paid a single rate for Glenbrook and Evanston Hospitals. (CX 5065 at 17-20).

REDACTED

(CX 5085 at 1-3; CX 5091 at 1-3; CX 216 at 14-16, *in camera*).

844. REDACTED

(Neary, Tr. 603, 644; Neary, Tr. 761, *in camera*).

Response to Finding No. 844:

This proposed finding is not supported by the evidence and is based wholly on unreliable lay opinion – especially to the extent it asserts that Evanston Hospital's rates were not below

market before the Merger.

REDACTED

(Neary, Tr. 603, 644; Neary, Tr. 761, *in camera*). This admission is consistent with the learning about demand theory.

REDACTED

(RFF ¶ 101, *in camera*; Neary, Tr. 622).

REDACTED

(RFF ¶¶ 30-33, 41-42, 103, *in camera*).

REDACTED

(RFF ¶ 103, *in camera*).

The fact that the negotiated rates charged by Evanston Hospital (an academic hospital) were below those charged by pre-Merger HPH (a community hospital) shows that Evanston Hospital's rates were, in fact, below market. (RFF ¶¶ 796-97). As Neary admitted, ENH emphasized in the One Health negotiations during 2000 that ENH needed a corrective increase to catch-up with its competitors. (Neary, Tr. 634). Neary further conceded that "it had been several years since the contracts had been renegotiated and that it was *appropriate* to – to increase some of the rates." (Neary, Tr. 608 (emphasis added)).

845. One Health also deemed it inappropriate to increase One Health's rates at Evanston to the level of Highland Park's rates because "the other hospitals that were in Evanston's community were not at that same level [of contract rates] as Highland Park." (Neary, Tr. 606).

Response to Finding No. 845:

This proposed finding is misleading. (RFF-Reply ¶ 844).

846.

REDACTED

(Holt-Darcy, Tr. 1560, *in camera*. *See* Holt-Darcy,

Tr. 1536, 1560-61, (REDACTED), *in camera*).

Response to Finding No. 846:

This proposed finding is false and misleading. Before the Merger, Unicare did not have a contract with HPH. (CX 114 at 1; RFF 861). Therefore, this proposed finding is factually inaccurate.

Assuming that Complaint Counsel intended to refer to Rush Prudential's pre-Merger contracts with HPH, the proposed finding is still incomplete and misleading. HPH's HMO contract with Rush Prudential became effective on May 1, 1994. (CX 5076 at 1).

REDACTED (Holt-Darcy, Tr. 1503, *in camera* (REDACTED).

847. REDACTED

(Hillebrand, Tr. 1705-06; Ballengee, Tr. 174-75; Neary, Tr. 763-64, *in camera*; Dorsey, Tr. 1439-42; Holt-Darcy, Tr. 1563, *in camera*; CX 5900 at 1).

Response to Finding No. 847:

This proposed finding is vague, incomplete and misleading.

REDACTED (RFF ¶¶ 831-837, *in camera*).

(RFF ¶ 841). After lengthy negotiations, PHCS negotiated for rates that were only an increase for Evanston and Glenbrook Hospitals, not HPH. (Ballengee, Tr. 175-76; RFF ¶¶ 716, 841-843).

REDACTED (RFF ¶ 846, *in camera*).

For Great West, Neary testified that the prices on the executed contract were not the same as what had been offered by ENH. (Neary, Tr. 763-64).

The citations to the testimony of Hillebrand and Dorsey do not support this proposed finding. (Hillebrand, Tr. 1705-06).

2. In Re-Negotiating Contracts, ENH Demanded the Higher of the Two Contract Rates Plus a Premium

a. ENH Went With the More Favorable Contract and Then Added a Premium to the Higher Rate

848. Using the more favorable of the two hospital contract rates was only ENH's "starting point" in health plan renegotiations after the merger. (Hillebrand, Tr. 1856, 1705).

Response to Finding No. 848:

Respondent has no specific response. (RFF ¶ 715).

849. In fact, during the winter of 1999 ENH senior management had decided that "the combined entity would use the better of the Highland Park or Evanston [contract rate] *and then add a premium to that.*" (Newton, Tr. 364 (emphasis added). *See* Hillebrand, Tr. 1705).

Response to Finding No. 849:

This proposed finding is incomplete and misleading. Bain advised ENH that "Targeting 10 percent above the best contract from either hospital" was ENH's "aggressive goal." (RFF ¶ 715). This proposed finding ignores the fact that several contracts, even the better of the two, were outdated or expired. For instance, Aetna's contract with HPH (the better of the two contracts) was from 1996. (CX 5001 at 1-2).

REDACTED (CX 5068 at 5, *in camera*). HPH's contracts with Great West and HFN dated from 1996, as well. (RFF ¶¶ 794, 810-812). CCN's contract with HPH, which was better than Evanston Hospital's contract with this MCO, was executed in 1992. (CX 5222 at 1). As a result, the strategy to seek an improvement over the better of the

two contracts merely was consistent with the goal of bringing ENH's contracts up to an appropriate market level.

850. As one of the "benefits of the merger," senior management recognized "the additional negotiating power and leverage with the payors." (Newton, Tr. 365; Chan, Tr. 709-10).

Response to Finding No. 850:

This proposed finding is incomplete, misleading and mischaracterizes the cited testimony. As an initial matter, the testimony of both Newton and Chan relating to the reasons for the Merger should be disregarded.

Newton was never more than a vice president of "business affairs" at HPH. He left ENH soon after the Merger and is now Chief Executive Officer of Swedish Covenant Hospital, an admitted competitor of ENH. (Spaeth, Tr. 2282-83, Hillebrand, Tr. 2028-29; Newton, Tr. 294-95, 279). Moreover, Newton did not have responsibility for financial matters, he did not have primary responsibility for Merger strategy, he was excluded from most Merger discussions, and he was not primarily responsible for managed care contracting. (Spaeth, Tr. 2283-84; Newton, Tr. 436, 452-53, 512-13).

This explains why Newton's testimony, which is quoted in the proposed finding, is distinctly limited to his own beliefs, not the representations or beliefs of "senior management." The question to which Newton responds is prefaced with "in your mind" and "what do you mean by that." (Newton, Tr. 365). In response, Newton limited his answers with "in my mind" and, therefore, did not purport to speak on behalf of "senior management" (a term that is undefined in this proposed finding). (Newton, Tr. 365).

Chan's involvement with Merger discussions was even more limited, consisting merely of attending a "couple of [Merger] integration meetings." (Chan, Tr. 659). **REDACTED**

REDACTED

(Chan, Tr. 840, *in camera*).

The citation to the testimony of Chan does not support the proposed finding. Chan testified that ENH's competition came from Northwestern Memorial and Advocate Lutheran General more so than HPH. (Chan, Tr. 706-10). Most important, she testified that "Highland Park really could not replace Evanston for all their services." (Chan, Tr. 706). Instead, this Court should rely on Bain's extensive analysis, which concluded that Evanston Hospital provided services that HPH did not and that, overall, HPH was "too small" to be important to MCOs during negotiations. (RFF ¶ 720).

851. ENH Negotiators would use this additional leverage to "seek additional price from the health plans" and to "increase the revenue to the combined entity." (Newton, Tr. 364-65. *See* CX 67 at 49 (ENH strove to "Justify premium pricing (i.e., above the competitive average.")).

Response to Finding No. 851:

This proposed finding is false and not supported by the evidence. Nor is this proposed finding based upon reliable testimony. Newton was never more than a Vice President of "business affairs" at HPH, left ENH soon after the Merger and is now Chief Executive Officer of Swedish Covenant Hospital, an admitted competitor to ENH. (Spaeth, Tr. 2282-83; Hillebrand, Tr. 2028-29, Newton, Tr. 279, 294-95; RFF-Reply ¶ 1465). Moreover, Newton did not have responsibility for financial matters, he did not have primary responsibility for Merger strategy, he was excluded from most Merger discussions, and he was not primarily responsible for managed care contracting. (Spaeth, Tr. 2283-84, Newton, Tr. 436, 452-53, 512-13).

Moreover, Bain advised ENH to ask for a price higher than what it might ultimately be satisfied with. (RFF ¶ 715). REDACTED

REDACTED (RFF ¶¶ 3, 8, 16, 715, 718-719, 732; RFF ¶¶ 30-32, *in camera*).

Finally, this proposed finding ignores that ENH renegotiated some rates even lower than what was in place at HPH before the Merger. (RFF ¶¶ 735-736).

852. ENH admitted that the merged entity was successful in 2000 in negotiating prices above the pre-merger rates of either Evanston or Highland Park for numerous payors. (Hillebrand, Tr. 1705).

Response to Finding No. 852:

This proposed finding is false and misleading. Hillebrand testified on the cited page that ENH only negotiated rates higher than either of the pre-Merger hospitals' rates "in some cases." (Hillebrand, Tr. 1705).

The record reflects that, for several MCOs – including PHCS, United's PPO and POS plans, CCN, Health Network, Preferred Plan and First Health – ENH ultimately agreed to rates that were *lower* than what HPH had in place before the Merger. This was the case even though pre-Merger HPH had higher rates than Evanston Hospital. (RFF ¶¶ 716, 735-736, 785, 789, 852).

853. In an October 2000 "Sequential Listing of Accomplishments," Mr. Neaman reported that the merged entity had successfully achieved an additional $18 million per year through managed care contract renegotiations. (CX 17 at 5-8. *See also* CX 13 at 1 (In July, 2000, Mr. Neaman reported an additional $16 million per year in total managed care re-negotiation benefits to the board); *plus* CX 17 at 8 (September, 2000, Humana contract renegotiation resulted in $2 million annualized economic revenue). *See* CCFF 855).

Response to Finding No. 853:

This proposed finding is incomplete and misleading because the cited revenue enhancements were not a result of market power but, instead, a result of ENH bringing its rates to market through the Merger integration process. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374-1376,

1378, 1395-1397). Moreover, the rate negotiations with Humana were completely unrelated to the Merger. (RFF ¶¶ 816-819, 822-825).

854. Among ENH's "accomplishments" were the re-negotiations of the United, PHCS, Aetna, Blue Cross/Blue Shield, and Cigna contracts, which collectively resulted in an annualized economic value of $15 million for ENH ($3 million per health plan). (CX 17 at 5-8). ENH realized an additional $3 million annually from the renegotiation of the Humana contract and from the re-negotiation of other smaller PPO contracts combined ($2 million for Humana and $1 million for some "smaller" PPO contracts combined). (CX 17 at 5, 8).

Response to Finding No. 854:

This proposed finding is incomplete and misleading. ENH negotiated improved rates with MCOs not by exercise of market power, but by bringing its rates up to competitive market levels. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374-1376, 1378, 1395-1397). Moreover, ENH's rate negotiations with Humana had nothing to do with the Merger. (RFF-Reply ¶ 853).

With respect to United, the evidence showed that the pre-Merger contract was outdated, under-market and below ENH's costs. (RFF ¶¶ 877-878, 883-893).

REDACTED

(RFF ¶¶ 738-756).

REDACTED

(RFF ¶ 827-848). With respect to Cigna, Complaint Counsel failed to prove anything at all with respect to those negotiations. ENH and Cigna's contract negotiation yielded a mutually beneficial contract that was renewed in 2003. (RFF ¶¶ 778-784).

855. Using Mr. Hillebrand's figure of $3.5 million in annualized economic benefit from the re-negotiation of the United contract instead of Mr. Neaman's $3 million figure increases ENH's total annualized economic revenue from the re-negotiation of managed care contracts to $18.5 million. (CX 5 at 5. *See* CX 17 at 5-8 (1/00 "Other (smaller) PPO agreement re-negotiations" ($1 million), 3/00 "Private Healthcare re-negotiation" ($3 million), 5/00 "Renegotiated Aetna contract" ($3 million), 6/00 "Blue Cross Contract re-negotiation" ($3 million), 6/00 "Cigna Contract re-negotiation" ($3 million), and 9/00 "Humana Contract Re-negotiations" ($2 million)).

Response to Finding No. 855:

This proposed finding is repetitive, incomplete and misleading. (RFF-Reply ¶ 854).

856. Evanston "had never achieved" a price increase as high as $18 million before the merger. (Hillebrand, Tr. 1722).

Response to Finding No. 856:

This proposed finding is incomplete and misleading. As proved at trial, it was not until after the passage of the Balanced Budget Act and a convergence of economic factors that Evanston Hospital began to focus upon revenue growth from managed care negotiations. (RFF ¶¶ 105-110, 624-645). Also, before the Merger, Sirabian, who was in charge of managed care contracting at Evanston Hospital, did not have the necessary support staff, did not use aggressive tactics, and did not diligently renegotiate lapsed contracts. (RFF ¶¶ 600-615). As a result, many contracts had not been renegotiated in five or even six years. (RFF ¶¶ 616-623).

857. **REDACTED**

(Dorsey, Tr. 1439-42, 57; Hillebrand, Tr. 1708, 1898; Sirabian, Tr. 5717; CX 5067 at 4, *in camera*; CX 266 at 1).

Response to Finding No. 857:

This proposed finding is misleading. (RFF-Reply ¶ 854; RFF ¶¶ 757-784, 814-826). Additionally, Complaint Counsel's contention that the estimate includes any other contracts in addition to One Health is unsupported by any evidence.

REDACTED

(Dorsey, Tr. 1439-42, 57; Hillebrand, Tr. 1708, 1898; Sirabian, Tr. 5717; CX 5067 at 4, *in camera*; CX 266 at 1).

858. This $18 - $18.5 million in additional annualized revenue does not take into account additional annualized revenue that ENH achieved through the shifting of health plans to the contract with the highest rate (between Evanston and Highland Park), the adoption of the higher of the Highland Park or Evanston pre-merger chargemaster rates post-merger, or the chargemaster increases in 2002 and later. (CX 17 at 5-8; CX 5 at 5; CX 13 at 1).

Response to Finding No. 858:

This proposed finding is unsupported by the record evidence. There is no evidence suggesting that the adoption of the higher contract is not represented in CX 17. Moreover, the impact of merging the chargemaster is specifically listed on the cited pages. (CX 17 at 5). The listing specifically enumerates "Unified Pricing Structure – 12,000 items." (CX 17 at 5; RFF ¶¶ 928-931). Obviously, the 2000 estimates could not possibly include any additional revenue earned two years later when the chargemaster was brought up to market levels. (RFF ¶¶ 932-964).

859. Evanston and Highland Park could not have accomplished these annualized revenue increases absent the merger. (CX 17 at 2 ("As stated previously, none of this could have been achieved by either Evanston or Highland Park alone."); CX 13 at 1 ("Neither Evanston nor Highland Park alone could achieve these results.")).

Response to Finding No. 859:

This proposed finding is misleading. Evanston Hospital would have renegotiated its managed care contracts in the absence of the Merger. (RFF ¶¶ 677, 679-693, 705).

This proposed finding also is misleading because it implies that ENH's minutes demonstrate market power. CX 13 merely reflects how ENH learned about its value in the marketplace. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374, 1375). By definition, Evanston Hospital alone could not have secured appropriate rates from MCOs without the Merger because Evanston Hospital would not have learned that its rates were lower than those of a community hospital (HPH). And, by definition, Evanston Hospital and HPH alone could not have achieved many of the other benefits of Merger integration – such as expanding and enhancing services at

HPH, generating significant cost savings, expanding Evanston Hospital's academic base to HPH and clinical rationalization. (CX 13 at 3; RFF ¶¶ 291-294). When the statements cited by Complaint Counsel are read within the context of the entire document, it is clear that the memo was an effort by Neaman, as the CEO of the organization, to boost morale and emphasize team-building by thanking everyone who participated in the Merger integration. (CX 13 at 1).

b. ENH Charged a Premium Over the Higher Evanston or Highland Park Pre-Merger Rate in Numerous Health Plan Contracts

(1) Aetna

860. **REDACTED**

(*Compare* CX 5001 (Highland Park pre-merger contract with Aetna), CX 5007 (Pre-merger Evanston contract with Aetna), *and* CX 5008 (**REDACTED**), *in camera*. *See* CCFF 863, 865, 868, *in camera*).

Response to Finding No. 860:

This proposed finding is incorrect, not supported by the evidence and misleading.

REDACTED

(RFF ¶¶ 753-754, *in camera*). **REDACTED**

(Mendonsa, Tr. 533-34, 564, *in camera*). **REDACTED**

(RFF ¶ 744, *in camera*; CX 5007 at 1; CX 5001 at 2).

REDACTED

(RFF ¶ 753, *in camera*). The 2000 negotiations with Aetna were not anticompetitive. (RFF-Reply ¶¶ 1196-1197; RFF ¶¶ 746-756).

Response to Finding No. 863:

This proposed finding is confusing, vague and misleading.

REDACTED (FF-Reply ¶ 860, *in camera*).

This proposed finding, however, appears to suggest that ENH should have been locked into those outdated and under-market rates – a suggestion that makes no logical sense.

REDACTED

(Mendonsa, Tr. 533-34, 564, *in camera*).

REDACTED

(RFF ¶ 754, *in camera*).

864. For Aetna's POS product, rates at Highland Park and Evanston for Medical, Surgical, Intensive Care Unit, Coronary Care Unit, OB-Normal, OB-C-section, and Boarder Baby did not differ by more than 50 dollars. (*Compare* CX 5001 at 6 *and* CX 5007 at 7).

Response to Finding No. 864:

This proposed finding is incomplete and misleading. This proposed finding suffers from the same flaws as the earlier finding with respect to Aetna's HMO rates. (RFF-Reply ¶ 862). Additionally, it is important to note that pre-Merger HPH, a community hospital, had higher rates than Evanston Hospital, the well-regarded, high-quality academic medical center. (*Compare* CX 5001 at 6 *with* CX 5007 at 7). Specifically, HPH's rates were higher for medical, surgical, intensive care, coronary care and OB-normal delivery categories. (*Compare* CX 5001 at 6 *with* CX 5007 at 7).

REDACTED

Mendonsa, Tr. 565-66, *in camera*; RFF ¶ 103, *in camera*).

Additionally, whereas Evanston Hospital had fixed rates for outpatient surgery, HPH had a

higher discount-off-charges arrangement encompassing all outpatient services. (*Compare* CX 5001 at 6-7 *with* CX 5007 at 7).

865. **REDACTED** (*Compare* CX 5001 at 6, CX 5007 at 7 *and* CX 5008 at 5, *in camera*).

Response to Finding No. 865:

This proposed finding is confusing, vague and misleading. (RFF-Reply ¶ 863).

866. Prior to the merger, both Highland Park and Evanston's PPO rates to Aetna for Intensive Care, Coronary Care, OB-C-section and Boarder Baby were identical. (*Compare* CX 5001 at 8 *and* CX 5007 at 10).

Response to Finding No. 866:

This proposed finding is incomplete and misleading. This proposed finding suffers from the same flaws as the earlier findings with respect to Aetna's HMO and POS rates. (RFF-Reply ¶ 862, 864).

REDACTED

(*Compare* CX 5001 at 8 *with* CX 5007 at 10; Mendonsa, Tr. 565-66, *in camera*). This proposed finding also ignores that HPH had a discount-off-charges arrangement at 90% of charges in place for Emergency Room visits, whereas Evanston Hospital had case rates. (*Compare* CX 5001 at 8 *with* CX 5007 at 10). Again, for outpatient services, HPH had a more favorable discount-off-charges arrangement. (*Compare* CX 5001 at 8 *with* CX 5007 at 10-11; RFF-Reply ¶ 864). Evanston Hospital offered Aetna fixed rates for outpatient services. (*Compare* CX 5001 at 8 *with* CX 5007 at 10-11).

867. Pre-merger rates at Highland Park and Evanston for Medical and Surgical services under the PPO product differed by only 40 dollars. (*Compare* CX 5001 at 8 *and* CX 5007 at 10).

Response to Finding No. 867:

This proposed finding is incomplete and misleading. For both medical and surgical services, HPH had higher rates than Evanston Hospital. (*Compare* CX 5001 at 8 *with* CX 5007 at 10).

REDACTED

(RFF ¶¶ 103-104, *in camera*).

868.

REDACTED

(*Compare* CX 5001 at 8, CX 5007 at 10, *and* CX 5008 at 5-6, *in camera*).

Response to Finding No. 868:

This proposed finding is speculative, immaterial, confusing, nonsensical and misleading. (RFF-Reply ¶¶ 863-865).

869. **REDACTED**

(Hillebrand, Tr. 1952, *in camera*).

Response to Finding No. 869:

This proposed finding is confusing, vague and misleading.

REDACTED

(Hillebrand, Tr. 1952, *in camera*).

REDACTED **REDACTED**

(RFF ¶ 753, *in camera*).

(2) Cigna

870. Beginning in 2000, ENH also charged rates that were above both the Highland Park and Evanston pre-merger contract rates for numerous service categories in the post-merger Cigna contract. (CX 5011; CX 5013; CX 5015. *See also* CCFF 872, 874).

Response to Finding No. 870:

This proposed finding is incomplete, misleading and not supported by the evidence. Complaint Counsel called no witness to testify at trial about ENH's contract renegotiation with Cigna. The Cigna documents do not support Complaint Counsel's cause. (RFF ¶¶ 778-784).

871. Prior to the merger, Cigna's reimbursement rate for Medical and Surgical services was $1,320 per day to Highland Park and $1,270 per day to Evanston. (CX 5011 at 1; CX 5013 at 2).

Response to Finding No. 871:

This proposed finding is incomplete. As reflected in the proposed finding, HPH had higher medical and surgical rates than Evanston Hospital, an academic tertiary center, before the Merger. (*Compare* CX 5011 at 1 *with* CX 5013 at 2; RFF ¶¶ 779-780).

REDACTED (RFF ¶ 781). This proposed finding reinforces what ENH learned from Bain – namely, that HPH's Cigna contract was superior to Evanston Hospital's, even though HPH's contract was negotiated years before Evanston Hospital's. (CX 75 at 6; RFF-Reply ¶ 870; RFF ¶ 679).

872. Instead of simply adopting the higher of Cigna's two hospital rates, ENH sought a per diem that was $77 more than either hospital's pre-merger rate, and contracted with Cigna to be reimbursed at $1,397 per day. (CX 5015 at 18).

Response to Finding No. 872:

This proposed finding is misleading. ENH and Cigna renegotiated and executed a contract at mutually agreeable rates and terms. (RFF ¶¶ 782-784). The fact that the inpatient per diem increased only $77 after nearly seven years highlights the reasonableness of the parties' negotiated contract. (RFF ¶¶ 782-784).

873. Similarly, Evanston's rates pre-merger were higher than Highland Park's for ICU services. (*Compare* CX 5013 at 2 (Evanston's ICU per diem of $1,765) *with* CX 5011 at 1 (Highland Park's ICU per diem of $1,320)).

Response to Finding No. 873:

This proposed finding is incomplete and misleading. REDACTED , (Chan, Tr. 786, *in camera*)

REDACTED

(RFF ¶ 781, *in camera*).

REDACTED (RFF ¶ 781, *in camera*).

874. Post-merger, ENH adopted an ICU rate of $1,942 per day, a rate $177 more than Evanston's pre-merger per diem and $622 more than Highland Park's pre-merger per diem. (*Compare* CX 5015 at 18, CX 5013 at 2, *and* CX 5011 at 1).

Response to Finding No. 874:

This proposed finding is incomplete and misleading in that REDACTED (RFF-Reply ¶¶ 871, 873; CX 1099 at 12, *in camera*; CX 5011 at 1). Therefore, the figures calculated by Complaint Counsel are incorrect, irrelevant and meaningless.

Moreover, it is unclear what Complaint Counsel means when it claims in this proposed finding that ENH "adopted" a particular contract rate. This rate was the result of contract negotiations. (RFF ¶¶ 782-784; CX 5015 at 15).

(3) Humana

875. REDACTED (CX 5019, *in camera*; CX 5027, *in camera*; CX 5029. *See also* CCFF 876-878, *in camera*).

Response to Finding No. 875:

This proposed finding is incomplete, immaterial and misleading. Complaint Counsel called no witness to testify at trial about ENH's contract renegotiation with Humana. As explained during trial, ENH and Humana have a long and complicated relationship. (RFF ¶¶

814-819; Hillebrand, Tr. 1837-38, 1863-67). The evidence demonstrated that the contract renegotiations with Humana had nothing to do with the Merger. (RFF ¶ 822).

Moreover, it was established at trial that HPH did not participate in all products with Humana. (Hillebrand, Tr. 1804; RFF ¶ 820).

REDACTED

(RFF ¶¶ 1024, 1026).

876. **REDACTED**

(*Compare* CX 5019 at 2-4, *in camera*, CX 5027 at 1, *in camera, and* CX 5029 at 1).

Response to Finding No. 876:

This proposed finding is incomplete, immaterial and misleading. (RFF-Reply ¶ 875). Hillebrand testified that where Evanston Hospital and HPH did have products with Humana in common, HPH's rates were higher. (Hillebrand, Tr. 1804; CX 75 at 6).

REDACTED

(*Compare* CX 5027 at 1, *in camera with* CX 5019 at 2-4, *in camera*).

REDACTED (RFF ¶ 821, *in camera*; CX 5019 at 2-4, *in camera*).

877. **REDACTED**

(*Compare* CX 5019 at 2-4, *in camera*, CX 5027 at 1, *in camera, and* CX 5029 at 1).

Response to Finding No. 877:

This proposed finding is incomplete, immaterial and misleading. (RFF-Reply ¶ 876).

REDACTED

(RFF-Reply ¶ 876, *in camera*). **REDACTED**

REDACTED

(CX 5027 at 4, *in camera*). Accordingly, Evanston Hospital was due for a rate increase in 2000.

878. **REDACTED**

(*Compare* CX 5019 at 2-4, *in camera*, CX 5027 at 1, *in camera*, *and* CX 5029 at 1).

Response to Finding No. 878:

This proposed finding is incomplete, immaterial and misleading. (RFF-Reply ¶ 876. Again, the rate increases with Humana had absolutely nothing to do with the Merger. (RFF-Reply ¶¶ 875-877; RFF ¶ 822).

879. Post-merger, the increase in Humana's rates over those charged by either Evanston or Highland Park was consistent with ENH's "premium pricing" strategy. (CX 67 at 49. *See* CCFF 849, 852).

Response to Finding No. 879:

This proposed finding is unsupported by the evidence, incomplete and misleading. The unrebutted evidence at trial is that the rate increases with Humana had absolutely nothing to do with the Merger. (RFF-Reply ¶¶ 875-877).

880. ENH was only able to impose a premium over pre-merger Evanston and Highland Park contract rates as a result of the merger. (Ballengee, Tr. 176-77, 194-95. *See* CX 13 at 1 (In referring to managed care renegotiations, Mark Neaman told the ENH board of directors that "neither Evanston nor Highland Park alone could achieve these results.")).

Response to Finding No. 880:

This proposed finding is misleading. The proposed finding does not rely on reliable evidence. (RFF-Reply ¶¶ 1067-1069, 1927). This proposed finding is extremely misleading because it makes the repeated mistake of implying that ENH's minutes demonstrate market power. But again, CX 13 is just another reflection of ENH learning about its value in the

marketplace. (FF-Reply ¶¶ 1365, 1367, 1372, 1374, 1375). By definition, Evanston Hospital alone could not have secured appropriate rates from MCOs without the Merger because Evanston Hospital would have never learned its true market value as an academic hospital. And by definition, Evanston Hospital and HPH alone could not have achieved many of the other benefits of Merger integration – such as expanding and enhancing services at HPH, generating significant cost savings, expanding Evanston Hospital's academic base to HPH, and clinical rationalization. (CX 13 at 3; RFF ¶¶ 291-294). When the statement cited by Complaint Counsel is read within the context of the entire document, it is clear that the memo was an effort by Neaman, as the CEO of the organization, to boost morale and emphasize team building by thanking everyone who participated in the Merger integration. (CX 13 at 1).

3. ENH Set up One Chargemaster for All Three Hospitals, with the Price for Each Product and Service Positioned at the Higher of the Two Pre-Merger Prices, Evanston's or Highland Park's

a. Chargemaster Definition

881. A chargemaster is a line-by-line listing of 15,000 to 20,000 line items showing a hospital's gross charges (i.e. list price) for all of its services. (Neaman, Tr. 1349; Chan, Tr. 674; H. Jones, Tr. 4143; Hillebrand, Tr. 1710-11).

Response to Finding No. 881:

Respondent has no specific response. (RFF ¶¶ 924-927; RFF-Reply ¶ 775).

882. **REDACTED**

(Hillebrand, Tr. 1711; Ballengee, Tr. 227, *in camera*; Chan, Tr. 667).

Response to Finding No. 882:

Respondent has no specific response.

883. **REDACTED**

(Neary, Tr. 766, *in camera*).

Response to Finding No. 883:

This proposed finding is incomplete.

REDACTED (Neary, Tr. 766-67, *in camera*; Chan, Tr. 785-86, *in camera*; RFF ¶¶ 93-95).

b. ENH Adopted the Higher of the Evanston or Highland Park Pre-Merger Chargemaster Rates Post-Merger

884. As part of the merger integration process, ENH consolidated the Highland Park and Evanston chargemasters in 2000. (Hillebrand, Tr. 1710; Porn, Tr. 5643).

Response to Finding No. 884:

The proposed finding is incomplete. The proposed finding omits that a single, consolidated chargemaster is the usual and best practice for a hospital system. (Porn, Tr. 5646-47). ENH did not hire outside consultants when it merged the chargemasters. (RFF ¶ 929).

885. In keeping with ENH's goal to move all three facilities to the same rates, ENH set out to conform the chargemaster rates for all three hospitals. (Hillebrand, Tr. 1704; Porn, Tr. 5643).

Response to Finding No. 885:

The proposed finding is incomplete. Consolidation of the ENH chargemaster was necessary to maximize Merger-related cost efficiencies. (RFF ¶¶ 928-931). The citation to the testimony of Lou Porn does not support the text of the proposed finding. (Porn, Tr. 5643).

886. Mr. Hillebrand was the "principal person" in charge of the chargemaster transition team. (Hillebrand, Tr. 1713).

Response to Finding No. 886:

Respondent has no specific response. (RFF ¶ 929).

887. Led by Mr. Hillebrand, ENH's transition team set out to "[e]qualize charges at all three sites," regardless of the different cost-structures at the three ENH hospitals. (Hillebrand, Tr. 1713; CX 2239 at 1). The work began in 1999 and was largely done in January 2000. (*See* CX 2237 at 1; CX 42 at 2; CX 2462 at 1).

Response to Finding No. 887:

This proposed finding is misleading. Complaint Counsel editorializes that the transition team performed its task "regardless of the different cost-structures at the three hospitals." But the term "cost-structures" is undefined. There is no evidence that the three hospitals had different "cost-structures." By extension, there is no evidence that, even if there were different "cost-structures," that the transition team did not take them into account.

The cited evidence does not support the fact that either the work began in 1999, nor that it was "largely done in January 2000." (CX 2237 at 1; CX 42 at 2; CX 2462 at 1). For instance, by January 28, 2000, ENH had not yet completed the "mapping" required for billing to be performed by the computer system. (CX 2237 at 1).

888. In a "fairly simplistic analysis," ENH examined the chargemasters at the two hospitals and adopted the higher of the Highland Park or Evanston chargemaster rates across the board for each line item. (Hillebrand, Tr. 1711, 1714-15; Noether, Tr. 6193. *See* CX 2240 at 11).

Response to Finding No. 888:

Respondent has no specific response.

889. For example, in universalizing the Intensive Care Unit line-item rate on the chargemaster, the merged entity chose Evanston's rate of $1,900 over Highland Park's lower rate of $1,828. (Hillebrand, Tr. 1715; CX 2240 at 11).

Response to Finding No. 889:

This proposed finding is irrelevant because it discusses only 1 of 15,000 to 20,000 charges. (CCFF ¶ 881; RFF ¶ 926).

890. Similarly, for a Semi-Private Room, ENH chose Highland Park's chargemaster rate of $711 over Evanston's lower rate of $588. (Hillebrand, Tr. 1715; CX 2240 at 11).

Response to Finding No. 890:

This proposed finding is irrelevant because it discusses only 1 of 15,000 to 20,000 charges. (CCFF ¶ 881; RFF ¶ 926).

891. For service line-items that only existed at one hospital and not the other, ENH automatically adopted the existing price. (Hillebrand, Tr. 1715; CX 2240 at 11).

Response to Finding No. 891:

Respondent has no specific response except to note that this proposed finding is based on common sense. When faced with a choice between an existing price and a non-existing price, ENH picked an existing price. (Hillebrand, Tr. 1715).

892. Upon completion of merging the chargemaster items related to renal dialysis, that transition team's report reflected ENH's objective: "Highest charge comparing those of EH and HPH utilized on new Charge Master." (CX 2383 at 2).

Response to Finding No. 892:

This proposed finding is irrelevant because it discusses only 1 of 15,000 to 20,000 charges. (CCFF ¶ 881; RFF ¶ 926).

893. For renal dialysis alone, ENH's finance department estimated a $1,324,497 "revenue enhancement" from selecting the higher of the Highland Park and Evanston rates. (CX 2383 at 2).

Response to Finding No. 893:

This proposed finding is misleading. Considering the whole chargemaster, Deloitte discovered that ENH's pricing on a weighted basis was at the 63rd percentile in the Chicago area. (RX 1170 at DC 2009; Porn, Tr. 5653; RFF ¶ 956). Deloitte recommended an increase to ENH's chargemaster even if there were no Merger. (RFF ¶ 964).

894. In January 2000, ENH's transition team projected the overall increase in gross revenue from equalizing the charges at the three hospitals to be at least $100,000,000. (CX 2237 at 1; CX 42 at 2; CX 2462 at 1). Later ENH documents also estimated the overall increase in gross revenues at $100 million(CX 2238 at 1 (May); CX 2239 at 1 (June); CX 2384 at 2 (July)).

Response to Finding No. 894:

The proposed finding is immaterial and misleading. Changes to a chargemaster have absolutely no impact on patients covered by Medicare, which represent nearly half of ENH's volume. (RFF ¶¶ 13, 963). As a result, in terms of actual net revenue resulting from changes in a chargemaster are a fraction of its estimates in gross revenue. (RFF-Reply ¶ 895).

A significant portion of the revenue increase is a result of adding HPH's volume of patients, not adjustments to prices. The goal of the 2000 chargemaster transition was to "equalize the charges" at all three sites, not to increase revenue. (RFF ¶ 930). Also, ENH did not increase the price over what had already been in place at either HPH or Evanston Hospital before the Merger. (RFF ¶ 930).

895. With regard to net revenue, as of September 30, 2000, only nine months after the merger, Mr. Neaman reported to ENH's board of directors that ENH's "Unified Pricing Structure" for the chargemaster had already resulted in $5 million of Annualized Economic Value. (CX 2382 at 6).

Response to Finding No. 895:

This proposed finding is incomplete and misleading. The "Unified Pricing Structure" resulted in $5 million in cost savings of the Merger. (RFF ¶ 2540). This is a Merger efficiency – a value realized as a result of the Merger.

c. In Adopting the Higher of the Two Merging Parties' Chargemaster Rates, ENH Raised Its Prices to Health Plans with Discount Off Charges Arrangements

896. Under a discount off charges contract, the price that the health plan must pay to the hospital increases as the chargemaster list price increases. (Porn, Tr. 5670).

Response to Finding No. 896:

This proposed finding is misleading and incomplete. On the cited page of testimony, Porn clarified that discount-off-charges contracts absorb changes to a chargemaster only to the

extent that the MCO does not negotiate a "ceiling," such as a maximum or escalator clause. (Porn, Tr. 5670). REDACTED

(RFF ¶¶ 87-88, *in camera*).

897. REDACTED (Neary, Tr. 609; Newton, Tr. 366; Holt-Darcy, Tr. 1522, *in camera*; Foucre, Tr. 898, 889; Mendonsa, Tr. 524-28, *in camera*. *See* CCFF 799, *in camera*).

Response to Finding No. 897:

Although it is technically true that MCOs are not consulted with respect to every change made to a chargemaster, this proposed finding is incomplete and misleading. Chargemaster increases do not necessarily have an adverse effect on MCOs.

REDACTED

(Dorsey, Tr. 1485; Mendonsa, Tr. 558, 566-67, *in camera*; Holt-Darcy, Tr. 1600-01, *in camera*; CX 5174 at 7, *in camera*). REDACTED

(Holt-Darcy, Tr. 1524, *in camera*). MCOs are really only limited by their creativity as to what sort of protection they seek.

REDACTED

(RFF ¶ 892, *in camera*). REDACTED

(RFF ¶¶ 89, 847, *in camera*).

The citations to Foucre's testimony do not support the text of the proposed finding. (Foucre, Tr. 889, 898). To the extent this proposed finding relies upon Newton, it should be disregarded. Newton was never more than a Vice President of "business affairs" at HPH, left ENH soon after the Merger and is now Chief Executive Officer of Swedish Covenant Hospital, an admitted competitor to ENH. (Spaeth, Tr. 2282-83; Hillebrand, Tr. 2028-29; Newton, Tr.

279, 294-95). Moreover, Newton did not have responsibility for financial matters, he did not have primary responsibility for Merger strategy, he was excluded from most Merger discussions, and he was not primarily responsible for managed care contracting. (RFF-Reply ¶ 1465).

898. **REDACTED** (CX 1373 at 14, *in camera*; CX 75 at 16; CX 2047 at 61-62 (Ogden, Dep.), *in camera*. *See* CX 67 at 49 (Bain advised ENH to "Lead with Percent of Charges")).

Response to Finding No. 898:

Respondent has no specific response. (RFF ¶¶ 81, 713-714).

899. **REDACTED** (CX 1373 at 14, *in camera*).

Response to Finding No. 899:

This proposed finding is false and is not based on any reliable evidence. In Court, the author of the cited memorandum, Chan, admitted that she had no personal knowledge about this matter, and she never did any work whatsoever with ENH's chargemaster. (Chan, Tr. 744). In short, Chan had no idea as to whether ENH or HPH had a higher chargemaster when viewed on the whole. Moreover, Complaint Counsel's own findings recognize that, for some items, HPH had the higher price on its chargemaster. (CCFF ¶ 890).

900. After the merger, ENH's "first negotiating step" with every health plan was to "move to discount off charges" arrangements. (Hillebrand, Tr. 1706; Newton, Tr. 366. *See* CCFF 815).

Response to Finding No. 900:

This proposed finding is incorrect, incomplete and misleading. Bain advised ENH to ask for discount-off-charges, even though it had no expectation that they would "end up there." (RX

2047 at 62 (Ogden Dep.); RFF ¶ 713). As Hillebrand testified, some MCOs agreed to this arrangement, yet others did not. (Hillebrand, Tr. 1706).

To the extent that this proposed finding relies upon the testimony of Newton, it should be accorded no weight. Newton left ENH soon after the Merger and is at present, the Chief Executive Officer of Swedish Covenant Hospital, an admitted competitor to ENH. (Spaeth, Tr. 2282-83; Hillebrand, Tr. 2028-29; Newton, Tr. 279, 294-95). Moreover, Newton did not have responsibility for financial matters, he did not have primary responsibility for Merger strategy, he was excluded from most Merger discussions, and he was not primarily responsible for managed care contracting. (RFF-Reply ¶ 1465).

901. **REDACTED** (Hillebrand, Tr. 1706, 1893; Hillebrand, Tr. 1947, *in camera*; Ballengee, Tr. 252, 255, *in camera*; Holt-Darcy, Tr. 1536, 1539, 1563, *in camera*; CX 5075-017, *in camera*; *compare* CX 116 at 2, *in camera*, CX 117 at 1, *in camera*, *and* CX 5072 at 23, *in camera*; *compare* CX 5067 at 15, *in camera*, CX 5059 at 17, *and* CX 5065 at 17).

Response to Finding No. 901:

This proposed finding is incorrect and misleading. After negotiations, some MCOs agreed to move to discount-off-charges arrangements for inpatient services, while others did not. (Hillebrand, Tr. 1706, 1896). **REDACTED** (Hillebrand, Tr. 1896; Mendonsa, Tr. 540, *in camera*; CX 2447, *in camera*). **REDACTED** (RFF ¶ 874, *in camera*). Several MCOs agreed to discount-off-charges arrangements for some of their products, but ended up with per diems on other products. **REDACTED** (RFF ¶¶ 870-872, 874, 889; CX 5174 at 11-12, *in camera*; CX 5046 at 2, *in camera*; CX 5050 at 1, *in camera*; CX 5057 at 1-2). **REDACTED**

REDACTED

(RFF ¶ 846, *in camera*).

REDACTED (RFF ¶

87-90, 847, *in camera*).

902. By switching from a per diem to a discount off charges arrangement and adopting the higher of the two hospitals' chargemaster rates, ENH ensured that health plans would have to reimburse the hospital system at a higher rate. (Porn, Tr. 5670; Chan, Tr. 743-44).

Response to Finding No. 902:

This proposed finding is vague, incomplete, misleading and not supported by the cited evidence. Porn's cited testimony is only that chargemaster prices only apply to contracts with discount-off-charges methodologies. (Porn, Tr. 5670). He clarified that even those effects can be limited by the terms of the contract such as "ceilings" or escalator clauses. (Porn, Tr. 5670).

Chan never worked with ENH's chargemaster. (RFF-Reply ¶ 889). Chan's involvement with Merger consisted merely of attending a "couple of [Merger] integration meetings." (Chan, Tr. 659).

903. The question of whether Highland Park should be put on the Evanston chargemaster for a particular product or service or whether Evanston should be put on the Highland park chargemaster for that product or service arose because of the merger. (Hillebrand, Tr. 1704). In short, the shift of all three hospitals to one of the two chargemasters for that product or service and the price increases resulting from the shift to the higher of the two chargemaster rates were both due to the merger. (Hillebrand, Tr. 1704).

Response to Finding No. 903:

This proposed finding is vague and misleading. To the extent this proposed finding states the truism that a hospital cannot consolidate chargemasters with another hospital if there is no merger between them, it is true. However, this proposed finding ignores that it is regarded as best practice for *any* hospital system to have a single chargemaster. (RFF ¶ 928).

4. Other Hospital Systems Have Separate Prices for Each Hospital

a. It Is Unusual For a Hospital System to Charge the Same Rates for All Hospitals in the System

904. The ENH system consists of Evanston, Highland Park, and Glenbrook Hospitals. (Neaman, Tr. 954).

Response to Finding No. 904:

Respondent has no specific response.

905. Highland Park and Glenbrook are community hospitals, while ENH claimed in this litigation to be an academic medical center. (Neaman, Tr. 1286-87).

Response to Finding No. 905:

This proposed finding is false. The evidence in this case overwhelmingly showed that ENH is an academic medical center. MedPAC defines an academic medical center and major academic hospital categories, characterizes an academic hospital as a hospital that has at least a 0.25 resident-to-bed ratio. (RFF ¶¶ 8, 2168; O'Brien, Tr. 3541-42). ENH has a 0.29 ratio. (RFF ¶¶ 8, 2168; O'Brien, Tr. 3542).

REDACTED

(RFF ¶ 101). ENH – including all three hospital campuses – is affiliated with Northwestern Medical School. (RFF ¶¶ 1, 8).

906. After the merger, ENH senior management renegotiated health plan contracts so that all three of its facilities would be reimbursed at the same rate. (Hillebrand, Tr. 1703. *See* CCFF 824).

Response to Finding No. 906:

This proposed finding is repetitive. (RFF-Reply ¶ 824).

907. **REDACTED**

(Foucre, Tr. 890-92; *See* Foucre, Tr. 891-92 (Other than ENH, there are no other systems in United's Chicago network that demand the same rate and contract for all the hospitals in the system.); Ballengee, Tr. 163-65; Dorsey, Tr. 1445-46; RX 1503, *in camera*; Holt-Darcy, Tr. 1528, *in camera*).

Response to Finding No. 907:

This proposed finding is incorrect and misleading. Evanston and Glenbrook Hospitals always were covered by a single contract with one set of rates. (RFF-Reply ¶¶ 824, 827-828, 830). The ENH system is unique in several respects from the other hospital systems in Chicago. For instance, ENH is the only system that has a single medical staff, single Medicare identification, and single tax identification number. (RFF-Reply ¶¶ 824, 915-916).

908. REDACTED (Foucre, Tr. 890-92; Ballengee, Tr. 163-65; Dorsey, Tr. 1446-47; RX 1503, ***in camera***. *See* Holt-Darcy, Tr. 1528 (REDACTED), *in camera*).

Response to Finding No. 908:

This proposed finding is misleading. Since ENH is a fully-integrated hospital system that operates as a single entity, it contracts for a single rate. (RFF ¶¶ 11-12). There is no reason to negotiate different rates because a patient can see his or her doctor at any of the three hospitals – thus receiving the same product, so to speak. (RFF ¶ 12). As indicated above, ENH is unique in this regard, which justifies its single-rate posture in negotiations with MCOs. (RFF-Reply ¶ 907).

b. The Advocate, Rush, Resurrection and Provena Systems Charge Different Rates for Different Hospitals in Their Systems

909. The Advocate System consists of eight hospitals, all in the Chicago area. (Foucre, Tr. 934; Neaman, Tr. 1297). Advocate Lutheran General is the flagship hospital of the Advocate system. (Neaman, Tr. 1296).

Response to Finding No. 909:

This proposed finding is misleading. The referenced citations do not support the proposed finding that Lutheran General is a "flagship hospital." Lutheran General, however, is the largest hospital in the Advocate System. (RFF ¶¶ 411, 414).

910. REDACTED

(Ballengee, Tr. 163-64; RX 1503 at PHCS 003649-66, *in camera*).

Response to Finding No. 910:

This proposed finding is incomplete and not supported by the cited evidence. System-wide contracts are becoming increasingly common in the Chicago area. (RFF ¶¶ 187-188).

REDACTED

(Ballengee, Tr. 163; Ballengee, Tr. 226, *in camera*).

REDACTED

(RX 1443 at PHCS 4587; RX 1503, *in camera*). Aside from that, the details of those negotiations are not in evidence. REDACTED

(Ballengee, Tr. 227, 270-71, *in camera*; RX 1503 at PHCS 3649).

REDACTED

(RX 1503 at PHCS 3649-66, *in camera*; Ballengee, Tr. 163-64). The cited evidence relates to the PHCS contract with the Rush System for Health hospitals, not Advocate. (Ballengee, Tr. 163-64).

911. REDACTED

(Foucre, Tr. 890-91; Ballengee, Tr. 163-65; Dorsey, Tr. 1446. *See e.g.* RX 1503, *in camera*).

Response to Finding No. 911:

This proposed finding is incorrect and not supported by the evidence. The citations to the testimony of Ballengee and Dorsey relate to PHCS and Great West's relationships with the Rush System, not the Advocate System. (Ballengee, Tr. 163-65; Dorsey, Tr. 1446). The testimony of Foucre, at least, relates to United's relationship with Advocate. (Foucre, 890-91). However, that testimony does not support the proposed finding. (Foucre, Tr. 890-91).

912. Five hospitals make up the Rush system, with Rush Presbyterian-St. Luke's Medical Center as the flagship hospital for the system. (Foucre, Tr. 933).

Response to Finding No. 912:

Respondent has no specific response.

913. As the academic facility in the system, Rush Presbyterian-St. Luke's is reimbursed at a higher rate than other hospitals in the system that offer a narrower breadth of services. (Dorsey, Tr. 1445-46; Ballengee, Tr. 163-64).

Response to Finding No. 913:

This proposed finding is incomplete, misleading and immaterial. The Rush System is not a fully-integrated hospital system like ENH. ENH is unique in that it has merged and consolidated all of its administrative functions and business offices, uses a single medical staff, and has single tax and Medicare identification numbers. (Hillebrand, Tr. 1839-41).

914. One Health and PHCS pay different rates for the hospitals in the Rush system based upon hospital service offerings. (Ballengee, Tr. 163-65; Dorsey, Tr. 1446).

Response to Finding No. 914:

This proposed finding is incomplete, misleading and immaterial. The Rush System is not a fully-integrated hospital system like ENH. ENH is unique in that it has merged and consolidated all of its administrative functions and business offices, uses a single medical staff, and has single tax and Medicare identification numbers. (Hillebrand, Tr. 1839-41).

915. When United's attempts to renew a business relationship with the entire Rush System failed in August 2003, the Rush System even allowed United to contract independently with Rush North Shore, only one of the five hospitals in the System. (Foucre, Tr. 935).

Response to Finding No. 915:

This proposed finding is incomplete, misleading and immaterial. The Rush System is not a fully-integrated hospital system like ENH. ENH is unique in that it has merged and consolidated all of its administrative functions and business offices, uses a single medical staff, and has single tax and Medicare identification numbers. (Hillebrand, Tr. 1839-41).

916. **REDACTED**

(Foucre, Tr. 890-91; Ballengee, Tr. 263, *in camera*; RX 1854 at ENHE F16 000426; RX 722, *in camera*).

Response to Finding No. 916:

This proposed finding is incomplete, misleading, immaterial and is not supported by the cited evidence. Like the Rush System, the Resurrection System is not a fully-integrated hospital system like ENH. (RFF-Reply ¶ 915).

The citation to the testimony of Foucre does not support the proposed finding. While she testified that the rates differed between the hospitals, Foucre did not testify as to why the rates are different. (Foucre, Tr. 890-91). In addition, Ballengee – who is from PHCS – has no personal knowledge from which to testify on the contracts held or negotiated by United. (Ballengee, Tr. 141, 145-49, 193-94). Therefore, the Court should ignore the citation to her testimony.

917. **REDACTED**

(*See* CCFF 1303, *in camera*).

Response to Finding No. 917:

This proposed finding is confusing, vague, incorrect and is not based on any evidence. Accordingly, it should be disregarded in its entirety. (RFF-Reply ¶ 1303).

C. ENH Instituted Major Chargemaster Price Increases in 2002 and 2003

918. REDACTED (RX 1687 at ENHL BW 027653, *in camera*; CX 44 at 1; CX 43 at 1; CX 45 at 8). REDACTED (Newton, Tr. 364-65; Neaman, Tr. 1036, 39; Hillebrand, Tr. 1790, 1801-02, 1811-12; CX 68 at 11, 13; CX 86 at 2-3; CX 69 at 1; CX 19; CX 2070 at 3; CX 75 at 12).

Response to Finding No. 918:

This proposed finding is inaccurate and misleading. A chargemaster is a fluid document that is constantly being updated and changed. (RFF ¶ 927). The evidence demonstrated that ENH's adjustments to its chargemaster were unrelated to the Merger and the 2000 MCO contract negotiations. (RFF ¶¶ 935, 948-950, 956-959, 963-964). Rather, a team from Deloitte, led by Porn, who testified at trial, informed ENH that many prices on the chargemaster were under-market. (RFF ¶¶ 932, 943, 951, 956-959).

In addition, this proposed finding is misleading because it ignores the fact that, after the "catch up adjustment," the next two increases were less than .9%. (CX 45 at 8).

This finding also is misleading to the extent it relies on Newton's testimony. Newton did not have responsibility for financial matters, he did not have primary responsibility for Merger strategy, he was excluded from most Merger discussions, and he was not responsible for managed care contracting. (Spaeth, Tr. 2283-84; Newton, Tr. 436, 452-454, 512-513; RFF-Reply ¶ 1387). Moreover, the citations to Neaman's testimony do not support what Complaint Counsel calls a "premium pricing" approach, but merely acknowledge that ENH sought to

negotiate competitive rates with MCOs. (Neaman, Tr. 1036). Therefore, to the extent this proposed finding relies to any extent on Newton's testimony, it should be disregarded.

Finally, some citations to Hillebrand's testimony have absolutely nothing to do with the text of the proposed finding. (Hillebrand, Tr. 1790, 1801-02).

919. **REDACTED** (CX 44 at 3; CX 45 at 8; RX 1687 at ENHL BW 027653, *in camera*). ENH expected that the April 2002 charge increase would yield ENH between $20 to $26 million in net revenue annually (which is roughly 20% net of the gross increase). (CX 45 at 8).

Response to Finding No. 919:

This proposed finding is misleading. This proposed finding is misleading because it ignores that Deloitte recommended an 11% increase to the chargemaster. Although ENH accepted Deloitte's general recommendation to increase its chargemaster, ENH opted only to implement chargemaster changes that resulted in an 8.5% gross increase to fair market levels. (RFF ¶¶ 958-961).

This proposed finding is also misleading because it misconstrues the significance of the 31.9% figure in ENH's documents. The average increase required to bring these 2,065 line items up to market level was 31.9% – proving that ENH's prices were significantly under-priced before the adjustment. (CX 44 at 3; CX 45 at 8). The prices were raised to the level recommended by Deloitte after its extensive analysis and comparison to other hospitals in the market of comparable reputation and breadth of service. (RFF ¶¶ 952-953, 958-959).

Finally, this proposed finding is misleading to the extent it is based on "gross charges." Since over half of ENH's volume is from government rates, projected effects on gross charges are nearly meaningless. (RFF ¶ 13). Moreover, where MCOs have negotiated per diems or case

rates, the chargemaster is uninvolved in that reimbursement. (Porn, Tr. 5670; CX 45 at 8 (indicating that only $20 million would be realized from gross changes of $102.2 million)).

920. REDACTED (RX 1687 at ENHL BW 027653, *in camera*).

Response to Finding No. 920:

This proposed finding is misleading. (RFF-Reply ¶ 919).

REDACTED (RX 1687 at ENHL BW 27653, *in camera*).

921. REDACTED (RX 1687 at ENHL BW 027653, *in camera*).

Response to Finding No. 921:

This proposed finding is misleading. (RFF-Reply ¶ 919).

REDACTED

(RX 1687 at ENHL BW 27653, *in camera*).

922. REDACTED (RX 1687 at ENHL BW 027653, *in camera*).

Response to Finding No. 922:

This proposed finding is misleading. (RFF-Reply ¶ 919).

REDACTED (RX 1687 at ENHL BW 27653, *in camera*).

923. **REDACTED**
(RX 1687 at ENHL BW 027653, *in camera*. *See also* CCFF 1394, *in camera*).

Response to Finding No. 923:

This proposed finding is misleading. (RFF-Reply ¶ 920-922).

924. **REDACTED**

(*See* CCFF 817-821, 930, *in camera*).

Response to Finding No. 924:

This proposed finding is inaccurate and misleading. (RFF-Reply ¶ 918-919). In addition, this proposed finding is misleading because revenues earned by bringing ENH's chargemaster up to *market* levels do not evidence market power. (RFF ¶¶ 935, 948-950, 956-959, 963-964).

D. The First Major Chargemaster Increase in 2002 Is an Example of ENH's Ability to Increase Prices Dramatically to Health Plans Without Needing to Re-Negotiate Their Contracts

925. In the spring and summer of 2002, ENH substantially raised prices on its chargemaster, resulting in an overall sustained, net price increase of over 8% to healthcare plans. (Porn, Tr. 5681-82, 85; CX 45 at 8).

Response to Finding No. 925:

This proposed finding is inaccurate and misleading. This proposed finding is misleading because it calls the 8% *gross* percentage increase – a "net price increase." (CX 45 at 8; Porn, Tr. 5685). In addition, this proposed finding is misleading to the extent it ignores that some MCOs did negotiate, and all of them could have negotiated, protections into the discount-off-charges arrangements that governed the impact of changes to a chargemaster. (RFF-Reply ¶ 897).

REDACTED

(Dorsey, Tr. 1485; Mendonsa, Tr. 558, 566-67, *in camera*; Holt-Darcy, Tr. 1600, *in camera*; CX 5174 at 7, *in camera*). **REDACTED**

REDACTED (Holt-Darcy, Tr. 1523, *in camera*).

REDACTED

(RFF ¶ 892).

REDACTED (RFF ¶¶ 89, 847). Therefore, it is misleading to suggest – as this proposed finding does – that MCOs have no control over the impact of chargemaster increases. (RFF-Reply ¶ 799).

926. There was little analysis on the part of ENH management as to the extent or magnitude of these substantial price increases or ENH's ability to raise prices to health plans. (Hillebrand, Tr. 1718 (decision to raise prices to 90th percentile target based on less than one hour deliberation with business consultant); Porn, Tr. 5681).

Response to Finding No. 926:

This proposed finding is misleading to the extent it suggests that amount of time spent in making the decision about ENH's chargemaster increase is evidence of the reasonableness of the decision. ENH relied on its consultant's recommendation to decide the price level. (RFF ¶ 959). The level price increases were reasonable based on ENH's substantial reputation and prestige in the market. (RFF ¶ 959).

927. These price increases resulted in a projected net impact of $20 million to $26 million annually. (Porn, Tr. 5685-86; CX 45 at 8).

Response to Finding No. 927:

This proposed finding is misleading. (RFF-Reply ¶¶ 918-919).

1. Chargemaster Changes Directly Affect Only Contracts Containing a Discount Off Charges Provision

928. An increase to chargemaster prices will only directly impact a health care provider's contracts containing a discount-off-charges provision. Chargemaster changes will not directly impact payments made under fixed rate contracts. (Porn, Tr. 5670).

Response to Finding No. 928:

Respondent has no specific response. (RFF ¶ 80).

929. Chargemaster changes can also indirectly affect payment under fixed rate contracts.

REDACTED

(Haas-Wilson, Tr. 2647-48, *in camera*).

Response to Finding No. 929:

This proposed finding is not supported by the cited evidence. (Haas-Wilson, Tr. 2647-48, *in camera*). The cited evidence does not support the proposition that changes to a chargemaster indirectly affect payment under fixed rate contracts. (Haas-Wilson, Tr. 2647-48, *in camera*).

930. The more discount off charges contracts a healthcare provider has, the more impact a chargemaster increase will have on net revenue realized by the provider. (Porn, Tr. 5670).

Response to Finding No. 930:

This proposed finding is vague and misleading. Nearly all contracts, to some extent, are discount-off-charges contracts. At the very least, outpatient services are reimbursed on discount-off-charges. (RFF-Reply ¶ 799). **REDACTED**

(RFF ¶ 846; Ballengee, Tr. 258-60, *in camera*). Consequently, it is impossible to generalize about the impact of a chargemaster increase on the net revenue realized by the provider in this manner.

REDACTED

(RFF ¶¶ 87-89, *in camera*).

931. Health plans prefer fixed rate contracts, rather than discount off charges, because fixed rate contracts are predictable. (*See* CCFF 790-797).

Response to Finding No. 931:

Respondent has no specific response.

932. With discount off charges arrangements, hospitals can set their own prices, and the health plans have little control over costs. (*See* Mendonsa, Tr. 526, (REDACTED), *in camera*. *See* CCFF 799-800).

Response to Finding No. 932:

This proposed finding is misleading. Discount-off-charges are the standard reimbursement methodology for outpatient services. (RFF-Reply ¶ 799).

REDACTED

(RFF ¶ 82-85, *in camera*). Since 2000, Chicago area hospitals have pressed more aggressively for discount-off-charges provisions for inpatient services. (RFF ¶ 86).

REDACTED

(RFF ¶¶ 87-89, *in camera*).

933. In post-merger renegotiations with health plans, ENH strategized "to move to discount off charges as [its] first negotiating step." (Hillebrand, Tr. 1706; Newton, Tr. 366. *See* CCFF 799).

Response to Finding No. 933:

This proposed finding is duplicative, not based on reliable evidence, incomplete and misleading. (RFF-Reply ¶¶ 815, 900).

934. ENH was successful in moving multiple fixed rate contracts to discount-off-charges arrangements. (Hillebrand, Tr. 1706. *See* CCFF 817-821).

Response to Finding No. 934:

This proposed finding is duplicative, incorrect, incomplete and misleading. (RFF-Reply ¶¶ 817-821).

935. In shifting health plan contract arrangements to discount off charges, ENH ensured that health plans would have to reimburse ENH at a higher rate as the ENH increased its chargemaster. (Porn, Tr. 5670; Chan, Tr. 743-44).

Response to Finding No. 935:

This proposed finding is misleading because it ignores that **REDACTED**

(RFF-Reply ¶ 897).

REDACTED

(RFF ¶¶ 750-751; CX 5046 at 2, *in camera*; CX 5050 at 1, *in camera*; CX 5057 at 1-2, *in camera*). **REDACTED**

(RFF ¶ 892, *in camera*).

REDACTED

(RFF ¶¶ 89, 846-847, *in camera*). All of these contractual arrangements limited the effect of any changes to ENH's chargemaster on reimbursement.

2. ENH, in Deciding to Increase Its Chargemaster Prices, Elected to Set the Prices at a Very High Level

936. In 2001, ENH hired Deloitte to merge and update the ENH and HPH chargemasters. (Porn, Tr. 5643-44).

Response to Finding No. 936:

This proposed finding is misleading and inaccurate. ENH did not hire outside consultants when it combined the chargemasters of HPH and Evanston Hospital after the Merger. (RFF ¶ 929). ENH hired Deloitte in late 2000 to perform a revenue cycle analysis, which involved a review of the chargemaster. (RFF ¶¶ 933-934, 938). During this project, Deloitte discovered that ENH's chargemaster needed further review and was under-market. (RFF ¶¶ 948-949). It

was not until March 8, 2002, that ENH retained Deloitte to perform the comprehensive chargemaster pricing project. (RFF ¶ 950).

This proposed finding is also misleading to the extent it ignores that Deloitte would have made the same recommendations to ENH even without the Merger. (RFF ¶¶ 935, 963-964).

937. As an outgrowth of the technical chargemaster project, in March 2002, ENH engaged Deloitte to "identify and implement" targeted price increases to ENH's chargemaster. (Porn, Tr. 5668-69; CX 43 at 1).

Response to Finding No. 937:

Respondent has no specific response. (RFF ¶ 950).

938. This Deloitte 2002 chargemaster engagement was known as the "strategic pricing project." (CX 45 at 1).

Response to Finding No. 938:

Respondent has no specific response.

939. Although the strategic pricing project officially began in March 2002, Deloitte on its own initiative made some preliminary findings as early as November 2001. (Porn, Tr. 5688).

Response to Finding No. 939:

Respondent has no specific response.

940. **REDACTED** (RX 1687 at ENHL BW 027652, *in camera*).

Response to Finding No. 940:

This proposed finding is misleading. Porn testified, subject to cross-examination, that ENH's increase was warranted, reasonable and brought ENH to a level in the market commensurate with its reputation and prestige. (RFF ¶ 959).

941. **REDACTED** (CX 2070 at 3; RX 1687 at ENHL BW 027652, *in camera*). ENH

planned to achieve this goal through its "growth initiatives," including the merger with Highland Park. (CX 2070 at 3; Hillebrand, Tr. 1811-12; Newton, Tr. 364). Likewise, this "aggressive" stance was consistent with Bain's negotiating strategy advice for ENH to obtain "premium pricing (*i.e.*, above the competitive average)" after the merger. (CX 75 at 16).

Response to Finding No. 941:

This proposed finding is inaccurate and misleading. After preparing a detailed comparison between ENH and 10 peer group hospitals, Deloitte determined that the catch-up increase of the chargemaster up to competitive levels was reasonable. (RFF-Reply ¶¶ 926, 940; RFF ¶¶ 958-959). Deloitte would have made the same recommendations even in the absence of the Merger. (RFF ¶ 964).

This proposed finding is misleading to the extent it relies on CX 2070, a document written over two years before the chargemaster study, to explain the chargemaster study. (CX 2070 at 3; RFF-Reply ¶¶ 1459, 1569).

Finally, this proposed finding is misleading to the extent it is based on Newton's testimony. (RFF-Reply ¶ 1387).

3. The First Major Chargemaster Increase in 2002 Raised ENH's Net Revenue by $20 Million to $26 Million Annually

942. There were two major chargemaster increases in 2002. (*See* CCFF 1393-1394, *in camera*). The first major 2002 chargemaster price increase resulted in a projected net revenue increase of $20 million to $26 million annually. (Porn, Tr. 5685-86; CX 45 at 8).

Response to Finding No. 942:

This proposed finding is misleading. (RFF-Reply ¶¶ 918-919).

943. By April 2002, ENH had raised 2,065 chargemaster prices. (Porn, Tr. 5684-85; CX 45 at 8).

Response to Finding No. 943:

This proposed finding is misleading because it ignores that ENH's chargemaster contains 15,000 to 20,000 codes. Deloitte recommended corrections to only 2,065 of them. (RFF ¶¶ 960-961).

944. ENH raised prices an average of 31.9% for these 2,065 listings. (Porn, Tr. 5685; CX 45 at 8).

Response to Finding No. 944:

This proposed finding is misleading and inaccurate. (RFF-Reply ¶¶ 919, 956-959).

945. The first major chargemaster increase in 2002 raised the overall chargemaster pricing by 8.5%. (Porn, Tr. 5685; CX 45 at 8).

Response to Finding No. 945:

Respondent has no specific response. (RFF ¶ 961; RFF-Reply ¶ 919).

946. This 2002 chargemaster price increase resulted in a projected gross charge impact of $102.2 million annually, and a net impact of $20 million to $26 million annually. (Porn, Tr. 5685-86; CX 45 at 8).

Response to Finding No. 946:

This proposed finding is misleading and inaccurate. (RFF-Reply ¶¶ 918-919).

947. The lower range did not include self-pay revenue increases, and the higher range did. (CX 45 at 8).

Response to Finding No. 947:

This proposed finding is misleading and inaccurate. (RFF-Reply ¶¶ 918-919).

948. Thus, ENH expected to realize, on a net basis, at a minimum, $20 million in additional revenue from health plans due to the 2002 chargemaster increases every year on a going forward basis. (Porn, Tr. 5686; CX 45 at 8). Coupled with the $18 million in additional annualized revenue from the 2000 managed care contract re-negotiations – an increase that was unprecedented for ENH – ENH realized an additional $38 million in annualized revenue for these two price increase strategies alone. ((Hillebrand, Tr. 1721-22; Porn, Tr. 5686; CX 45 at 8).

Response to Finding No. 948:

This proposed finding is misleading. (RFF-Reply ¶¶ 853-857, 859). In addition, this proposed finding is misleading because the changes to ENH's chargemaster mostly affected commercial indemnity contracts, not all MCOs. (Porn, Tr. 5686-87). In addition, this proposed finding is misleading to the extent it relies on Deloitte's projections of net revenue. The projected net revenue "does not make any adjustments for underpayments," which at comparable institutions was as much as 25%. (CX 45 at 8). As a result, Deloitte advised ENH Finance to monitor potential variations over the coming 4-6 months. (CX 45 at 8).

Finally, Complaint Counsel's reference to the $18 million figure is misleading. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374-76, 1378, 1395-1397).

949. **REDACTED**

(Haas-Wilson, Tr. 2537-38, *in camera*; *compare* CX 6279 at 4, *in camera, and* CX 6279 at 5, *in camera*). **REDACTED** Haas-Wilson, Tr. 2538, *in camera*).

Response to Finding No. 949:

This proposed finding is misleading to the extent it suggests that an analysis of ENH-only data has any independent relevance or significance. These data contain only price information for the ENH hospitals and, therefore, cannot provide a basis for relative price calculations. (CCFF ¶¶ 385, 386). Only relative price changes, not absolute price changes, are relevant to the analysis in this case. **REDACTED**

(Baker, Tr. 4702, 4644, 4649-50, 4653, *in camera*; Haas-Wilson, Tr. 2677 *in camera*; Noether, Tr. 5904; RFF ¶¶ 315, 519). To conclude

that price increases have any competitive relevance, it is necessary first to compare the price increases at the merged hospitals with price increases, during the same time period, at comparable hospitals. (Baker, Tr. 4639-43, *in camera*).

REDACTED

(Haas-Wilson, Tr. 2677-78; Elzinga, Tr. 2404; Baker, Tr. 4649-50, *in camera*; Noether, Tr. 5903-04; RFF ¶¶ 316-317, 319, *in camera;* RFF ¶¶ 521-522).

This finding is also misleading to the extent it considers only price changes. Dr. Haas-Wilson admitted that

REDACTED

(Haas-Wilson, Tr. 2834-36, *in camera*; RFF ¶¶ 1053, 1059-1061; RFF ¶¶ 1054-1058, 1062-1064, *in camera*). Consequently, it is impossible to conclude that the post-Merger price changes were anticompetitive based on a simple examination of price changes, without a consideration of competitive price levels.

Finally, this proposed finding is misleading to the extent that it suggests that ENH's 2002 chargemaster increases were anticompetitive. (RFF ¶¶ 924-964).

950. **REDACTED**

(CX 6279 at 4, *in camera*; Haas-Wilson, Tr. 2537-38).

REDACTED

(CX 6279 at 5, *in camera*; Haas-Wilson, Tr. 2537).

Response to Finding No. 950:

This proposed finding is misleading. (RFF-Reply ¶ 949).

951. REDACTED (CX 6279 at 4-5, *in camera*).

Response to Finding No. 951:

This proposed finding is misleading. (RFF-Reply ¶ 949).

4. ENH Was Not Concerned That Health Plans Would Switch to Other Hospitals Due to the 2002 Chargemaster Price Increases

952. ENH management did not anticipate any problems in implementing the chargemaster price increase nor did management fear that health plans would leave and switch to other hospitals due to the price increase. (Hillebrand, Tr. 1718-19).

Response to Finding No. 952:

This proposed finding is misleading because it ignores that MCOs never before requested to see ENH's chargemaster, nor had they shown an interest in the chargemaster before the 2002 increase. (RFF ¶ 962). As a result, ENH did not anticipate any resistance from MCOs to bringing its chargemaster up to market levels. (RFF ¶¶ 956-959, 962).

953. Deloitte recognized that certain health plans might have a negative reaction to the 2002 chargemaster price increases. (Porn, Tr. 5683; CX 43 at 2). However, during the course of the 2002 chargemaster project, Deloitte did not have discussions with ENH management about adverse health plans' reactions to the price increases, and Deloitte was unaware of any issues between health plans and ENH due to the chargemaster increases. (Porn, Tr. 5683-84).

Response to Finding No. 953:

This proposed finding is misleading. (RFF-Reply ¶ 952).

954. ENH management also did not factor the reactions of other hospitals into its decision to implement the 2002 chargemaster increase. (Hillebrand, Tr. 1751).

Response to Finding No. 954:

This proposed finding is misleading because it ignores that ENH had no way of knowing how its competitor hospitals, such as Advocate Lutheran General, would react to any change in

ENH's chargemaster. (Hillebrand, Tr. 1751). Based on Deloitte's extensive analysis, ENH learned that it was severely under-valuing its services as compared to its competitors. (RFF ¶¶ 952-959). ENH simply attempted to address that discrepancy. (RFF ¶¶ 959, 961).

5. Because of the Discount Off Charges Provisions in Health Plan Contracts, ENH Can Unilaterally Institute Large Chargemaster Price Increases Without Even Giving Notice to Most of Its Health Plan Customers

955. After ENH raised its chargemaster prices in April 2002, Tom Hodges, ENH's executive vice-president for finance, wrote to ENH managers that "[f]or a number of reasons we want to be as quiet as possible and there are relatively few people who have seen the scope of the changes." (CX 44 at 1).

Response to Finding No. 955:

This proposed finding is misleading because it mischaracterizes the evidence. The e-mail cited in this proposed finding, CX 44, makes it specifically clear that the chargemaster changes were intended to correct ENH "significantly undercharging in some areas." (CX 44 at 1; RFF ¶¶ 956-959). The stated purpose of this e-mail was to share the "larger picture" so that ENH's personnel could act accordingly. (CX 44 at 1). In this proper context, the quotation cited by Complaint Counsel is consistent with ENH and Deloitte's objective of correcting the under-valuation in the chargemaster.

956. **REDACTED**

(Holt-Darcy, Tr. 1523, *in camera*).

Response to Finding No. 956:

This proposed finding is misleading because **REDACTED**

(Holt-Darcy, Tr. 1523, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1523, *in camera*).

REDACTED (Holt-Darcy, Tr. 1523, *in camera*).

957. According to Mr. Hillebrand, for chargemaster increases, "the only notification we make is to Blue Cross." Mr. Hillebrand added, "We should not notify anyone beyond those we have a contractual obligation to do so." (CX 54 at 1).

Response to Finding No. 957:

This proposed finding is misleading to the extent it ignores that the common industry practice is for hospitals to notify "only those [MCOs] they are obligated to notify per their contract." (CX 54 at 1). Further, Deloitte noted that "[u]sually clients opt to take the same communication approach they use when doing annual price increases." (CX 54 at 1). In response to this advice, Hillebrand acknowledged that Sirabian and ENH Finance usually handled this notification, and that be believed that ENH was only obligated to notify Blue Cross. (CX 54 at 1).

REDACTED

(Hillebrand, Tr. 1939; CX 5072 at 18-19, *in camera*).

958. REDACTED (*see, e.g.*, Foucre, Tr. 1091, 1093, 1096, *in camera*; CX 2381 at 4, *in camera*; CX 6277 at 3, *in camera*), but they needed ENH in their network (*see, e.g.*, Foucre, Tr. 903, 905).

Response to Finding No. 958:

This proposed finding is misleading. It ignores that, outside of these proceedings, not a single MCO expressed concerns to either ENH or Deloitte regarding the chargemaster. (RFF ¶ 962). In addition, this proposed finding is misleading because it relies on Foucre's testimony.

REDACTED

(Foucre, Tr. 1118, *in camera*).

REDACTED

REDACTED (RFF ¶ 892, *in camera*; CX 111 at 1-4).

REDACTED

(RFF ¶ 892, *in camera*; CX 5174 at 7, *in camera*; Foucre, Tr. 899-900).

Finally, this finding is misleading because the documents cited are not reliable.

REDACTED

(*Compare* RX 424 at UHCENH 3324, *in camera, with* CX 2381 at 4, *in camera*; Hillebrand, Tr. 1879-81).

REDACTED

(RFF ¶ 905, *in camera*; RFF ¶ 906; RX 424 at UHCENH 3324, *in camera*; Hillebrand, Tr. 1879-80 (defining "case mix" as the "federal standard that measures the intensity of service")).

REDACTED

(RFF ¶ 905). REDACTED

(RFF ¶ 905, *in camera*).

REDACTED (RFF ¶ 905, *in camera*). At the time, ENH asserted that this data was unreliable and inaccurate. From that point, United ceased attempting to rely on this inaccurate information in the negotiations. (RFF ¶¶ 903-906).

E. ENH Extracted a Significant Price Increase from United

1. Pre-Merger Experience

959. United – the second largest health plan in the Chicago area – contracted with Highland Park Hospital throughout the 1990s under the names of the health plan's affiliates, including MetLife, Metropolitan Life, Chicago HMO, Travelers, and MetraHealth. (CX 5910 at 36-38; Hillebrand, Tr. 1868).

Response to Finding No. 959:

Respondent has no specific response. (RFF ¶¶ 170, 177, 880).

960. United also had various contracts throughout the 1990s with Evanston Hospital under the names of United affiliates including Share, Metlife, Metropolitan Life, Chicago HMO, Travelers, and MetraHealth. (CX 5910 at 38-42).

Response to Finding No. 960:

Respondent has no specific response. (RFF ¶¶ 170, 177, 880).

2. Post-Merger Experience

2000 Negotiation Experience - ENH Demanded a Price Increase from United

961. **REDACTED**

(Hillebrand, Tr. 1873-74; Chan, Tr. 834, *in camera*).

Response to Finding No. 961:

This proposed finding is duplicative, incomplete and misleading. (RFF-Reply ¶ 755).

962. Bain targeted the United contract as a "1st Priority" contract with "upside revenue potential" for which the merged entity had "enough leverage to improve terms." (CX 75 at 9-10; CX 74 at 10).

Response to Finding No. 962:

This proposed finding is misleading. Bain identified the United contract as of the utmost importance because: (1) it was outdated, as it was nearly 6 years old; (2) Evanston Hospital was being reimbursed at less than a fair rate; and (3) there was a substantial difference between Evanston Hospital and HPH's contract rates with United. (RFF ¶¶ 680-684, 704; CX 75 at 9-10). Bain's analysis revealed that United was paying Evanston Hospital 45 to 50% of what it was paying HPH. (RFF ¶ 680).

REDACTED

(RFF ¶ 681). ENH's executives were "beyond surprised" and "shocked" because United had given

Evanston Hospital the impression that it was being fairly and appropriately compensated. (RFF ¶¶ 682-83, 885). United's contract was of the highest priority because it represented a large book of business, had poor performance, was expired or outdated, and there was a substantial difference between Evanston Hospital and HPH. (RFF ¶ 704; CX 75 at 9-10).

REDACTED

(RFF ¶ 681).

In addition, this proposed finding is misleading to the extent that it suggests that the use of the word "leverage" implies market power. "Leverage" simply means that ENH should not be afraid to ask to be paid fair market value. (RFF ¶¶ 995-1000).

963. In October 1999, Evanston contacted United on behalf of both merging parties to renegotiate their hospital contracts. (Hillebrand, Tr. 1740, 1852).

Response to Finding No. 963:

Respondent has no specific response. (RFF ¶ 709).

964. While ENH did not know specifically what price targets it would be seeking for the new contract, ENH did know that the price targets it would set would be "high." (CX 75 at 12; Hillebrand, Tr., 1743).

Response to Finding No. 964:

This proposed finding is misleading to the extent it suggests that the use of the word "high" in Bain documents implies market power. Bain advised ENH to ask for a price higher than it might ultimately be satisfied with as a starting point for negotiations with the clear understanding that ENH's initial offer would not be the ultimate contract price. (RFF ¶ 715; CX 75 at 12). In addition, this proposed finding is misleading because it mischaracterizes Hillebrand's testimony. Hillebrand testified that he did not recall the specific targets for each contract while on the stand – not that no one at ENH knew what they were at the time, as this proposed finding suggests. (Hillebrand, Tr. 1743).

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

In the matter of	)	
	)	Docket No. 9315
Evanston Northwestern Healthcare Corporation,	)	**Public Record**

RESPONDENT'S REPLIES TO COMPLAINT COUNSEL'S PROPOSED FINDINGS OF FACT

VOLUME V of XI

WINSTON & STRAWN LLP

35 West Wacker Dr.
Chicago, IL 60601-9703
(312) 558-5764

1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000

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965. **REDACTED**

(CX 1607 at 5, *in camera*).

Response to Finding No. 965:

This proposed finding is misleading to the extent it ignores the fact that the market share referenced in the proposed finding likely represents ENH's rough share of its "core," the sub-market that is too small to sustain ENH's business and, therefore, is of little relevance to the hospital. (RFF-Reply ¶¶ 49, 57). **REDACTED**

(RX 1331 at ENHE DL 11883, *in camera*; RFF-Reply ¶ 65).

REDACTED

(Chan, Tr. 839, *in camera*).

Bain's comment regarding ENH being the "preferred provider" underscores ENH's reputation and prestige in the relevant market. (RFF ¶¶ 3, 10, 30-32, 34, 701-702, 718). Bain marshaled this value in an articulated way and advised ENH to bring that value to the negotiating table.

966. In terms of geography, ENH also knew that it had negotiating leverage due to the fact that "with the Highland Park merger, ENH offers the largest regional network for more convenient access." (CX 75 at 37).

Response to Finding No. 966:

This proposed finding is misleading because the cited Bain quotation relates to the number of physicians associated with ENH, not to the hospital network. The explanatory note in the Bain document reads: "Over 900 IPA physicians with a high degree of exclusivity." (CX 75 at 37). This statement simply reflects that the surrounding area physicians have more convenient access to hospital resources after the Merger to care for their patients.

967. **REDACTED** , (CX 21 at 5, *in camera*).

Response to Finding No. 967:

This proposed finding is misleading because **REDACTED** (Foucre, Tr. 1111, *in camera*). **REDACTED** (CX 21, *in camera*; Foucre, Tr. 1111-12, *in camera*). **REDACTED** (*Compare* CX 21 at 5 *with* CX 5174 at 1-2; RFF ¶¶ 709, 888).

This proposed finding is also misleading to the extent it suggests that the ultimate rates agreed on by ENH and United were above-market. **REDACTED** (RFF ¶¶ 1131-1136). In addition, this proposed finding ignores that **REDACTED** (RFF ¶¶ 184-186).

Finally, this proposed finding is inaccurate because, far from being "non-negotiable," as this proposed finding suggests, the evidence demonstrated that several of the contract terms between ENH and United were the subject of negotiation. On December 3, 1999, ENH sent a proposal to United. (CX 111 at 1). United's negotiators indicated that the parties should use the better of the existing Evanston Hospital or HPH contracts as the basis for the new contract. (CX 111 at 1). Therefore, ENH proposed a series of rates consistent with HPH's contract. (CX 111

at 2-4). This proposal, however, bears almost no resemblance to the deal that the parties executed.

ENH proposed medical, surgical and pediatric per diems of $1650 per day for HMO patients. (CX 111 at 2). **REDACTED**

(CX 5174 at 11, *in camera*).

REDACTED

(*Compare* CX 111 at 2 *with* CX 5174 at 11, *in camera*).

REDACTED

(*Compare* CX 111 at 2 *with* CX 5174 at 12, *in camera*). **REDACTED**

(CX 111 at 2-3).

REDACTED

(CX 5174 at 11-12; RFF ¶¶ 889-890).

REDACTED

(*Compare* CX 111 at 2 *with* CX 5174 at 12, *in camera*).

REDACTED (*Compare* CX 111 at 4 *with* CX 5174 at 7, *in camera*).

REDACTED (RFF ¶ 892; CX 111; CX 5174 at 7, *in camera*).

968. During the United renegotiations, representatives from the health plan never threatened to redirect their patients to other hospitals as a result of the price increase. (Chan, Tr. 703).

Response to Finding No. 968:

This proposed finding is misleading because it ignores that while selective contracting has historically been a tool of managed care, it has not played a role in managed care in the

Chicago area. (RFF ¶¶ 75-76). Therefore, it is unlikely that any MCO would make a threat to exclude any area hospital. In recent years, patients and employees in Chicago have demanded broad provider networks with few restrictions. (RFF ¶¶ 58-60).

969. REDACTED (CX 21 at 5, *in camera*).

Response to Finding No. 969:

This proposed finding is misleading and inaccurate. (RFF-Reply ¶ 967).

970. In late 1999, United and ENH reached agreement on the new hospital rates with a contract effective date of January 1, 2000 (the date of the merger). (Hillebrand, Tr. 1875).

Response to Finding No. 970:

Respondent has no specific response.

ENH Obtained a Significant Price Increase from United

971. REDACTED

(Foucre, Tr. 890; CX 5174 at 11-12, *in camera*).

Response to Finding No. 971:

This proposed finding is misleading because it ignores the fact that, at United's behest, the 2000 contract negotiations began with a proposal that was "consistent" with the rates and structure of HPH's contract, which was a discount-off-charges arrangement. (CX 111 at 1). Both Bain's and Chan's analysis revealed to ENH that HPH's agreement with United was far superior to Evanston Hospital's in many respects. (RFF ¶¶ 664, 679-684, 707-709, 882-885, 888).

This proposed finding is also misleading because it suggests that United's Open Access plan contracts with ENH were discount-off-charges arrangements. As is clear in the contract, for

many inpatient services Open Access had the same fixed rates as United's HMO. (CX 5174 at 11-12, *in camera*)

Finally, this proposed finding is misleading to the extent it relies on Foucre's testimony. **REDACTED** (Foucre, Tr. 1118, *in camera*). **REDACTED**

(Foucre, Tr. 1119-20, *in camera*).

972. The 2000 contract between United and ENH also required United to pay the same rates for each of ENH's three hospitals. (Foucre, Tr. 890). ENH's insistence on one tax ID number and identical rates for all three hospitals was "challenging" (Foucre, Tr. 891).

Response to Finding No. 972:

This proposed finding is repetitive, misleading and should be afforded no weight. (RFF-Reply ¶¶ 825-826).

973. Ms. Chan, a negotiator for ENH, knew that, after the contract renegotiation, United "did poorly" and had to pay a lot more. (Chan, Tr. 696).

Response to Finding No. 973:

This proposed finding is misleading because it misconstrues the cited testimony. Chan testified only with regards to United's success in negotiations with ENH relative to some other MCOs. (Chan, Tr. 696). Moreover, this proposed finding ignores that, **REDACTED** (Holt-Darcy, Tr. 1589, *in camera*). Poor negotiation on United's part is not evidence of the exercise of market power by ENH. **REDACTED**

(RFF ¶ 890, *in camera*). United successfully negotiated a number of terms into the finalized contract. (RFF-Reply ¶ 967). **REDACTED**

REDACTED

(RFF ¶¶ 681-684).

974. After the renegotiated contract went into effect, Mr. Hillebrand reported to ENH's board of directors that the United contract renegotiation resulted in an "additional 3.5 million dollar benefit" for ENH. (CX 5 at 5; Hillebrand, Tr. 1820).

Response to Finding No. 974:

This proposed finding is misleading to the extent it ignores that Evanston Hospital had not renegotiated its contract with United since 1994, and that contract was severely under-market. (RFF ¶¶ 680-684, 694-695, 877-878). Earning increased revenue from bringing rates up to competitive market levels is not anticompetitive. (RFF ¶¶ 1131-1136).

975. Mr. Neaman further noted that the renegotiated United contract would bring in $3 million of annualized economic value for the merged entity. (CX 17 at 1, 5).

Response to Finding No. 975:

This proposed finding is misleading. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374-1376, 1378, 1395-1397).

976. **REDACTED**

(CX 6279 at 19, *in camera*. *See also* CCFF 672-677, *in camera*).

Response to Finding No. 976:

This proposed finding is inaccurate and misleading. (RFF-Reply ¶¶ 672-677).

977. **REDACTED**

(CX 6279 at 19, *in camera*; Haas-Wilson, Tr. 2563, 2612-13, 2627-28, *in camera*).

Response to Finding No. 977:

This proposed finding is inaccurate and misleading. (RFF-Reply ¶¶ 672-677).

2002 Renegotiation Experience of United

978. REDACTED

(CX 21 at 5, *in camera*).

Response to Finding No. 978:

This proposed finding is inaccurate and misleading. (RFF-Reply ¶¶ 967, 969). In addition, this proposed finding is misleading because the evidence demonstrated that there were many other hospitals in the Chicago area that exercised competitive constraint on ENH.

REDACTED

(Foucre, Tr. 1115, *in camera*; RX 1208 at UHCENH 3380, *in camera*).

REDACTED

(Foucre, Tr. 1115, *in camera*; RX 1208 at UHCENH 3380, *in camera*).

REDACTED

(RX 1208 at UHCENH 3380, *in camera*).

Moreover, Foucre admitted that ENH competes with other hospitals in the North Shore. Foucre agreed that ENH *competes* with Advocate Lutheran General, St. Francis, Rush North Shore, and that HPH "*primarily*" competes with Condell and Lake Forest Hospitals. (Foucre, Tr. 941-42, 944 (emphasis added)). Foucre further testified that Advocate Lutheran General is "the most comparable facility from type of services, quality of services, and size of facility" to

Evanston Hospital. (Foucre, Tr. 943-44; RFF ¶ 565; RFF ¶¶ 563-564, 566-567, 569 (confirming that other MCOs also viewed Advocate Lutheran General as Evanston Hospital's closest competitor)).

979. In August 2002, United's COO, Jillian Foucre, requested a renegotiation of United's contract with ENH because, since the 2000 contract, ENH had been an "outlier" hospital with "much higher than the average reimbursement." (Foucre, Tr. 888).

Response to Finding No. 979:

This proposed finding is misleading. (RFF-Reply ¶ 971).

REDACTED

(RFF ¶¶ 907-908).

REDACTED

(RFF ¶¶ 907-908).

980. United was concerned in part because the 2000 contract relied primarily on a discount off charges payment methodology, resulting in higher and higher reimbursements from United as it witnessed "alarmin[g] escalating costs in [ENH's] billed charges" that were "outside of the norms for the market." (Foucre, Tr. 898, 889).

Response to Finding No. 980:

This proposed finding is misleading. First, the United contract with ENH included many fixed rates for important categories of service.

REDACTED

(CX 5174 at 11-12, *in camera*).

REDACTED

(RFF ¶ 892).

REDACTED

(Foucre, Tr. 1118, *in camera*).

981. **REDACTED**
(Foucre, Tr. 1078, *in camera*; CX 21 at 8, *in camera*).

Response to Finding No. 981:

This proposed finding inaccurate and misleading. (RFF-Reply ¶¶ 967, 969, 978). In addition, this proposed finding is misleading to the extent it ignores expert empirical analysis of price levels demonstrating that **REDACTED**

(RFF ¶¶ 1131-1136, 1154).

982. **REDACTED**
(Foucre, Tr. 1078, *in camera*; CX 21 at 8, *in camera*).

Response to Finding No. 982:

This proposed inaccurate and misleading. (RFF-Reply ¶¶ 967, 969, 978, 981).

983. In 2002, United's objectives in the renegotiation talks were to move the hospital to a new contract template, to move to more fixed rates with ENH, and to achieve a reduction in the total reimbursement under the contract so that United 's rates would be in line with Blue Cross/Blue Shield, United's primary competitor. (Foucre, Tr. 892-93).

Response to Finding No. 983:

This proposed finding is incomplete and not based on reliable evidence. (RFF ¶ 896).

REDACTED

(RFF ¶¶ 898-900; Foucre, Tr. 894, 896; Foucre, Tr. 1107, *in camera*; Hillebrand, Tr. 1882).

REDACTED

(Hillebrand, Tr. 1880-81; RX 424 at UHCENH 3326, *in camera*). Those calculations simply "did not make any sense." (Hillebrand, Tr. 1879-81). Ultimately, ENH questioned the validity and reliability of this data and, "it never again resurfaced." (Hillebrand, Tr. 1881-82).

984. Mr. Hillebrand knew that United's renegotiation objectives in August 2002 were to get a "fair deal" and a "price reduction." (Hillebrand, Tr. 1877).

Response to Finding No. 984:

This proposed finding is misleading. United's initial proposal sought a $20 million reduction on a $50 million book of business, which failed to recognize the quality of service ENH provided to United's customers. (RFF ¶¶ 901-902). ENH had never before, and has never since, been presented with a proposal requesting such a significant reduction. (RFF ¶¶ 902). In addition, this finding is misleading because Complaint Counsel mischaracterizes Hillebrand's testimony. Hillebrand only related his understanding of the terminology used by United in justifying its unique proposal – "fair deal" and "price reduction." Hillebrand did not personally characterize United's proposal in this manner. (Hillebrand, Tr. 1877). To the contrary, Hillebrand clarified that he was "upset" about United's proposal and felt it was "demeaning" and "inadequate." (Hillebrand, Tr. 1878-79).

985. The face-to-face renegotiations between United's CEO, Bill Moeller, Ms. Foucre, Mr. Hillebrand, and Mr. Golbus came to a standstill as ENH refused to consider any of United's requests. (Foucre, Tr. 893).

Response to Finding No. 985:

This proposed finding is inaccurate. The evidence cited by Complaint Counsel does not support the proposed finding. (Foucre, Tr. 893). Foucre herself noted that ENH responded to each of United's concerns. Foucre testified that ENH responded that it felt fixed rates put too much risk on the hospitals rather than United, the "organization responsible for taking risk." (Foucre, Tr. 893). The fact is that ENH approached the United renegotiations hoping to accommodate United's concerns and reach a new agreement. (RFF ¶¶ 894-923). Moreover, at the end of the negotiations, both sides negotiated a deal that was mutually acceptable. (RFF ¶¶ 917-922).

986. **REDACTED**

(Foucre, Tr. 894-96, 898; CX 2381 at 1, *in camera*).

Response to Finding No. 986:

This proposed finding is misleading. (RFF ¶¶ 897-906; RFF-Reply ¶¶ 958, 985). In addition, the evidence showed that United used this litigation and Complaint Counsel's investigation to improve its bargaining position in the contract renegotiation. (RFF-Reply ¶ 967). **REDACTED**

(Foucre, Tr. 1109-11, *in camera*).

REDACTED

, (RX 1208 at UHCENH 3383 to 3384, *in camera*). In fact, the evidence showed that United tried to play both sides. William Moeller, the president and CEO of United, pulled Hillebrand into a private caucus during a negotiation meeting and offered to help ENH with respect to the investigation. (Hillebrand, Tr. 1886-89; Foucre, Tr. 892, 922-23). As a result, the testimony of Foucre should be considered with the highest degree of caution, and the United evidence viewed with the highest order of skepticism.

987. **REDACTED**

(Foucre, Tr. 1081-82, *in camera*; CX 2381 at 4, *in camera*).

Response to Finding No. 987:

This proposed finding is misleading because it ignores that

REDACTED

(RFF-Reply ¶ 979, *in camera*).

REDACTED

REDACTED (RFF ¶ 908, *in camera*). {**United's**

REDACTED

(RFF ¶¶ 905-906; RX 424 at UHCENH 3324, *in camera*; Hillebrand, Tr. 1879-80 (defining "case mix" as the "federal standard that measures the intensity of service")).

REDACTED

(RFF ¶ 905, *in camera*). As a result, the cited evidence is unreliable and should be disregarded.

988. REDACTED

(Foucre, Tr. 936; Foucre, Tr. 1083, *in camera*; CX 2381 at 4, *in camera*).

Response to Finding No. 988

This proposed finding is misleading. Foucre defined academic hospitals as hospitals that have an association with a medical school. (Foucre, Tr. 935; Foucre, Tr. 1112, *in camera*).

REDACTED

(Foucre, Tr. 1112, *in camera*; RFF ¶¶ 1, 8-11, 30). By United's own definition, therefore, ENH is an academic hospital. This status is confirmed by MedPAC, a federal regulatory body. (RFF ¶¶ 8, 559).

989. REDACTED

(Foucre, Tr. 1082, *in camera*).

Response to Finding 989:

This proposed finding is misleading. (RFF-Reply ¶ 958; RFF ¶¶ 904-906, 987-988).

990. REDACTED

(CX 2381 at 4, *in camera*).

REDACTED (Foucre, Tr. 1082-84, *in camera* ; CX 2381 at 4, *in camera*).

Response to Finding No. 990:

This proposed finding is misleading. (RFF-Reply ¶¶ 987-989).

991. REDACTED

(Foucre, Tr. 1084, *in camera*; CX 2381 at 4, *in camera*).

REDACTED

(Foucre, Tr. 1084-85, *in camera*; CX 2381 at 4, *in camera*).

REDACTED

(Foucre, Tr. 1084-85, *in camera*; CX 2381 at 4, *in camera*).

Response to Finding No. 991:

This proposed finding is misleading. (RFF-Reply ¶ 958). REDACTED

(RFF-Reply ¶¶ 987-990).

REDACTED (RX 1208 at UHCENH 3378, *in camera*; Foucre, Tr. 1116-18, *in camera*).

REDACTED

(RFF ¶¶ 907-908, *in camera*). REDACTED

(RX 1208 at UHCENH 3378, *in camera*).

REDACTED

(RX 1208 at UHCENH 3378, *in camera*).

REDACTED

(RFF ¶ 908; Foucre, Tr. 1117-18, *in camera*).

To further demonstrate that ENH was at reasonable market levels, Foucre testified that Advocate Lutheran General, **REDACTED** was the most comparable hospital to Evanston Hospital in terms of breadth of service, quality of service and size of facility. (RFF ¶ 565). United also admitted that Evanston Hospital and Northwestern Memorial were competitors for some services. (RFF ¶ 565).

992. **REDACTED**

(Foucre, Tr. 1098-99, *in camera*; CX 6277 at 7, *in camera*).

Response to Finding No. 992:

This proposed finding is misleading and inaccurate. (RFF-Reply ¶¶ 967, 969, 978, 981-982, 987, 990-991). This proposed finding is also misleading because the document relied on by Complaint Counsel for this proposed finding is unreliable.

REDACTED

(Foucre, Tr. 1108-09, *in camera*; RFF ¶ 909). However, none of these customers felt adversely affected by the Merger. (Foucre, Tr. 948).

993. **REDACTED**

(Foucre, Tr. 1081, *in camera*).

REDACTED

(Foucre, Tr. 1081, *in camera*; CX 2381 at 3, *in camera*).

Response to Finding No. 993:

This proposed finding is misleading to the extent it ignores expert empirical analysis of price levels. (RFF ¶¶ 987, 990-991). **REDACTED**

REDACTED (RFF ¶ 1135). **REDACTED**

(RFF ¶ 1135, *in camera*).

This proposed finding is also misleading because United specifically negotiated a provision into its 2000 contract with ENH to address increases in the hospital's standard charges. (RFF-Reply ¶¶ 958, 967, 980; RFF ¶ 892).

REDACTED

(RFF ¶¶ 87-90, 750-51, 846-847, 892).

994. **REDACTED** (Foucre, Tr. 1081, *in camera*; CX 2381 at 3, *in camera*).

Response to Finding No. 994:

This proposed finding is misleading. (RFF-Reply ¶¶ 987, 990-991, 993).

995. **REDACTED**

(Foucre, Tr. 1096, *in camera*; CX 6277 at 6, *in camera*).

Response to Finding No. 995:

This proposed finding is misleading. (RFF-Reply ¶¶ 992-993).

996. **REDACTED**

(Foucre, Tr. 897; CX 57 at 1, *in camera*).

Response to Finding No. 996:

This proposed finding is inaccurate and misleading. Since ENH had learned about demand and knew that its rates were competitively priced, it refused to reduce its rates by 40% as requested by United. (Hillebrand, Tr. 1878-79). United's request for reduction was not

reasonable and did not recognize the care ENH was providing to its members and was inadequate compensation for the services. (RFF ¶¶ 901-902).

This proposed finding is also misleading because ENH rejected United's data because it was "nonsensical," "invalid," "extremely flawed," "didn't make any sense," and resembled "junior graduate school level work." (RFF ¶ 904; Hillebrand, Tr. 1879, 1881-82; Foucre, Tr. 896). In fact, after ENH criticized the data, United never again attempted to use it again during the negotiations. (RFF ¶ 906).

997. **REDACTED** (Foucre, Tr. 897; CX 57 at 1, *in camera*).

Response to Finding No. 997:

This proposed finding is misleading because it ignores that,

REDACTED

(RFF ¶ 921).

REDACTED (RFF ¶¶ 883-884, 907-908, 921-922, 1131-1136, 1154).

998. In 2002, after exchanging proposals and counter-proposals a second time, United had made no progress towards achieving any of its business goals and considered terminating its existing contract with ENH. (Foucre, Tr. 898-900).

REDACTED

(Foucre, Tr. 899-900; CX 5174 at 7, *in camera*).

Response to Finding No. 998:

This proposed finding is misleading and inaccurate because it ignores that,

REDACTED (CX 5174 at 7, *in camera*).

REDACTED

(CX 5174 at 7, *in camera*). **REDACTED**

REDACTED

(RFF ¶ 892).

According to United, Excluding ENH from Its Network Was Not a Viable Choice

999. Nonetheless, United could not terminate its contract with ENH because United "could not have a viable network that would support our sales and growth objectives without the Evanston Northwestern Healthcare system." (Foucre, Tr. 901-02, 925-26).

Response to Finding No. 999:

This proposed finding relies on unreliable hearsay evidence and also is inaccurate and misleading. At trial, Respondent objected to Foucre's unfounded characterization of out-of-court statements by United's customers. (Foucre, Tr. 901-902, 905-906). The Court allowed the testimony into the record, but it should be accorded little or no weight.

Also, the impetus for Foucre's conversations with employer groups regarding ENH was to coordinate with Complaint Counsel and use this litigation as leverage in its contract negotiation. **REDACTED**

(Foucre, Tr. 1110-11, *in camera*).

REDACTED

(RFF ¶ 909; Foucre, Tr. 1110-11, *in camera*). The Merger was not even discussed at that meeting. (Hillebrand, Tr. 1883-84).

In addition, this proposed finding is misleading because it ignores evidence suggesting that many hospitals could have served as network alternatives to ENH. At trial, Foucre admitted that ENH has a number of competitors that could serve as alternatives to the ENH hospitals. (RFF-Reply ¶ 978).

1000. A network comprised of United's other participating hospitals – Lake Forest, Condell, Northwest Community, Advocate Lutheran General and St. Francis Hospitals – would not be viable without ENH. (Foucre, Tr. 900-01, 925-26).

Response to Finding No. 1000:

This proposed finding is misleading. (RFF-Reply ¶¶ 978-999). Moreover, this proposed finding ignores that a significant nearby competitor of ENH had terminated from United's network in the post-Merger period. Rush North Shore, which is located a mere 3.7 miles from Evanston Hospital, was not in United's network from 2000 until August 2003. (Foucre, Tr. 932; RFF ¶ 389(b)). Importantly, Rush North Shore is closer to HPH than Evanston Hospital is to HPH. (RFF ¶ 390(c)).

Then, just as United contracted with Rush North Shore, ENH's closest competitor, Advocate Lutheran General, could not agree to terms with United and terminated from the network. (Foucre, Tr. 933-34; RFF ¶¶ 414, 563-569, 915). As a result of United's inability to reach agreements with ENH's competitors, it had less ability to use the alternative network. Therefore, the Merger had no effect on United's ability to field an appropriate network to its customers. United cannot credibly complain it has no substitutes when it failed to negotiate contracts with ENH's alternatives.

1001. United knew a network without Evanston Northwestern Healthcare would not provide adequate service to the "very heavily populated," area surrounding the three hospitals because "there are no other facilities" within the geographic triangle formed by the three hospitals. (Foucre, Tr. 902, 933).

Response to Finding No. 1001:

This proposed finding is misleading. (RFF-Reply ¶ 285). In particular, the North Shore is not a "very heavily populated" area. (Foucre, Tr. 902). The North Shore is composed of "bedroom communities" for people who work in the city, with single-family homes and a fair amount of land, and a limited retail environment. (Hillebrand, Tr. 2030-31). Moreover, Foucre,

admitted that she did not live in the North Shore and did not "have a sense of the geography." (Foucre, Tr. 941).

In addition, this proposed finding is misleading to the extent it ignores the evidence demonstrating that the properly defined geographic market, in which to assess the competitive effects of the Merger, is much larger than the "triangle" advanced in this proposed finding. (RFF ¶¶ 383-498).

United's Employer Groups Would Not Accept a Network Without ENH

1002. Although United did not want to involve its employer groups in the negotiations with ENH ("they pay [United] to manage the network. They have businesses of their own to run"), United decided in early 2003 that "the situation was extreme enough" that it was time to contact representatives of some of its largest employer groups. (Foucre, Tr. 904-05).

Response to Finding 1002:

This proposed finding is misleading. As of January 2003, not a single United customer was adversely affected by the Merger. (Foucre, Tr. 948).

REDACTED

(RFF-Reply ¶ 999; Foucre, Tr. 1108-11, *in camera*).

Although employer representatives met with United and ENH, the Merger was never discussed at this meeting. (Hillebrand, Tr. 1884-85). Rather, this meeting focused on the general trends of health care costs, tort reform and the evolution of new types of health plans. (Hillebrand, Tr. 1884-85).

1003. **REDACTED**

(Foucre, Tr. 903-05; Foucre, Tr. 1085-86, *in camera*; CX 6277 at 4, *in camera*).

Response to Finding No. 1003:

This proposed finding is misleading. (RFF-Reply ¶ 1002).

1004. **REDACTED**

(Foucre, Tr. 1089-92, *in camera*; CX 6277 at 3, *in camera*).

Response to Finding No. 1004:

This proposed finding is misleading and inaccurate. (RFF-Reply ¶¶ 958, 992, 995).

1005. **REDACTED**

(Foucre, Tr. 1086, *in camera*; CX 6277 at 4, *in camera*).

Response to Finding No. 1005:

This proposed finding is misleading. (RFF-Reply ¶¶ 958, 992, 995).

1006. **REDACTED**
(Foucre, Tr. 1095, *in camera*).

Response to Finding No. 1006:

This proposed finding is misleading. (RFF-Reply ¶¶ 958, 992, 995).

1007. **REDACTED**
(Foucre, Tr. 1097, *in camera*; CX 6277 at 8, *in camera*).

REDACTED

(Foucre, Tr. 1097, *in camera*; CX 6277 at 8, *in camera*).

Response to Finding No. 1007:

This proposed finding is misleading and inaccurate. (RFF-Reply ¶¶ 958, 992, 995). ENH's prices with United were not anticompetitive after the Merger. (RFF ¶¶ 1132-1136, 1154). **REDACTED**

(RFF-Reply ¶ 991).

1008. **REDACTED**

(Foucre, Tr. 1091, 1096, *in camera*).

REDACTED

(Foucre, Tr. 1093, *in camera*; CX 2381 at 4, *in camera*; CX 6277 at 3, *in camera*).

Response to Finding No. 1008:

This proposed finding is inaccurate and misleading. (RFF-Reply ¶¶ 958, 992, 995). Deloitte's chargemaster study was, in fact, a one-time adjustment to bring ENH's prices up to market levels. (RFF ¶¶ 956-959).

1009. Despite having learned of ENH's escalating rates, United's largest employer groups, comprising the "largest number of dollars flowing through Evanston Northwestern Healthcare," informed United that they did not view a network without ENH as a viable alternative (Foucre, Tr. 903, 905).

Response to Finding No. 1009:

This proposed finding is misleading and not based on reliable evidence. (RFF-Reply ¶¶ 958, 978, 996, 1000). This proposed finding is based only on hearsay (admitted over the objection of Respondent) and should be afforded no evidentiary weight. (Foucre, Tr. 906-07). Complaint Counsel could have brought, but did not bring, any employers to testify at trial. As a result, Respondent had no right to effectively cross-examine any employers. Instead, Complaint Counsel relied on unreliable rumors and insinuations.

1010. United could have had a network that did not include certain hospitals (such as hospitals in the Rush or Advocate system that are spread out over a larger geographic area), but United could not market a network without ENH, a system that "is not geographically dispersed." (Foucre, Tr. 931-34).

Response to Finding No. 1010:

This proposed finding is misleading. (RFF-Reply ¶¶ 958, 978, 996, 1000). In addition, as Foucre testified, there are "a lot of hospitals in the North Chicagoland area." (Foucre, Tr. 934). **REDACTED**

REDACTED (RFF ¶ 456). Of those nineteen, two were from the Rush System (Rush Presbyterian and Rush North Shore) and one belongs to the Advocate System (Advocate Lutheran General). (RFF ¶ 456). Of course, since 2000, hospitals in the Rush System have been out of United's network. (RFF-Reply ¶¶ 958, 978, 996). Since the end of 2003, Advocate Lutheran General, one of Evanston Hospital's closest competitors also terminated from United's network. (RFF-Reply ¶¶ 958, 978, 996). In fact, there is significant and important overlap between the three ENH hospitals and the Rush and Advocate Systems. As United burned bridges to ENH's competitors, ENH became more important – not because of the Merger.

1011. Faced with the knowledge that it would not be able to market a network to its largest employer groups without including the three ENH facilities, United decided to abandon its objective of receiving a reduction in reimbursement from ENH in favor of a contract structured with fixed rates. (Foucre, Tr. 907).

Response to Finding No. 1011:

This proposed finding is inaccurate and misleading. United did not, and could not, impose a rate reduction because ENH's rates were appropriate for the market and competitive.

REDACTED

(RFF ¶¶ 907-908, 1131-1136, 1154).

1012. United contacted ENH with its new written proposal in the hopes that, with more fixed rates, United would be better able to protect itself from ENH's escalating chargemaster. (Foucre, Tr. 907-08).

Response to Finding No. 1012:

This proposed finding is misleading because it ignores that,

REDACTED

(RFF-Reply ¶¶

925, 935, 958, 967, 980). United secured protection from chargemaster updates in its 2000 contract.

In addition, this proposed finding ignores that

REDACTED (RFF ¶¶ 879-880, 912-913).

REDACTED (RFF ¶ 913).

Finally, this proposed finding is misleading because, ultimately, ENH became the first hospital to agree to United's new methodology in its template contract. (RFF ¶ 919).

REDACTED (RFF ¶ 920). Only months into that new contract, ENH discovered significant problems resulting in mispaid claims under that payment structure. (RFF ¶ 923).

1013. On May 13, 2003, United held a meeting involving both ENH and its largest employer groups. (Foucre, Tr. 906). Kraft representatives "question[ed] the current reimbursement structure that was at percentage of charges" and "supported [United's] desire for more predictability on fixed rates." (Foucre, Tr. 909).

Response to Finding No. 1013:

This proposed finding is based on hearsay and is misleading. Complaint Counsel refused to call a single employer to testify regarding any alleged effect of the Merger. The cited testimony was admitted over Respondent's objection. Although it is part of the record, it should be given little weight. (Foucre, Tr. 906). At no time during the meeting with employers was the subject of the Merger even discussed. (RFF ¶ 909; Hillebrand, Tr. 1884).

In addition, this proposed finding is misleading to the extent ignores that the data provided to Kraft by United was inaccurate and unreliable. (RFF-Reply ¶¶ 958, 992, 995).

Finally, of the at least seven employers that were approached by Foucre, by her own admission, only two even supported United's position on the matter. (Foucre, Tr. 909; RFF ¶ 909).

1014. Kraft representatives in particular were "pretty vocal about their . . . concern about the increasing trend" in ENH's chargemaster rates and the discount off charges structure of the current contract. (Foucre, Tr. 908).

Response to Finding No. 1014:

This proposed finding is based on hearsay and is misleading. (RFF-Reply ¶ 1013).

1015. ENH and United did not resolve the issue of contract structure at the May 13, 2003 meeting. (Foucre, Tr. 921-23).

Response to Finding No. 1015:

This proposed finding is misleading.

REDACTED

(RFF ¶¶ 917, 919-920).

ENH Compromised with United Only After Learning of the FTC's Scrutiny of the Matter

1016. Over the summer of 2003, the tone of the negotiations between ENH and United changed (Foucre, Tr. 912). New negotiators took over for both ENH and United, and ENH approached United to request a health plan for its employees and to become a customer of United for network services. (Foucre, Tr. 912-14).

Response to Finding No. 1016:

This proposed finding is misleading. The tone of negotiations certainly changed when new personalities from both sides took over the negotiations. (RFF ¶ 910). Washa from ENH had previously worked with United's new negotiator, Kurt Janavitz, and the contract negotiations between these two negotiators were more effective. (RFF ¶ 910).

This proposed finding implies that there is an inappropriate connection between ENH's annual renewal of its benefit plans for its employees and the contract negotiations. There is no

evidence that there was anything unusual about ENH considering United as its health insurer for its employees. (Foucre, Tr. 914). All employers compete in the labor markets and try to maximize "choice" for the employees to satisfy health care needs. (RFF ¶¶ 56-57). United is the second largest insurer in the Chicago area serving nearly 875,000 employees and families. (RFF ¶ 170). Naturally, as ENH sought a health insurer for its employees, United would be among the choices available.

1017. During a meeting at ENH to discuss the possible employee-benefit plan, Mr. Hillebrand requested that United representatives "contact the FTC and have a conversation with them about whether–about whether [United] believed that [it] had been . . . financially harmed by the merger of the Evanston hospitals with Highland Park." (Foucre, Tr. 914-15). Mr. Hillebrand also requested that United representatives contact ENH's counsel, Mr. Sibarium, at Winston & Strawn to make a statement that United was "not unreasonably harmed by the merger," and gave Mr. Sibarium's phone number to United representative William Moeller. (Foucre, Tr. 918-19; CX 6283 at 1).

Response to Finding No. 1017:

This proposed finding is misleading to the extent it relies only on unreliable testimony by Foucre. Foucre was not even a party to the private caucus between Moeller, CEO of United, and Hillebrand referenced in this proposed finding. (Hillebrand, Tr. 1886; Foucre, Tr. 914-15 (*confirming* a private meeting between Moeller and Hillebrand took place)). During this private caucus, Moeller offered to assist ENH with respect to the FTC investigation. (Hillebrand, Tr. 1887). In particular, Moeller offered to support the *hospitals*' position during that meeting. (Hillebrand, Tr. 1887; RFF-Reply ¶ 978). Accordingly, Moeller asked Hillebrand for Sibarium's contact information. (Hillebrand, Tr. 1887).

1018. Believing that United, in fact, had been financially harmed by the merger, United did not assist ENH or its counsel. (Foucre, Tr. 919, 927).

Response to Finding No. 1018:

This proposed finding is misleading. (RFF-Reply ¶ 1017).

1019. Having made some progress on the renegotiation of the hospital contract from spring 2003, United representatives and ENH met again on September 2, 2003. (Foucre, Tr. 921).

REDACTED

(Foucre, Tr. 921-23; Hillebrand, Tr. 1928, *in camera*; CX 6284 at 1). Mr. Hillebrand told United representatives that ENH and its attorneys had "taken the liberty of drafting [a] letter pursuant to his conversation that he had had with Bill [Moeller] several weeks earlier." (Foucre, Tr. 923).

Response to Finding No. 1019:

This proposed finding is misleading. It is undisputed that Moeller requested the draft letter and, pursuant to that request, Hillebrand provided it. (Foucre, Tr. 923; Hillebrand, Tr. 1887.) Foucre was not a party to the discussions between Moeller and Hillebrand. (RFF-Reply ¶ 1017). Accordingly, Foucre's testimony concerning this issue should be accorded no weight. (Foucre, Tr. 928 (ruling that the Court will be mindful of CX 6284's due weight)).

1020. Mr. Hillebrand requested that United "consider sending [the] letter or some version of it that [they] were comfortable with" to the Director of the Bureau of Competition at the FTC. (Foucre, Tr. 922-23; CX 6284 at 1).

Response to Finding No. 1020:

This proposed finding is misleading. (RFF-Reply ¶ 1019).

1021. Disagreeing with the substance of the letter drafted by counsel for ENH, United did not sign it or send it to the FTC. (Foucre, Tr. 924-25, 927).

Response to Finding No. 1021:

This proposed finding is misleading. (RFF-Reply ¶ 1019).

1022. While the letter drafted by ENH's counsel claimed that "the combination of ENH and HPH has not had any adverse impact on competition for hospital services in the Chicagoland area," United's "own data and information would indicate that there had been an adverse impact to United Healthcare." (Foucre, Tr. 924-25; CX 6284 at 1).

Response to Finding No. 1022:

This proposed finding is misleading. (RFF-Reply ¶¶ 967, 969, 978, 981-982, 987, 990-992).

1023. United could not adopt the language of ENH's letter in part because, as of September 2003, Ms. Foucre did not know whether or not the ENH/HPH merger had created an "improved and expanded integrated healthcare delivery system" or whether quality of care had been enhanced at each of the hospitals (as ENH's letter claimed) because she had not been given any information by ENH regarding "re-admission rates, complication rates, [or] average length of stay." (Foucre, Tr. 926-27).

Response to Finding No. 1023:

This proposed finding is incomplete and misleading.

REDACTED

(RFF ¶ 905; CX 2381 at 4, *in camera*; CX 6277 at 12, *in camera*).

1024. **REDACTED** (Foucre, Tr. 921-23; Foucre, Tr. 1101, *in camera*).

Response to Finding No. 1024:

This proposed finding is irrelevant and misleading. A "fair amount" of negotiations occurred between the summer of 2003 and the date the new contract was executed in April 2004. (RFF ¶ 910).

REDACTED

(RFF-Reply ¶ 1012).

1025. **REDACTED**

(Foucre, Tr. 921-23; Foucre, Tr. 1101, *in camera*; CX 6284 at 1; CX 426 at 1, *in camera*).

Response to Finding No. 1025:

This proposed finding is inaccurate and misleading. As an initial matter, Moeller from United *offered* to assist ENH in the FTC investigation. (RFF-Reply ¶¶ 1017-1018). Secondly, the private caucus in which Moeller offered to support ENH's position in this matter occurred

before the September 2, 2003, meeting. (RFF-Reply ¶¶ 1017, 1019). Pursuant to that meeting, ENH prepared the draft letter referenced by this proposed finding. (RFF-Reply ¶¶ 1017, 1019).

REDACTED

(CX 426 at 1, *in camera* (' **REDACTED**)).

1026. The Complaint in this matter was issued by the Commission on February 10, 2004. (Administrative Complaint, In the Matter of *Evanston Northwestern Healthcare*, February 10, 2004).

Response to Finding No. 1026:

Respondent has no specific response.

1027. **REDACTED** (Foucre, Tr. 887-88; CX 5176 at 1, 12, *in camera*).

Response to Finding No. 1027:

Respondent has no specific response.

1028. **REDACTED** (Foucre, Tr. 1103, *in camera*). **REDACTED** (Foucre, Tr. 1103-04, *in camera*).

Response to Finding No. 1028:

This proposed finding is misleading. (RFF-Reply ¶¶ 967, 969, 978, 981-982, 987, 990-992).

REDACTED

(RFF-Reply ¶¶ 979, 987, 991).

1029. Mr. Hillebrand admitted that the 2004 negotiation with United did not result in an overall price reduction to the health plan. (Hillebrand, Tr. 1890).

Response to Finding No. 1029:

This proposed finding is misleading.

REDACTED

(RFF ¶ 921, *in camera*).

REDACTED (RFF ¶ 921; *see* CX 5176 at 33-34, *in camera*).

REDACTED (RFF ¶ 921).

1030.

REDACTED

(Foucre, Tr. 1103, *in camera*; Foucre, Tr. 931-32).

Response to Finding No. 1030:

This proposed finding is inaccurate and misleading. (RFF-Reply ¶¶ 958, 967, 971, 978, 981, 988, 996, 1000, 1002-1003, 1009-1010).

F. ENH Extracted a Significant Price Increase from PHCS

1. Pre-Merger Experience

1031. Prior to the merger, PHCS considered Highland Park and Evanston to be "competitors." (Ballengee, Tr. 166).

Response to Finding No. 1031:

This proposed finding is incomplete and misleading. PHCS recognized that both HPH and Evanston Hospital had numerous competitors. PHCS listed St. Francis, Lake Forest Hospital, Advocate Lutheran General, Rush North Shore, and Holy Family Hospital as alternatives to the ENH hospitals. (RFF ¶ 457). REDACTED (RFF ¶ 457). PHCS characterized Advocate Lutheran General, St. Francis, and Rush North Shore as significant competitors to

Evanston Hospital. (Ballengee, Tr. 211-12). Similarly, PHCS identified Lake Forest Hospital as HPH's most significant competitor. (Ballengee, Tr. 212).

1032. PHCS was able to get more competitive pricing from both hospitals when they were separate entities because "if, in fact, the negotiation and the rates were not going well at one hospital . . . we had the alternative." (Ballengee, Tr. 167).

Response to Finding No. 1032:

This proposed finding is inaccurate and misleading. First, this proposed finding is misleading to the extent it is based on Ballengee's testimony. REDACTED (Ballengee, Tr. 257-58, *in camera*). From 1997 through 1999, Ballengee did not have any responsibility for contracting in the Chicago area for PHCS. (Ballengee, Tr. 146-47). Consequently, Ballengee has absolutely no reliable basis to comment upon the negotiations of the pre-Merger contracts in effect at the time of the Merger.

Second, Ballengee and PHCS never explicitly used the existence of HPH in negotiations with Evanston Hospital, or vice versa. That is, PHCS did not play one hospital off of the other before the Merger. (Ballengee, Tr. 170; RFF ¶¶ 974-976).

1033. PHCS understood that it "could choose between the two [hospitals] and work them against each other." (Ballengee, Tr. 167).

Response to Finding No. 1033:

This proposed finding in accurate and misleading. Ballengee has no foundation for this speculation. (RFF-Reply ¶ 1032). Moreover, PHCS never played HPH off of Evanston Hospital before the Merger, or vice versa. (RFF-Reply ¶ 1032).

1034. During contract renegotiations prior to the merger, PHCS was able to get Evanston to lower its proposed rate increases to "4-8 percent" due to the "competitive nature of the two hospitals, one with the other." (Ballengee, Tr. 168-71).

Response to Finding No. 1034:

This proposed finding is inaccurate and misleading. In 1995, PHCS boasted to its customers that it was able to negotiate decreases in rates with Evanston Hospital. (RFF ¶¶ 828-829). REDACTED

(RFF ¶ 3, RFF ¶¶ 16, 30-32, 831-837, *in camera*).

REDACTED

(RFF ¶ 685, RFF ¶¶ 686-688, *in camera*).

REDACTED

(RFF ¶¶ 685, 840; RFF ¶¶ 686-688, 831-837, *in camera*).

1035. Keeping the rate increases down during contract renegotiations was always important to PHCS because "rate increases at any price [for either Evanston or Highland Park] would have a direct impact on the customer's premium pricing that they had to pass on to the employers and on to – downstream to the employees." (Ballengee, Tr. 171-72, 179).

Response to Finding No. 1035:

This proposed finding is misleading. A MCO does not pass along the effects of all cost changes to its consumers.

REDACTED

(RX 1346 at BCBSI-ENH 5536; RX 1393 at ENHL BW 3691, *in camera*). Second, PHCS does not pass along all savings to its customers. PHCS's earnings exploded by an "astounding 50%" in 2003. (RFF ¶ 160).

2. Post-Merger Experience

2000 Negotiation Experience - ENH Demanded a Price Increase from PHCS

1036. In November of 1999, Bain identified ENH's contract with PHCS as a "1st priority" opportunity for which ENH had "enough leverage to improve terms." (CX 75 at 9-10; Neaman, Tr. 1171-72; CX 1998 at 40, 43)

Response to Finding No. 1036:

This proposed finding is misleading.

REDACTED

(CX 1998 at 40; RFF ¶¶ 685-688, 838, *in camera*). This proposed finding insinuates that the word "leverage" as used by Bain is synonymous with market power. However, as was shown at trial, this word is benign. Ogden defined "leverage" as simply recognizing one's "position and not be[ing] afraid to ask to be paid fair market value." (RFF ¶ 996).

REDACTED

(RFF ¶¶ 997-998, *in camera*; RFF ¶¶ 999-1000).

1037. Although the PHCS contract was already ENH's "most profitable contract" in October of 1999, Bain advised ENH that it could be more profitable if the merged entity were to "achieve [a] more favorable contract structure." (CX 74 at 22).

Response to Finding No. 1037:

This proposed finding is inaccurate and misleading. Evanston Hospital's contract with PHCS was not profitable. **REDACTED**

(RFF ¶¶ 686, *in camera*).

REDACTED (RFF ¶ 686, *in camera*).

REDACTED

(RFF ¶ 686, *in camera*).

In addition, this proposed finding is misleading to the extent it attempts to attribute a "for-profit" motive to ENH. ENH is a Not-for-Profit entity. (RFF ¶ 1). As a non-profit entity, ENH does not try to maximize profits in the same manner as a for-profit entity. (RFF ¶¶ 2414-2424).

1038. The combination of the three hospitals would give Evanston a powerful bargaining position with PHCS in particular because, as Bain reported, "ENH has significant leverage in negotiations with PHCS as they have strong North Shore presence and need us in their network." (CX 1998 at 44; Neaman, Tr. 1179; CX 67 at 39).

Response to Finding No. 1038:

This proposed finding is misleading. (RFF-Reply ¶¶ 1036). In addition, this proposed finding is misleading because Bain identified numerous factors that contributed to ENH's strategy to acquire fair market rates. Bain noted that the Evanston Hospital contract expired in February 2000, that its terms were less attractive than Evanston Hospital had in place with smaller MCOs, and that HPH's contract was more attractive than Evanston Hospital's. (CX 1998 at 44).

1039. Bain projected that ENH could use its "significant leverage" to extract "$3M in net revenue improvement" from PHCS. (CX 1998 at 44; Neaman, Tr. 1178-79; CX 67 at 39).

Response to Finding No. 1039:

This proposed finding is misleading. (RFF-Reply ¶¶ 1036). In addition, this proposed finding ignores the fact that Evanston Hospital was significantly under-market with respect to PHCS before the Merger. (RFF-Reply ¶¶ 686-88; CX 67 at 39 (identifying the "significant disparity" between Evanston Hospital and HPH rates).

REDACTED

(RFF ¶ 688, *in camera*).

REDACTED

REDACTED

(RX 773 at 2, *in camera*).

Therefore, the net revenue increases negotiated by ENH were not anticompetitive. Rather, they were appropriate market rates resulting from learning about demand for its services. (RFF ¶¶ 827, 831-837). ENH's targeted outcome of the negotiation was simply to "bring discount in line with current HP contract." (CX 1998 at 44).

1040. Upon first hearing about the merger in December 1999, PHCS was "concern[ed]" because the merger would "elimina[te PHCS'] ability to have more of a competitive environment between the two hospitals." (Ballengee, Tr. 172-73).

Response to Finding No. 1040:

This proposed finding is inaccurate and misleading. (RFF-Reply ¶¶ 1032).

REDACTED

(RFF ¶¶ 566; RFF ¶¶ 570, 577-578, *in camera*).

1041. Later in December 1999, ENH representatives contacted PHCS to request a renegotiation of its hospital facility agreement. (Ballengee, Tr. 173-74; CX 171 at 1).

Response to Finding No. 1041:

This proposed misleading because it is not supported by the evidence cited. On December 1, 1999, ENH notified PHCS of the impending Merger and sought to assign HPH's rates. (CX 171 at 1). As the text of the letter indicates, ENH did not request renegotiation of the hospital facility agreement. (CX 171 at 1). REDACTED

(RFF ¶ 841, *in camera*).

1042. ENH informed PHCS that it would "assign" Highland Park's contract and rates to the merged entity. (Ballengee, Tr. 174-75; Ballengee, Tr. 232, *in camera*; CX 171 at 1).

Response to Finding No. 1042:

This proposed finding mischaracterizes the cited evidence and is misleading. ENH merely sought PHCS's consent to assignment. (CX 171 at 1-2). The proposed finding suggests that it was ENH's decision alone as to whether the rates would be assigned.

REDACTED (RFF ¶ 841, *in camera*).

1043. **REDACTED**

(CX 1539 at 2, *in camera*; CX 172 at 1, *in camera*).

Response to Finding No. 1043:

This proposed finding is misleading. **REDACTED**

(CX 1539 at 2, *in camera*). PHCS presumably knew, at that point, that Evanston Hospital had discovered that it had been significantly underpaid in its then-existing contract.

REDACTED

(CX 172 at 1, *in camera*; RFF ¶¶ 831, 1071).

1044. **REDACTED**

(CX 1539 at 2, *in camera*).

Response to Finding No. 1044:

This proposed finding is misleading.

REDACTED

(RFF ¶¶ 840-842, *in camera*; CX 5068 at 5, *in camera*). **REDACTED**

(RFF ¶¶ 841, 843, *in camera*).

1045. **REDACTED** (CX 172 at 1, *in camera*; Ballengee, Tr. 233, *in camera*).

Response to Finding No. 1045:

This proposed finding is misleading. **REDACTED** (CX 172 at 1, *in camera*).

REDACTED (RFF ¶¶ 102, 104, *in camera*). Indeed, other MCOs agreed that an appropriate starting point was to look at the better of the existing contracts. (RFF ¶ 881).

1046. **REDACTED** (CX 172 at 2, *in camera*; Ballengee, Tr. 253-54, *in camera*; *compare* CX 5068 at 27, *in camera*, *and* CX 5070 at 28*)*.

Response to Finding No. 1046:

This proposed finding is misleading. **REDACTED** (RFF ¶ 94, *in camera*). This proposed finding is also misleading to the extent it implies that the Evanston Hospital contract was similar to the HPH contract. **REDACTED** (RFF ¶ 686 (**REDACTED**), 833-834 (**REDACTED**), 835, *in camera* (**REDACTED**).

1047. REDACTED

(Ballengee, Tr. 234-35, 255, *in camera*. *See* RX 1414 at PHCS 000102 ("Fixed costs, such as per diem and per case, are the most advantageous because they allow customers to predict claims costs.")).

Response to Finding No. 1047:

This proposed finding is misleading. (RFF-Reply ¶ 790).

REDACTED

(CX 5068 at 35, *in camera*; CX 5070 at 36-37). PHCS also recognized that more hospitals across the nation are requesting discount-off-charges reimbursement. (RX 1414 at PHCS 102).

REDACTED

(Ballengee, Tr. 235, *in camera*).

REDACTED (RFF ¶¶ 87-89, *in camera*).

REDACTED

(RFF ¶¶ 89, 846-847, *in camera*).

1048. REDACTED

(CX 113 at 1, *in camera*; Ballengee, Tr. 234, *in camera*).

Response to Finding No. 1048:

This proposed finding is misleading. REDACTED

(RFF-Reply ¶ 1045, *in camera*).

REDACTED

REDACTED (CX 113 at 1, *in camera*).

REDACTED

(CX 113 at 2, *in camera*; RFF ¶¶ 94, 835, *in camera*).

1049. REDACTED

(Ballengee, Tr. 234, *in camera*; CX 113 at 2, *in camera*).

Response to Finding No. 1049:

This proposed finding is misleading. REDACTED

(RX 279, *in camera*; RFF ¶ 835, *in camera*).

REDACTED (RX 279, *in camera*; RFF ¶ 835, *in camera*).

REDACTED

(RFF ¶¶ 835-836, *in camera*).

1050. REDACTED

(Ballengee, Tr. 235, *in camera*).

Response to Finding No. 1050:

This proposed finding is incomplete and misleading.

REDACTED (RFF ¶ 87-89, *in camera*). REDACTED

(RFF ¶¶ 89, 846-847, *in camera*).

REDACTED

REDACTED

(RFF ¶ 846, *in camera*).

1051. REDACTED

(Ballengee, Tr. 235, *in camera*).

Response the Finding No. 1051:

This proposed finding is inaccurate. The evidence showed that MCOs have never even requested to see ENH's chargemaster. (RFF ¶ 962). Further, PHCS receives annual notice of changes to ENH's chargemaster pursuant to its contract with ENH. Each year, by November 15, ENH must notify PHCS of the exact percentage change in its chargemaster. (Hillebrand, Tr. 1995-96). REDACTED

(RFF-Reply ¶¶ 1047, 1050, *in camera*; RFF ¶¶ 89, 846-847, *in camera*).

1052. REDACTED

(Ballengee, Tr. 235, *in camera*).

Response to Finding No. 1052:

This proposed finding is misleading. (RFF-Reply ¶ 1047). Every year, MCOs make assumptions when making their budgets and pricing their products. (Mendonsa, Tr. 482-83). MCOs estimate and predict their costs based on two elements: cost per unit and utilization. (Mendonsa, Tr. 482). REDACTED

(Ballengee, Tr. 235, *in camera*).

REDACTED

(CX 5068 at 35, *in camera*; CX 5070 at 36-37).

1053. **REDACTED**

(CX 115 at 1, *in camera*).

Response to Finding No. 1053:

This proposed finding is incomplete and misleading.

REDACTED

(CX 115 at 1, *in camera*). **REDACTED**

(RFF-Reply ¶¶ 1046, 1048-1049).

1054. **REDACTED**

(CX 116 at 1, *in camera*; Ballengee, Tr. 236, *in camera*).

Response to Finding No. 1054:

This proposed finding is incomplete and misleading.

REDACTED

(RFF ¶ 845, *in camera*).

REDACTED

(RFF ¶¶ 846-847, *in camera*).

REDACTED

(*Compare* CX 113 at 2, *in camera*, *with* CX 116 at 2, *in camera* (

REDACTED ;).

1055. **REDACTED**

(Ballengee, Tr. 236, *in camera*; CX 116 at 2, *in camera*).

Response to Finding No. 1055:

Respondent has no specific response.

1056. **REDACTED**

(Ballengee, Tr. 237, *in camera*; CX 176 at 2, *in camera*).

Response to Finding No. 1056:

This proposed is incomplete and misleading. For PHCS, renegotiation of a contract under a notice of termination is common in the Chicago area. (RX 1530; RX 927; RX 965; RX 1443; RX 1528; RX 1615 at 4).

1057. **REDACTED**

(Ballengee, Tr. 239-40, *in camera*).

Response to Finding No. 1057:

This proposed finding is incorrect, incomplete and misleading. PHCS is not an insurance company, it is an alliance formed by independent insurance companies to collectively negotiate rates with hospitals. (RFF ¶¶ 156-157). Consequently, Trustmark Insurance Company is not an employer but, rather, as the name suggests, another insurance company. Accordingly, Complaint Counsel's bracketed addition is twice-removed from any actual employer's premium. Complaint Counsel did not call any witnesses from any employers. Instead, it relied on hearsay with little indicia of reliability that is entitled to little or no weight. (Ballengee, Tr. 180, 183 (objecting to the hearsay)).

This proposed finding is also incomplete because

REDACTED

REDACTED (RFF ¶¶ 660-661, 685-688, 832; Ballengee, Tr. 240, *in camera*).

Eliminating ENH from Its Network Would Have Been Cheaper for PHCS

1058. **REDACTED**

(Ballengee, Tr. 184; Ballengee, Tr. 242, *in camera*; CX 46 at 1, *in camera*).

Response to Finding No. 1058:

This proposed finding is misleading. **REDACTED** (Ballengee, Tr. 261-62, *in camera*). **REDACTED**

(Ballengee, Tr. 262, *in camera*). **REDACTED**

(Ballengee, Tr. 262, *in camera*). **REDACTED**

(Ballengee, Tr. 262, *in camera*).

REDACTED (Ballengee, Tr. 262, *in camera*). Consequently, any conclusions allegedly reached by PHCS cannot be verified and should not be afforded any weight.

1059. **REDACTED** (Ballengee, Tr. 184, 242; CX 46 at 1, *in camera*).

Response to Finding No. 1059:

Respondent has no specific response.

1060. **REDACTED**

(Ballengee, Tr. 244-45, *in camera*; CX 46 at 1, *in camera*).

Response to Finding No. 1060:

This proposed finding is misleading. (RFF-Reply ¶ 1058).

REDACTED

(RFF ¶¶ 833-834, *in camera*).

REDACTED

(RFF ¶¶ 833-834, *in camera*; CX 46, *in camera*).

REDACTED

(RFF ¶¶ 833-834, *in camera*; CX 46, *in camera*).

REDACTED

(RFF ¶¶ 833-834, *in camera*).

These figures indicate that Evanston Hospital's rates were far below the "Chicago Territory" average represented in this proposed finding.

1061.

REDACTED

(CX 46 at 1, *in camera*).

Response to Finding No. 1061:

This proposed finding is misleading. (RFF-Reply ¶ 1058). Further, this proposed finding is misleading because it does not provide APPD for Evanston Hospital's academic hospital-competitors such as Northwestern Memorial, Rush Presbyterian, or Advocate Lutheran General.

REDACTED

(RFF ¶¶ 658, 685; RFF ¶¶ 686-688, 716, 832, *in camera*).

Achieving that outcome would be unreasonable and below-market.

1062. **REDACTED** (Ballengee, Tr. 246-7, *in camera*; CX 46 at 1, *in camera*). **REDACTED** (Ballengee, Tr. 246-47, *in camera*; CX 46 at 1, *in camera*).

Response to Finding No. 1062:

This proposed finding is misleading. (RFF-Reply ¶ 1058).

1063. **REDACTED** (Ballengee, Tr. 246, *in camera*; CX 46 at 1, *in camera*).

Response to Finding No. 1063:

This proposed finding is misleading. (RFF-Reply ¶ 1062).

1064. **REDACTED** (Ballengee, Tr. 246, 248, *in camera*; CX 46 at 1, *in camera*).

Response to Finding No. 1064:

This proposed finding is misleading. (RFF-Reply ¶ 1062).

REDACTED (Ballengee, Tr. 246, *in camera*). Accordingly, this proposed finding should be afforded no weight.

1065. Overall, PHCS's calculations showed that "the elimination of Evanston and Highland Park financially would be the best overall in impacting [PHCS's] costs," and that scenarios eliminating other hospitals and keeping the ENH system did not show "as significant" cost savings as eliminating the ENH system altogether. (Ballengee, Tr. 185).

Response to Finding No. 1065:

This proposed finding is misleading. (RFF-Reply ¶ 1062).

ENH Would Not Compromise with PHCS on Rates

1066. **REDACTED**

(Ballengee, Tr. 175; CX 116 at 1, *in camera*).

Response to Finding No. 1066:

Respondent has no specific response.

1067. Mr. Hillebrand demanded higher rates from PHCS because the three hospitals were "now one system" that "controlled the marketplace." (Ballengee, Tr. 176-77, 194).

Response to Finding No. 1067:

This proposed finding is inaccurate and misleading. This proposed finding is directly contradicted by Hillebrand's testimony. Hillebrand never referenced ENH's market share in his conversations with Ballengee. Hillebrand never said that ENH had 60% market share and, as a result, PHCS had to agree to its terms. (Hillebrand, Tr. 1894). Further, Ballengee admitted that ENH's proposal did not even represent an increase over the pre-Merger contract at HPH. (Ballengee, Tr. 175-76; RFF-Reply ¶¶ 1049, 1053). PHCS's contemporaneous documents confirm that ENH's proposal had a rate structure similar to HPH's pre-Merger contract. (RFF-Reply ¶ 1053).

Moreover, this proposed finding mischaracterizes Ballengee's testimony. Ballengee testified that she was not relating the substance of the conversation, as suggested above, but, rather, was recounting her own editorialized version. Ballengee repeatedly qualifies the cited testimony with "basically." (Ballengee, Tr. 176-77). This proposed finding, therefore, is entitled to little weight.

1068. As evidence of ENH's "control" over the marketplace, Mr. Hillebrand cited market share figures, noting that the three hospitals combined "already had the market share for these [North Shore] communities." (Ballengee, Tr. 176-77, 194).

Response to Finding No. 1068:

This proposed finding is inaccurate and misleading. (RFF-Reply ¶ 1067). Moreover, this proposed finding is contradicted by PHCS's own documents.

REDACTED

(RX 773 at 1, *in camera*).

1069. Mr. Hillebrand informed Ms. Ballengee that ENH's market share in the North Shore area was 60%. (Ballengee, Tr. 177).

Response to Finding No. 1069:

This proposed finding is inaccurate and misleading. (RFF-Reply ¶¶ 1067-1068).

1070.

REDACTED

(Ballengee, Tr. 164, 76; Ballengee, Tr. 225, *in camera*; RX 1503 at PHCS 003654-65, *in camera*).

Response to Finding No. 1070:

This proposed finding is misleading. Since one of the goals of the Merger was to create an integrated health care delivery system, ENH decided to cover all three hospitals on the same contract for each MCO at the same prices. (RFF-Reply ¶¶ 823, 908). As a consequence of having a single medical staff, there is no reason for ENH to negotiate different rates because a patient can see his or her doctor at any of the three hospitals – receiving the same product, so to speak. (RFF ¶ 12). ENH is unique in this regard among the hospital systems in Chicago, and this unique policy preceded the Merger. (RFF-Reply ¶ 907). PHCS's pre-Merger contract with Evanston Hospital covered both Evanston Hospital and Glenbrook Hospital. (CX 5070 at 40). Now, the trend in Chicago is for hospital systems to have one contract covering all of their hospitals. (RFF ¶¶ 187-189).

Moreover, '

REDACTED

(RX 1503 at PHCS 3648, *in camera*).

Finally, the citation to Ballengee's testimony does not support the text of the proposed finding. (Ballengee, Tr. 76).

1071. ENH assured PHCS that all of the other health plans would also have to acquiesce to ENH's pricing demands. (Ballengee, Tr. 176-77 ("these were the rates, everybody was going to do it.")).

Response to Finding No. 1071:

This proposed finding is misleading. PHCS did not "acquiesce" to ENH's rate proposals. **REDACTED**

(RFF ¶ 846, *in camera*).

REDACTED

(RFF ¶ 846, *in camera*).

REDACTED

(RFF ¶ 847, *in camera*).

1072. In a "take it or leave it type – type [*sic*] presentation," Mr. Hillebrand told Ms. Ballengee that the PHCS representatives should "go down the hall for 15 minutes," that Ms. Ballengee should "talk it over with [her] boss," and that when the ENH representatives returned, "they wanted a decision at that time." (Ballengee, Tr. 177, 194).

Response to Finding No. 1072:

This proposed finding is misleading. The negotiations between ENH and PHCS were not "take it or leave it." Rather, PHCS specifically negotiated for several key terms of the agreement to suit its requirements and desires. (RFF-Reply ¶ 1071).

Also, Bain advised ENH that it should not be afraid to ask for fair rates for its services. (RFF ¶ 996). To secure fair rates, Bain also advised ENH to bring a more aggressive negotiating style to the table. (RFF ¶ 717).

Finally, Ballengee admitted that PHCS did not agree one way or the other at the face-to-face meeting. (Ballengee, Tr. 178). There were several negotiations and counter-proposals thereafter. (Ballengee, Tr. 178).

1073. Ms. Ballengee was "concerned" about the impact that the price increase was going to have on PHCS and its customers. (Ballengee, Tr. 178).

Response to Finding No. 1073:

This proposed finding is misleading.

REDACTED

(CX 5072 at 15, *in camera*).

1074. Feeling the "heavy responsibility" of "having some sort of arrangement that would work in a beneficial way for our customers," PHCS did not immediately agree to ENH's demands on the price increases. (Ballengee, Tr. 178).

Response to Finding No. 1074:

This proposed finding is misleading. (RFF-Reply ¶ 1073).

1075. Instead, PHCS focused on finding terms that would persuade ENH to lower its rates to PHCS. (Ballengee, Tr. 178-79).

Response to Finding No. 1075:

Respondent has no specific response.

1076. PHCS offered to "eliminat[e] competitive hospitals" in exchange for "more enhanced rates." (Ballengee, Tr. 178). Identifying St. Francis, Rush North Shore, and Condell as "competitive hospitals" to ENH, PHCS prepared scenarios in which it would eliminate those hospitals from its network in the hopes that it would prompt ENH to lower its hospital contract rates. (Ballengee, Tr. 178-79, 181-82).

Response to Finding No. 1076:

This proposed finding is misleading. First, when Ballengee made the offer to exclude hospitals referenced in this proposed finding, she did not even have the authority to make the offer. (Hillebrand, Tr. 1894). The offer was not supported by the "decision-makers" at PHCS. (Hillebrand, Tr. 1894). Moreover, ENH was skeptical of the offer because PPOs simply do not have the mechanisms nor the ability to steer volume. (RFF ¶¶ 69, 844). Generally, selective contracting has not played a role in managed care contracting in Chicago. (RFF ¶¶ 75-76).

1077. Mr. Hillebrand rejected PHCS's offer on the grounds that he did not view St. Francis, Rush North Shore, or Condell as "competitors that would be worth any additional rates." (Ballengee, Tr. 182; Hillebrand, Tr. 1746-47).

Response to Finding No. 1077:

This proposed finding is misleading. (RFF-Reply ¶ 1076). Every MCO, including PHCS, agreed that ENH competes with St. Francis, Rush North Shore and Condell. (RFF ¶¶ 455-459; Ballengee, Tr. 163). In addition, ENH viewed Advocate Lutheran General as its closest, most comparable competitor that might be worth an extra discount to PHCS. (RFF ¶ 566; Ballengee, Tr. 181-82).

1078. The only hospital that Mr. Hillebrand "considered possibly might be worth something" in lower ENH rates was Advocate Lutheran General. In exchange for eliminating that hospital from PHCS's network, ENH was willing to lower PHCS's rate "only . . . five points." (Ballengee, Tr. 182).

Response to Finding No. 1078:

This proposed finding is misleading. (RFF-Reply ¶ 1076). In addition, this proposed finding is misleading to the extent it suggests that an additional 5% discount was not substantial. An additional 5% discount for all hospital services is substantial where the MCOs has significant volume.

REDACTED

(CX 5176 at 34-35, *in camera*).

1079. ENH and PHCS did not reach an agreement on rates at the February 2000 meeting. (Ballengee, Tr. 179).

Response to Finding No. 1079:

Respondent has no specific response. (RFF-Reply ¶ 1072).

PHCS Found that Alternative Networks Excluding ENH Were Not Viable

1080. PHCS next consulted its customers about the possibility of eliminating ENH from its network, but found that the insurance companies, third party administrators, and direct employers that contracted with PHCS "would not find it acceptable" to redirect enrollees to hospitals outside of the geographic triangle formed by the three ENH facilities. (Ballengee, Tr. 183-84). Those customers "made it very clear . . . that they didn't believe that they could have a marketable network . . . without having the new ENH entity in it." (Ballengee, Tr. 180-81, 183-84).

Response to Finding No. 1080:

This proposed finding misleading. Complaint Counsel did not call a single employer or customer of an insurance company in these proceedings. This proposed finding, however, relies on purported hearsay statements filtered through Ballengee and/or pure speculation as to what third parties would or would not find acceptable. (Ballengee, Tr. 171, 180, 183 (objecting to the hearsay)). The testimony underlying this proposed finding is suspect given PHCS's interest in this litigation. PHCS, like other MCOs, has an incentive to use this litigation as a bargaining chip in its continuing relationship with ENH. (RFF-Reply ¶¶ 967, 978). In addition, Ballengee, the only witness Complaint Counsel relied on for this proposed finding, has *never* had any responsibility for marketing PHCS's plans. (Ballengee, Tr. 204). Therefore, her testimony with respect to what may or may not constitute a "marketable network" should be wholly disregarded.

Finally, this proposed finding conflicts with PHCS contemporaneous documents. In its frank communication with its customers, PHCS identified several hospitals in the "same geographical area" as alternatives to the ENH facilities. (RFF ¶ 457). PHCS knew, and told its customers in December 1999, where to send members in the event it could not reach an

agreement with ENH. (RFF ¶ 457). As a result, Ballengee's mention of a "triangle" reveals nothing about a market of any economic or legal significance to PHCS. (RFF-Reply ¶ 285).

1081. Eliminating the ENH system from PHCS's network would have left "a large area that would be uncovered." (Ballengee, Tr. 181).

Response to Finding No. 1081:

This proposed finding is misleading. In December 1999, at the time of the Merger, PHCS indicated to its customers that the potential termination of the ENH hospitals would have no impact on its network because "there are other contracted providers in the same geographical area." (RX 712 at PHCS 891). PHCS identified a series of alternatives including, St. Francis, Lake Forest Hospital, Advocate Lutheran General, Rush North Shore, and Holy Family Hospital. (RFF ¶ 457).

1082. Other hospitals in PHCS's network, such as Rush North Shore, Lake Forest or Lutheran General Hospitals, were not considered to be "viable alternatives" to ENH because "there would be a large area that would be not served by the community hospitals." (Ballengee, Tr. 181, 183-84).

Response to Finding No. 1082:

This proposed finding is misleading. (RFF-Reply ¶¶ 1080-1081). In its internal study of the Chicago market, PHCS specifically identified Lake Forest Hospital as a "viable" substitute for HPH. (RFF ¶ 578). For Evanston Hospital, Advocate Lutheran General was a "significant competitor" with comparable services. (RFF ¶ 566). PHCS also identified St. Francis as an alternative to Evanston Hospital, since it is right down the street. (RFF ¶ 570). Rush North Shore is also a "significant competitor" to Evanston Hospital. (RFF ¶ 570).

Complaint Counsel contends that, before the Merger, a network of Evanston Hospital and Lake Forest Hospital, without HPH, could have served the geography adequately. (CCFF ¶ 1297). Also, before the Merger, an alternate network excluding Evanston Hospital, but including

HPH, Rush North Shore, St. Francis and Advocate Lutheran General, could have served the geography. (CCFF ¶ 1298). Yet, even though PHCS's documents prove that Lake Forest was a "viable" alternative for HPH, this proposed finding suggests that an alternative network of Rush North Shore, St. Francis, Advocate Lutheran General and Lake Forest Hospital would not be viable. That suggestion is not credible, especially in light of PHCS correspondence to its clients at the time of the Merger stating that this precise alternative network was, in fact, viable. (RFF ¶ 457).

PHCS Could Not Walk Away from ENH

1083. Notwithstanding the "significantly higher" rates proposed by ENH, the fact that "the elimination of Evanston and Highland Park financially would be the best overall in impacting [PHCS's] costs," and the fact that PHCS had 72 other hospitals in its network, PHCS reached the conclusion that it "needed to finalize some rates" and "go on with our contract with Evanston." (Ballengee, Tr. 154, 179, 185).

Response to Finding No. 1083:

This proposed finding is misleading. First, ENH's proposal matched the rates already in place at HPH before the Merger. (RFF-Reply ¶¶ 1048-1049, 1053-1054). Ballengee admitted that the proposal only represented an increase for Evanston Hospital. (Ballengee, Tr. 175-76). This proves ENH's learning about demand theory, and confirms that ENH acted accordingly to achieve fair market rates. (RFF ¶¶ 661, 685-688, 827).

Second, PHCS's calculations, which purport to suggest that eliminating the ENH facilities would decrease the average payment per day, are not based on reliable claims data. (RFF-Reply ¶¶ 1060-1065).

Finally, PHCS did not "go on with its contract" with ENH as suggested in this proposed finding. **REDACTED**

REDACTED (RFF-Reply ¶ 1071; RFF ¶¶ 846-847, *in camera*).

1084. **REDACTED** (Ballengee, Tr. 155, 180; Ballengee, Tr. 249, *in camera*).

Response to Finding No. 1084:

This proposed finding of fact is inaccurate, based on unreliable hearsay and misleading. (RFF-Reply ¶¶ 1071, 1080-1083).

ENH's Price Increase to PHCS Resulted in "Significantly Higher" Rates for PHCS

1085. After the February meeting, PHCS and ENH came to agreement on rates that were "significantly higher" than what PHCS had been paying pre-merger. (Ballengee, Tr. 179).

Response to Finding No. 1085:

This proposed finding is misleading. The new contract rates only represented an increase over PHCS's pre-Merger contract with Evanston Hospital. (Ballengee, Tr. 175-76).

REDACTED

(RFF-Reply ¶¶ 1034, 1039, 1067, 1083, *in camera*; RFF ¶ 715-716, *in camera*).

1086. **REDACTED** (Ballengee, Tr. 252, 255, *in camera*; Hillebrand, Tr. 1893; CX 116 at 2, *in camera*, CX 117 at 1, *in camera*; CX 5072 at 23, *in camera*).

Response to Finding No. 1086:

This proposed finding is misleading. (RFF-Reply ¶ 818).

REDACTED

(CX 117 at 1, *in camera*; CX 5072 at 23, *in camera*).

REDACTED (Ballengee, Tr. 258-

61, *in camera*; CX 5072 at 23, *in camera*).

REDACTED

(Ballengee, Tr. 258-59, *in camera*; CX 5072 at 23, *in camera*). **REDACTED** (Ballengee, Tr. 258, *in camera*; CX 5072 at 23, *in camera*).

REDACTED

(Ballengee, Tr. 259-60, *in camera*; CX 5072 at 23, *in camera*).

REDACTED

(CX 117 at 1, *in camera*; Ballengee, Tr. 258-61, *in camera*; CX 5072 at 23, *in camera*). **REDACTED** (CX 116 at 2, *in camera*).

REDACTED

(RFF ¶¶ 94, 686, 716, 835, *in camera*; RFF ¶ 664). By negotiating the discount to 20% off charges (80% of charges), PHCS negotiated more favorable terms than it had with HPH before the Merger. (Ballengee, Tr. 175-76)

1087. **REDACTED**

(CX 5072 at 23, *in camera*; CX 1998 at 44).

Response to Finding No. 1087:

This proposed finding is inaccurate and misleading. **REDACTED**

(RFF-Reply ¶ 1086). Bain advised ENH to seek discount-off-charges terms, but acknowledged, and predicted (correctly), that MCOs would counter with

per diems and that the contracts would likely end up on fixed rates. (RFF ¶¶ 713-714).

REDACTED

(RFF ¶¶ 89, 846-847, *in camera*; Ballengee, Tr. 260-61, *in camera*).

1088. **REDACTED**

(Ballengee, Tr. 252, *in camera*; *compare* CX 5068 at 27, *in camera*, *and* CX 5070 at 28).

Response to Finding No. 1088:

This proposed finding is inaccurate and misleading.

REDACTED

(RFF-Reply ¶ 1086, *in camera*).

REDACTED (RFF-Reply ¶ 1086, *in camera*).

REDACTED

(RFF-Reply ¶ 1047, *in camera*).

REDACTED

(RFF ¶ 94, *in camera*). **REDACTED**

(Ballengee, Tr. 252, *in camera*).

1089. **REDACTED**

(CX 5072 at 23, *in camera*; RX 1414 at PHCS 000102).

Response to Finding No. 1089:

This proposed finding is incomplete and misleading. **REDACTED**

(Ballengee, Tr. 258-60). In any event, PHCS, in its annual report, recognized that "[p]roviders, on the other hand, often request straight

discounts or discount off billed charges." (RX 1414 at PHCS 102).

REDACTED

(RFF-Reply ¶ 1050, *in camera*).

1090. If ENH increases its chargemaster rates, "the amount the customer pays also increases, based on the discount percentage." (RX 1414 at PHCS 000102).

Response to Finding No. 1090:

This proposed finding is misleading.

REDACTED , (RFF ¶¶ 88-89, 846-847, *in camera*).

REDACTED (RFF ¶ 89, *in camera*). Therefore, the amount the "customer pays," in the case of the ENH/PHCS contract, stays exactly the same as it would if medical CPI applied to the contract.

1091. **REDACTED**

(Ballengee, Tr. 268-70, *in camera*).

Response to Finding No. 1091:

This proposed finding is incomplete and misleading.

REDACTED

(Ballengee, Tr. 258-60, *in camera*; RFF-Reply ¶ 1086).

Second, given that the pre-Merger rates with Evanston Hospital dated back to 1998, PHCS should have expected the rates to increase. (RFF-Reply ¶¶ 863, 865, 868, 872). Moreover, as compared to HPH's pre-Merger rates, PHCS negotiated a more favorable discount. (Ballengee, Tr. 175-76).

1092. **REDACTED**

(CX 5070 at 28; Ballengee, Tr. 268, *in camera*). **REDACTED**

REDACTED
(CX 5068 at 27, *in camera*; Ballengee, Tr. 269, *in camera*).
REDACTED
(Ballengee, Tr. 269-70, *in camera*).

Response to Finding No. 1092:

This proposed finding is incomplete and misleading.

REDACTED

(RFF ¶¶ 661, 685-688, 827, 832, *in camera*).

REDACTED

(RFF ¶¶ 93-94, *in camera*). PHCS kept its preferred methodology, but ENH was able to put fair market rates in place in the 2000 negotiations.

1093. While PHCS's average rate increases prior to the merger ranged from 4-8%, post-merger, PHCS showed a 60% increase in the rates that it had to pay under the new contract. (Ballengee, Tr. 179, 196).

Response to Finding No. 1093:

This proposed finding is incomplete and misleading.

REDACTED

(RFF-Reply ¶¶ 1034, *in camera*; RFF ¶¶ 661, 685-688, 827, 832, *in camera*; Ballengee, Tr. 179). That information is useful because it demonstrated that Evanston Hospital was under-compensated given its reputation, quality and breadth of service.

Moreover, PHCS's calculation is not supported by reliable or credible evidence.

REDACTED (RFF-Reply ¶¶ 1058-1065, *in camera*).

REDACTED (RFF-Reply ¶ 1058, *in camera*).

REDACTED (RFF-Reply ¶ 1058, *in camera*).

Additionally, **REDACTED**

(Ballengee, Tr. 261-62, *in camera*). **REDACTED**

(Ballengee, Tr. 261-62, *in camera*).

REDACTED (Ballengee, Tr. 261-62, *in camera*).

1094. The new rates for ENH's contract with PHCS went into effect April 1, 2000. (Ballengee, Tr. 188; CX 5071 at 1, *in camera*).

Response to Finding No. 1094:

This proposed finding is incorrect, and inconsistent with the record. (RFF-Reply ¶ 759).

1095. ENH's victory in imposing higher rates on PHCS was large, as PHCS represents "a significant part of [ENH's] business." (Hillebrand, Tr. 1891-92).

Response to Finding No. 1095:

This proposed finding is misleading. The cited testimony states only that PHCS one of ENH's four largest managed care customers. (Hillebrand, Tr. 1891-92). The remainder of this proposed finding constitutes unsupported argument.

1096. In October 2000, Mr. Neaman told ENH's board of directors that he estimated the annualized economic value of the renegotiation of the PHCS contract to be 3 million dollars. (CX 17 at 6). In achieving an annualized economic value of 3 million dollars, ENH had met the net revenue target set by Bain nine months earlier. (*Compare* CX 17 at 6 *and* CX 1998 at 44).

Response to Finding No. 1096:

This proposed finding is misleading and incomplete. **REDACTED**

(RFF ¶¶ 827, 828-848, *in camera*).

REDACTED (RFF ¶¶ 832-838, *in camera*).

REDACTED

REDACTED (RFF ¶ 847, *in camera*).

REDACTED

(RFF ¶ 716; Ballengee, Tr. 175-76; CX 5068 at 27-28, *in camera*).

1097. After the rate increases went into effect, PHCS learned the downstream effect of ENH's price increases on employer premiums. (Ballengee, Tr. 197). PHCS's customers "had to raise their rates significantly in – the premiums to accommodate the increased rates at Evanston." (Ballengee, Tr. 197).

Response to Finding No. 1097:

This proposed finding is misleading (RFF-Reply ¶ 1080). Complaint Counsel offered no evidence to support the proposition that any of PHCS's insurance company-clients increased their premiums because of this Merger.

REDACTED

(Haas-Wilson, Tr. 2765-2766, *in camera*).

REDACTED (Haas-Wilson, Tr. 2765-2766, *in camera*).

1098. **REDACTED**

(Haas-Wilson, Tr. 2535-36, *in camera*. *See also* CCFF 424-425, 453-454, *in camera*).

Response to Finding No. 1098:

This proposed finding is misleading. (RFF-Reply ¶¶ 406-431, 435-463).

1099. **REDACTED**

(CX 6279 at 4-5 (**REDACTED**), *in camera*; Haas-Wilson, Tr. 2522, *in camera*).

Response to Finding No. 1099:

This proposed finding is misleading. (RFF-Reply ¶¶ 454, 424).

1100. **REDACTED**

(Haas-Wilson, Tr. 2522, *in camera*; CX 6279 at 4-5, *in camera*; Ballengee, Tr. 196).

Response to Finding No. 1100:

This proposed finding is misleading. (RFF-Reply ¶ 1099). In addition, this finding is misleading to the extent it implies that the calculations done by Ballengee were based on accurate and complete data.

REDACTED

(Ballengee, Tr. 261-62, *in camera*).

G. ENH Extracted a Significant Price Increase from One Health/Great-West

1. Pre-Merger Experience

1101. Prior to the merger, One Health considered Highland Park Hospital, the "next hospital to the north" of Evanston, to be Evanston's "main competitor." (Neary, Tr. 600-02).

Response to Finding No. 1101:

This proposed finding is misleading. One Health identified several hospitals that were alternatives for the ENH hospitals. (RFF ¶ 458). The list of alternatives included: Lake Forest Hospital, St. Therese and Victory Memorial as alternatives to HPH; and St. Francis and Advocate Lutheran General as alternatives to Evanston Hospital. (RFF ¶ 458). One Health also considered Northwestern Memorial and Condell as alternatives to ENH. (RFF ¶ 458).

REDACTED

(RFF ¶¶ 538-540, 542-547, 550-559; RFF ¶¶ 541, 548-549, *in camera*).

1102. Both hospitals "drew patients from the same general area" in the affluent communities between the two hospitals. (Neary, Tr. 601-02).

Response to Finding No. 1102:

This proposed finding is misleading. Both hospitals, along with numerous other hospitals, draw patients from the North Shore. (RFF ¶¶ 395-404, 454-61).

REDACTED

(RFF ¶ 397, *in camera*).

REDACTED

(RFF ¶ 397, *in camera*).

REDACTED

(RFF ¶ 398, *in camera*).

1103. Highland Park Hospital was also Evanston's "main competitor" pre-merger because the two hospitals offered "comparable" services. (Neary, Tr. 601-02).

Response to Finding No. 1103:

This proposed finding is incorrect. Neary demonstrated at trial that he has no knowledge of the services offered at these hospitals, nor the frequency of those services at Chicago hospitals. (Neary, Tr. 641-43). In addition, Neary has no clinical degree in medicine and, therefore, lacked the foundation to compare adequately the services provided by Evanston Hospital and HPH. (Neary, Tr. 630).

The evidence showed that Evanston Hospital offered far more services than HPH. In fact, out of twenty hospitals studied, Evanston Hospital offered the fourth most DRGs, whereas HPH offered the fewest. (RFF ¶¶ 543-544). Evanston Hospital compared favorably with University of Chicago, Loyola, Advocate Northside, Northwestern Memorial, Advocate

Lutheran General and Rush Presbyterian. (RFF ¶¶ 543-548). **REDACTED**

(RFF ¶ 548).

1104. The area surrounding Highland Park Hospital was especially important to One Health prior to the merger because the hospital was located in "a more affluent" neighborhood with a "number of leaders from the business community." (Neary, Tr. 604). These leaders are the purchasers of care for their own businesses, and they "would want to have the hospital that's in their community in the network." (Neary, Tr. 604-05).

Response to Finding No. 1104:

This proposed finding is misleading and is not based on reliable evidence. (RFF ¶¶ 228-229). There is no direct evidence that a "number of leaders from the business community" live in the area surrounding HPH. Indeed, not one such leader testified at trial or, for that matter, was even identified at trial. This proposed finding is pure speculation. There also is no evidence that "leaders from the business community" would elevate their own self-interests at the expense of its employees. To the extent that this proposed finding suggests that employers would place greater priority upon assuring themselves access, it is not supported by the evidence. Employers compete in labor markets based upon employee benefits offered. (RFF ¶¶ 56-57).

2. Post-Merger Experience

2000 Negotiation Experience - ENH Demanded a Price Increase from One Health

1105. In December of 1999, ENH contacted One Health to request the renegotiation of its hospital contract – a contract that Bain had identified as one with "significant upside potential." (Neary, Tr. 595; CX 75 at 9-10).

Response to Finding No. 1105:

This proposed finding is incomplete and misleading. Evanston Hospital's One Health contract was characterized by its "poor performance," "weak structure" and "weak terms." (CX 75 at 9). There was also a "substantial difference" between HPH and Evanston Hospital's rates. (RFF ¶¶ 790-794; CX 75 at 9-10; Neary, Tr. 604). In addition, the existing contract had not been

renegotiated since 1996. (RFF ¶ 791). As a result, Bain identified the One Health contract as a priority for renegotiating fair market rates. (CX 75 at 10; RFF ¶ 704). In December 1999, ENH sought to open renegotiations.

1106. Bain instructed ENH to "Achieve HP terms or better" in its negotiations with One Health. (CX 1998 at 43).

Response to Finding No. 1106:

This proposed finding is incomplete. Bain advised ENH that, at the very least, ENH had to achieve the market rates in place with HPH since 1996. (RFF ¶¶ 790-794). In addition, ENH targeted a price that properly accounted for the time since both the HPH and Evanston Hospital contracts were negotiated by seeking HPH's terms "or better." (CX 1998 at 43).

1107. One Health knew that "[they] were not in a strong negotiating position" because "Evanston had purchased their main competitor," Highland Park. (Neary, Tr. 600-01).

Response to Finding No. 1107:

This proposed finding is incorrect and misleading. HPH was not Evanston Hospital's "main competitor" in either a geographic or product market. (RFF-Reply ¶¶ 1101-1103).

1108. ENH's initial demand was to convert "every single service" to a discount-off-charges basis. (Neary, Tr. 607-08).

Response to Finding No. 1108:

This proposed finding is misleading. Discount-off-charges is the standard reimbursement methodology for outpatient services. (RFF-Reply ¶ 799). One Health had discount-off-charges arrangements with both Evanston Hospital and HPH for outpatient services before the Merger. (CX 5059 at 18; CX 5065 at 19). Therefore, this proposed finding is misleading in that it claims all of the service categories were converted to discount-off-charges, when, in fact, roughly half of all of the service categories were always reimbursed on discount-off-charges. (RFF ¶¶ 73-74).

Additionally,

REDACTED

(RFF ¶¶ 82-85). Since 2000, Chicago area hospitals have pressed more aggressively for discount-off-charges provisions for inpatient services. (RFF ¶ 86).

1109. Knowing that One Health would "have less control . . . over what will ultimately be paid" to the hospital under a percent of charges arrangement, Mr. Neary resisted changing the structure of the contract. (Neary, Tr. 609).

Response to Finding No. 1109:

This proposed finding is misleading. For outpatient services, discount-off-charges are standard. (RFF ¶ 91). Moreover, MCOs can, and do, negotiate terms into contracts that provide stability under a discount-off-charges reimbursement methodology. (RFF ¶¶ 87-89).

1110. If One Health were to accept ENH's proposal, the health plan would lose the ability to accurately predict hospital charges because, under a discount-off-charges contract, "a hospital could potentially raise their rates as they saw fit, which would ultimately increase the payments that went out the door." (Neary, Tr. 609).

Response to Finding No. 1110:

This proposed finding is misleading. One Health admitted that there are "industry standard methodologies" for addressing the ability of a hospital to adjust its charges. (Dorsey, Tr. 1485). Other MCOs obtained escalator clauses or other such standard methodologies in their negotiations with ENH. (RFF ¶ 89). Indeed, while One Health did not seek escalator clauses at the time of the ENH negotiations, seeking such protections later became One Health's general strategy. (Dorsey, Tr. 1485-86 (stating that that strategy was not "in place at the time of [the ENH] negotiations")).

1111. **REDACTED**

(CX 262 at 1, *in camera*; Neary, Tr. 756, *in camera*; Dorsey, Tr. 1436-37).

Response to Finding No. 1111:

This proposed finding is misleading and incomplete. After nearly four months of negotiation, ENH made a final proposal. (RFF-Reply ¶ 1105).

1112. **REDACTED** (Neary, Tr. 602; Neary, Tr. 757, *in camera*; CX 262 at 2-3, *in camera*).

Response to Finding No. 1112:

This proposed finding is vague and misleading. ENH sought an increase in reimbursement rates because its contracts with One Health were outdated and under-market. (RFF-Reply ¶¶ 1106). One Health acknowledged that since it had been several years since the contracts had been renegotiated, it was appropriate to increase the rates. (RFF ¶ 796). ENH also sought to establish discount-off-charges inpatient rates consistent with its outpatient rates. (RFF-Reply ¶ 1108).

1113. **REDACTED** (Neary, Tr. 757, *in camera*; CX 262 at 2-3, *in camera*).

Response to Finding No. 1113:

This proposed finding is incorrect and misleading. One Health already had discount-off-charges methodology for outpatient services. (RFF-Reply ¶ 1108). ENH did not unilaterally change, and could not have unilaterally changed, the reimbursement structure for inpatient services. **REDACTED**

(CX 5064 at 17, *in camera*).

1114. **REDACTED** (Neary, Tr. 757-58, *in camera*; CX 5064 at 17, *in camera*).

Response to Finding No. 1114:

This proposed finding is incomplete and misleading. Before the Merger, HPH's rates for medical and surgical were far higher than the rates presented in this proposed finding.

REDACTED

(RFF ¶ 794).

1115. **REDACTED**

(Neary, Tr. 758-59, *in camera*).

Response to Finding No. 1115:

Respondent has no specific response.

1116. **REDACTED**

(Neary, Tr. 759, *in camera*; CX 262 at 2-3, *in camera*).

Response to Finding No. 1116:

This proposed finding is not supported by the evidence. There is no evidence supporting Complaint Counsel's assertion that switching to discount-off-charges was a "significant contract structure change." One Health always had discount-off-charges arrangements for outpatient services with hospitals before the Merger. (RFF-Reply ¶ 1108).

REDACTED

(Neary, Tr. 759, *in camera*).

1117. **REDACTED**

(Neary, Tr. 756, *in camera*; CX 262 at 2, *in camera*).

Response to Finding No. 1117:

This proposed finding is immaterial. Even before the Merger, Evanston Hospital had a single rate structure with One Health that included both Evanston and Glenbrook Hospitals. (CX 5065 at 17-20). ENH simply proposed to extend the principle and efficiencies of a single rate to HPH after the Merger.

1118. **REDACTED** (CX 262 at 1, *in camera*).

Response to Finding No. 1118:

This proposed finding is incomplete and misleading.

REDACTED (RFF ¶¶ 184-186). **REDACTED**

(RFF ¶ 804, *in camera*).

1119. Having last renegotiated the Highland Park and Evanston contracts in 1996 and 1995, One Health "agreed that it had been several years since the contracts had been renegotiated and that it was appropriate to – to increase some of the rates." (Neary, Tr. 596, 608). **REDACTED**

(Neary, Tr. 763, *in camera*; CX 2085 at 1, 6, *in camera*. *See* CCFF 1188, 1194, *in camera*).

Response to Finding No. 1119:

This proposed finding is incomplete. First, this proposed finding accurately indicates that both HPH and Evanston Hospital's contracts were outdated and required significant increase in rates. (RFF ¶¶ 790-796). However, it does not recognize that Evanston Hospital's rates were below the rates of HPH, a community hospital, and thus required a one-time corrective adjustment to bring the rates to fair market levels. (RFF ¶¶ 790-796). Neary agreed with ENH

that it had been "several years since the contracts had been renegotiated and it was appropriate to...increase some of the rates." (RFF ¶ 796).

Medical CPI only tracks inflation over the value of time. (RFF-Reply ¶¶ 1194, 1212). As a result, benchmarking to Medical CPI does not account for the fact that Evanston Hospital's pre-Merger rates were below market and below costs. (RFF ¶¶ 790-796). Indeed, One Health recognized that ENH's proposal was simply not "that shocking" under the circumstances. (RFF ¶ 797).

ENH's Proposed Price Increase to One Health Was "Excessive"

1120. **REDACTED**

(Neary, Tr. 762, *in camera*; Neary, Tr. 609).

Response to Finding No. 1120:

This proposed finding is vague and incorrect.

REDACTED (Neary, Tr. 762, *in camera*).

1121. One Health's analysis of ENH's best and final offer showed "excessive" price increases. (Neary, Tr. 609).

Response to Finding No. 1121:

This proposed finding is not supported by the record. Dorsey, Neary's boss, testified that the proposed rates were not "that shocking" – all things considered. (Dorsey, Tr. 1437; RFF ¶ 797).

1122. **REDACTED** (Neary, Tr. 762, *in camera*; CX 2085 at 1, *in camera*).

Response to Finding No. 1122:

This proposed finding is imprecise, incomplete, misleading and immaterial.

REDACTED

(Neary, Tr. 763-64, *in camera*). As a result, to the extent the figures in this proposed finding are based on proposed numbers rather than the rates ultimately agreed to by the parties, they are of little value. Even so, One Health admitted that the proposal was not "that shocking" and that ENH was due for an increase in rates because the contract had not been renegotiated in several years. (RFF ¶¶ 796-797).

ENH Rejected One Health's Counter-Proposal

1123. One Health believed that ENH was "shooting for the stars" with its "extreme" reimbursement request and viewed ENH's proposal as "an opportunity to counter and an opportunity to begin negotiations of a final agreement." (Dorsey, Tr. 1437-38).

Response to Finding No. 1123:

This proposed finding is incomplete. Dorsey testified that it was typical to receive a proposal where a hospital "more or less shoot[s] for the stars of what they would like to receive." (Dorsey, Tr. 1437-38). Accordingly, the ENH proposal did not "shock" him. (Dorsey, Tr. 1437-38).

1124. **REDACTED**

Neary, Tr. 609; Neary, Tr. 760, 763, *in camera*; Dorsey, Tr. 1438; CX 2085 at 1, *in camera*).

Response to Finding No. 1124:

This proposed finding is incomplete and misleading. One Health's counter-proposal was not a reasonable offer. **REDACTED**

(RFF ¶ 798). Despite the rhetoric

that One Health used to characterize ENH's proposal as a "drastic increase," ENH's proposal was not "that shocking." (RFF-Reply ¶¶ 1122-1123).

1125. **REDACTED** (CX 2085 at 2, *in camera*).

Response to Finding No. 1125:

This proposed finding is incorrect. **REDACTED**

(CX 2085 at 3, *in camera*).

1126. Because it had been paying higher rates to Highland Park prior to the merger, One Health also proposed a "fair increase to both hospitals," but wanted to assign a separate rate to Highland Park from the rates for Evanston and Glenbrook. (Neary, Tr. 603; Neary, Tr. 760, *in camera*; Dorsey, Tr. 1446-47).

Response to Finding No. 1126:

This proposed finding is consistent with the learning about demand theory. Complaint Counsel concedes in this proposed finding that HPH, a community hospital, had higher rates than Evanston Hospital, an academic hospital. (RFF ¶ 790). One Health may have desired to prevent Evanston Hospital from learning about its demand, but such desire has nothing to due with antitrust law.

REDACTED (CX 2085 at 2-3, *in camera*).

1127. For other hospitals systems such as Rush and Advocate, One Health typically paid different rates for hospitals based upon varying levels of service. (Dorsey, Tr. 1446). Academic facilities, such as Rush Presbyterian-St. Lukes, were reimbursed at a higher rate than a smaller community or tertiary facility in the same system. (Dorsey, Tr. 1466).

Response to Finding No. 1127:

This proposed finding is not supported by reliable evidence.

REDACTED (Dorsey, Tr. 1445-46; Mendonsa, Tr. 543, *in camera*; RFF-Reply ¶¶ 913-914).

1128. Glenbrook Hospital did not have "the same level of service or the same requirement of service from [One Health's] members as other hospitals within the ENH network." (Dorsey, Tr. 1447).

Response to Finding No. 1128:

This proposed finding is incomplete, misleading and suspect given One Health's actions in negotiations. Since 1977, Evanston and Glenbrook Hospitals have had a single Medicare identification number. (RFF-Reply ¶ 825). Not a single MCO ever complained – either before or after the Merger – about paying Evanston and Glenbrook Hospitals a single rate because of the unified Medicare identification. (RFF-Reply ¶¶ 825, 828; RFF ¶ 11).

1129. Moreover, One Health "didn't see that [ENH's] facility and that list of services warranted the same reimbursement structure as we were giving in the Highland Park system." (Dorsey, Tr. 1447).

Response to Finding No. 1129:

This proposed finding is incomplete, misleading and suspect given One Health's actions in negotiations. (RFF-Reply ¶ 1128).

1130. One Health also "didn't think it was appropriate" to bring the rates at Evanston up to the level of the rates at Highland Park because the other hospitals in the Evanston community did not have rates as high as Highland Park's rates. (Neary, Tr. 606).

Response to Finding No. 1130:

This proposed finding is incomplete and misleading.

REDACTED

(Mendonsa, Tr. 565, *in camera*; RFF ¶¶ 102-

103, *in camera*). Moreover, Neary conceded that Evanston Hospital competes with the downtown Chicago academic hospitals as well as Advocate Lutheran General. (Neary, Tr. 630-31). Indeed, it was established at trial that Evanston Hospital was (and still is) one of the top academic tertiary hospitals in the country. (RFF ¶¶ 3, 8, 30-32). Accordingly, there is no basis for Neary to conclude that HPH warranted higher rates than Evanston Hospital before the Merger.

1131. Automatically increasing Evanston's level of reimbursement to that of Highland Park "would represent what [One Health] deemed to be an excessive increase in the rates" for a hospital whose rates were not below market prior to the merger. (Neary, Tr. 603, 644; Neary, Tr. 761, *in camera*).

Response to Finding No. 1131:

This proposed finding is incorrect and contradicted by the evidence. Evanston Hospital's rates were justified in being higher than HPH's. (RFF-Reply ¶ 1130). This is especially true given that HPH's rates were last negotiated in 1996. (RFF ¶ 794). Even Neary admitted that contracts that have not been renegotiated in several years are due an increase. (RFF ¶ 796).

1132. ENH dismissed One Health's proposal and demanded that all three hospitals be reimbursed at the same rate. (Neary, Tr. 602).

Response to Finding No. 1132:

This proposed finding is not supported by the record.

REDACTED (RFF-Reply ¶ 1126, *in camera*). Second, the cited testimony does not support the proposition that Great West even raised the issue of separate rates to ENH, much less that they "dismissed" it. (Neary, Tr. 602). Neary only stated "his position" on the subject. (Neary, Tr. 602).

One Health Dropped ENH from Its Network for a Short Period of Time

1133. In the first half of 2000, ENH and One Health did not reach agreement on the renegotiation of the PPO and HMO contracts, and ENH invoked the termination clause in its contract. (Neary, Tr. 598, 609-10; Dorsey, Tr. 1438).

Response to Finding No. 1133:

This proposed finding is misleading. One Health accepted ENH's notice of termination and allowed the agreement to lapse. (RFF ¶ 799).

1134. On May 23, 2000, One Health received a letter from ENH stating that the PPO and HMO contracts would terminate on August 31, 2000, if an agreement on rates could not be reached. (CX 5062 at 1; Neary, Tr. 609-10; Dorsey, Tr. 1438-39, 1441-42).

Response to Finding No. 1134:

This proposed finding is incomplete and misleading because it fails to note that the parties had been negotiating for nearly six months. (RFF-Reply ¶ 1105).

1135. One Health knew that terminating the ENH contract could mean "los[ing] the employer groups because we didn't have [ENH] in the network." (Dorsey, Tr. 1450).

Response to Finding No. 1135:

This proposed finding is based on speculation and contradicted by the facts. Neary did not have responsibility for marketing at One Health. (Neary, Tr. 629). As a result, his speculation as to the effect of termination on the marketing of the network is entitled to little or no weight. Even if he were competent to testify on the subject, Neary's judgment was that the company could have a "sellable network" without the ENH hospitals. (Neary, Tr. 615). Lake Forest Hospital, Northwest Community, Advocate Lutheran General, Rush North Shore and St. Francis were all part of One Health's network at the time. (RFF ¶ 801).

Even after termination, One Health witnesses could not identify a single employer that left One Health as a result of the termination. (RFF ¶¶ 802-803). Dorsey could not identify any sales that were lost to any specific customer. (RFF ¶ 802).

1136. On the other hand, if One Health were to acquiesce to ENH's higher prices, One Health would "lose the employer groups because they couldn't afford to continue to pay the high cost in their overall medical cost ratio." (Dorsey, Tr. 1450).

Response to Finding No. 1136:

This proposed finding is not based on reliable evidence. Any complaints from employer groups came through One Health's sales and marketing person, Scott Barnett. (Dorsey, Tr. 1451). Since this proposed finding is based solely on unreliable hearsay, it should be accorded no weight. (Dorsey, Tr. 1452, 1454, 1456 (objecting to hearsay)).

1137. One Health decided to explore the strength of its "alternative networks" before accepting the termination of the ENH contract. (Dorsey, Tr. 1450).

Response to Finding No. 1137:

Respondent has no specific response.

1138. Mr. Neary met with his sales staff to "determine whether or not we would have a network that would be sellable" without the merged entity. (Neary, Tr. 613).

Response to Finding No. 1138:

This proposed finding highlights the fact that this witness relies on unreliable hearsay evidence. (Neary, Tr. 613-14).

1139. While Mr. Neary knew that "it would be risky" to terminate the ENH system from One Health's network, he "thought that it perhaps could be done . . . the company would have a sellable network, that was my judgment." (Neary, Tr. 615).

Response to Finding No. 1139:

Respondent has no specific response. (RFF ¶ 801).

1140. As a final response to ENH's May 23, 2000, termination letter, Patricia Moldovan, the president of One Health's Midwest region placed a call to Jeffrey Hillebrand to make a "last-ditch effort to try and salvage the relationship." (Dorsey, Tr. 1449).

Response to Finding No. 1140:

This proposed finding is incomplete. Dorsey testified that it was not uncommon for Moldovan to make a call to the "decision-maker for that terminating entity." (Dorsey, Tr. 1449).

1141. One Health explained to Mr. Hillebrand that "the price increases were just too high for [One Health] to pass on to the employer groups." (Dorsey, Tr. 1450).

Response to Finding No. 1141:

Respondent has no specific response.

1142. At the conclusion of the call, One Health realized that its "last-ditch effort" to "salvage the relationship" had failed and that the termination would proceed. (Dorsey, Tr. 1449-50).

Response to Finding No. 1142:

Respondent has no specific response.

1143. After giving the matter careful consideration and sending the issue "up through the entire organization," the collective decision of Mr. Neary, Kevin Dorsey, the regional president of One Health, and Pat Moldovan, the vice president of sales for the region, was to accept ENH's termination and allow the contract to lapse. (Neary, Tr. 611, 616; Dorsey, Tr. 1449-50).

Response to Finding No. 1143:

Respondent has no specific response.

1144. In July 2000, One Health accepted ENH's termination. (CX 266 at 1).

Response to Finding No. 1144:

Respondent has no specific response.

ENH Raised Its Rates for Pregnant Women Soon to Give Birth and Refused to Deal with Transitioning Other One Health Customers After the Termination

1145. In order to ensure a smooth transition for its employer groups away from ENH, One Health "tried to arrange a meeting with utilization management staff at ENH . . . to come up with a plan for members who were going to be in the hospital as of the termination date." (Neary, Tr. 619).

Response to Finding No. 1145:

This proposed finding is misleading. One Health did not make efforts to "ensure a smooth transition for its employer groups." One Health failed to even notify a large number of its members that it had allowed the contract to lapse with the ENH hospitals. (RX 993 at ENHL JL 22377). As a result, ENH fielded a number of phone calls from members upset with One Health's failure to communicate with them. (RX 993 at ENHL JL 22377).

1146. ENH disregarded One Health's request and would not agree to meet with the health plan's medical director. (Neary, Tr. 619). In other words, One Health patients whose stay in the hospital went past the contract termination would not have their post-termination charges limited by EHN [sic] to the amount specified on the One Health Contract. (Neary, Tr. 619).

Response to Finding No. 1146:

This proposed finding is misleading because ENH and One Health negotiated an interim agreement that would apply to certain patients after the effective date of termination. (Hillebrand, Tr. 1898; Neary, Tr. 637).

1147. One Health also tried to make provisions for women "who were in the third trimester of pregnancy" at the time of the contract termination. (Neary, Tr. 619-20).

Response to Finding No. 1147:

This proposed finding is misleading to the extent it implies that ENH was not a willing participant in negotiating provisions for these pregnant women. (Neary, Tr. 637 (clarifying that ENH negotiated terms with One Health to cover the pregnant women affected by One Health's decision to let the parties' contract lapse)).

1148. These expecting mothers "would need to have their babies at one of the ENH hospitals regardless of whether or not they were in network" because "if their OB had only admitting privileges to one of those hospitals, the mother could not switch OBs in the third trimester of her pregnancy. Another OB would not take that person as a patient." (Neary, Tr. 619-20).

Response to Finding No. 1148:

This proposed finding is based solely on Neary's speculation and does not even attempt to quantify how many of the affected women had obstetricians with admitting privileges only at the ENH hospitals. Rather, because ENH had 1200 non-employed, private practice physicians, many of whom had privileges at other hospitals, the number of affected women was likely to be very small. (Neaman, Tr. 1282; RFF-Reply ¶ 1149).

1149. Knowing that One Health had no other provider options for those expecting mothers, ENH used its negotiating leverage to increase One Health's prices to a 10% discount-off-charges arrangement for those OB services. (Neary, Tr. 620, 637; CX 5063 at 1).

Response to Finding No. 1149:

This proposed finding is misleading because, again, it fails to detail how many women were affected by the termination. (RFF-Reply ¶ 1148). Moreover, this proposed finding does not explain whether a 10% discount-off charges for OB services was unusual or different from the OB rates negotiated with other academic hospitals.

Further, the negotiating power ENH allegedly had with One Health would have been a function of a handful of obstetricians' admitting privileges, not the Merger with HPH. Neary conceded that, even though One Health decided to terminate with ENH, ENH granted One Health's members a discount-off-charges of 10% for their care. (Neary, Tr. 637). If ENH had not granted that courtesy, One Health would have been responsible for paying actual charges. (Neary, Tr. 637).

1150. While One Health was able to negotiate a continuation of benefits for those expecting mothers, ENH charged the health plan rates that were even "higher" than contract rates that were in place under the pre-merger One Health contract. (Neary, Tr. 620, 37; CX 5063 at 1).

Response to Finding No. 1150:

This proposed finding is misleading because it fails to explain that Evanston Hospital's pre-Merger One Health contract had been in place since 1996 and was also less favorable than HPH's. (Neary, Tr. 604-05; CX 5065 at 4; RFF ¶¶ 790-795). It therefore is hardly surprising that after having seen HPH's contract, ENH was able to negotiate a "higher" price for a very small volume of a particular type of service. REDACTED (RFF ¶ 798). Then, One Health decided to allow the contract to lapse, leaving its members with the prospect of losing their doctors in the midst of a pregnancy. (RFF-Reply ¶ 1149). Nevertheless, ENH provided One Health with a 10% discount despite One Health's failure to even adequately notify its own customers. (RFF-Reply ¶¶ 1145, 1147, 1149)

1151. One Health's contract with ENH terminated on August 31, 2000. (Neary, Tr. 610-11; Hillebrand, Tr. 1707-08, 1898; CX 5062 at 1).

Response to Finding No. 1151:

Respondent has no specific response.

One Health Lost Membership and Could Not Market a Network Without ENH After Its Contract with ENH Terminated

1152. Shortly after the termination of the ENH contract went into effect, Mr. Neary realized that he "was wrong" in thinking that One Health could market and sell a network without the three ENH facilities. (Neary, Tr. 617).

Response to Finding No. 1152:

This proposed finding is based on nothing more than Neary's unsubstantiated opinion. The record showed that neither of Complaint Counsel's Great West witnesses could identify a single customer that was lost during the period in which the relationship between Great West and ENH was terminated. (Neary, Tr. 635; Dorsey, Tr. 1481). Neary never saw any letter from any Great West customer complaining about the ENH termination. (Neary, Tr. 635). And Dorsey

could not identify any sales that were lost to any specific customer. (Dorsey, Tr. 1481). Nor could Neary quantify the revenue purportedly lost by Great West as a result of the termination. (Neary, Tr. 635). Neary could not even testify whether the purportedly lost customers were large or small. (Neary, Tr. 635). Neary's only knowledge of lost customers came from the sales manager, Don Manno, who Great West actually demoted in 2001 or 2002. (Neary, Tr. 636-37). Moreover, neither Neary nor Dorsey had direct sales or marketing responsibility for One Health. (Neary, Tr. 629-30; Dorsey, Tr. 1467, 1488).

1153. One Health "immediately started receiving complaints from our sales staff about the termination." (Neary, Tr. 617).

Response to Finding No. 1153:

This proposed finding is misleading because the "complaints" from the sales staff did not translate into any identifiable lost customers. (RFF-Reply ¶ 1152). Moreover, Neary never saw any complaint letters from any Great West customers. (Neary, Tr. 635).

1154. The sales staff tried to market its network to employer groups. However, Lake Forest, Condell, Northwest Community, Advocate Lutheran General, Holy Family, Rush North Shore, St. Francis, St. Therese and Victory Memorial – all hospitals in One Health's network at the time of the termination of ENH's contract – could not provide adequate access to the health plan's customers in the North Shore. (Neary, Tr. 611, 617, 618-19; Dorsey, Tr. 1459, 1467, 1479).

Response to Finding No. 1154:

This proposed finding is based on nothing more than speculation because One Health did not lose any identifiable customers as a result of termination. (RFF-Reply ¶ 1152). This proposed finding also is based on unreliable hearsay. The so-called complaints from One Health's sales staff are not corroborated by any documentary evidence, nor is there any evidence of any identifiable customer lost as a result of the termination. (RFF ¶¶ 802-803).

In addition, at the same time it was renegotiating with ENH, One Health was nearing termination with Lake Forest Hospital. (RFF ¶¶ 807-808). One Health acknowledged that it would have been "very problematic" for negotiations to break down with ENH and with Lake Forest Hospital at the same time. (RFF ¶ 808).

1155. The sales staff urged network development management to "try to re-open negotiations with ENH" because One Health was "losing membership" and "losing employer groups" without the three ENH facilities. (Neary, Tr. 617; Dorsey, Tr. 1452).

Response to Finding No. 1155:

This proposed finding is misleading and is based solely on unreliable hearsay. (Dorsey, Tr. 1451-52 (objection overruled to hearsay); Neary, Tr. 617 (same)). Neither of the witnesses Complaint Counsel called to the stand could name a single customer who was lost as a result of terminating with ENH. (RFF ¶ 802). Instead, the best Complaint Counsel can muster is unsubstantiated hearsay unsusceptible to cross-examination. (Neary, Tr. 617; Dorsey, Tr. 1452). This evidence is not reliable and should not be accorded any weight.

1156. In the months following the termination of the ENH contract, One Health's monthly membership reports also began to reflect a "loss of membership within [the] network." (Dorsey, Tr. 1488).

Response to Finding No. 1156:

This proposed finding is misleading and is not based on reliable evidence. Once again, One Health, could not identify any customers lost as a result of the termination. (RFF-Reply ¶¶ 1152, 1155). Instead, this Court is left only with rumor and hearsay. (RFF-Reply ¶ 1155).

1157. In response to declining membership figures and lost employer groups, One Health held a meeting with regional vice presidents and the president of the One Health Midwest region to reassess One Health's "ability to continue without ENH in our network." (Dorsey, Tr. 1455, 1488).

Response to Finding No. 1157:

This proposed finding is misleading because, once again, One Health could not identify any customers lost as a result of the termination. (RFF-Reply ¶ 1152).

1158. One Health management concluded that they "wanted a face-to-face" with ENH so that the health plan could establish a new contractual agreement. (Dorsey, Tr. 1455-57).

Response to Finding No. 1158:

Respondent has no specific response.

One Health Soon Re-Opened Negotiations with ENH and Came to an Agreement

1159. After only a few months of attempting to market a network without ENH, One Health requested a "face-to-face" with ENH and re-opened negotiations on November 15, 2000. (Neary, Tr. 617-18; Hillebrand, Tr. 1708; Dorsey, Tr. 1439, 1441-42, 1456-57; CX 266 at 1).

Response to Finding No. 1159:

The above cited testimony is, at best, ambiguous as to whether One Health took the initiative to reopen negotiations with ENH. (CX 266 at 1 (noting that ENH contacted One Health to discuss re-opening negotiations)).

1160. One Health approached the negotiating table a second time knowing that they "were not in a strong negotiating position" because they "were going back to a . . . hospital system that had terminated with us, and . . . we are going there because our sales staff could not sell the network without having this hospital system in our network." (Neary, Tr. 618-19).

Response to Finding No. 1160:

This proposed finding is extremely misleading because there is no evidence ENH was aware of One Health's alleged attempts to sell a network without the ENH hospitals. This proposed finding is further misleading because One Health could not identify any customers lost as a result of the termination. (RFF-Reply ¶ 1152).

Moreover, One Health's alternative viable network was unraveling in the fall of 2000 for reasons wholly unrelated to the Merger. Before ENH reinitiated discussions in early October 2000, Great West received a written notice of termination, effective December 31, 2000, from Lake Forest and its medical group on September 28, 2000. (RX 949; RX 950; RFF ¶ 807). Since Lake Forest was the primary alternative to HPH, it would have been "very problematic" for Great West to have lost Lake Forest Hospital from the network at the same time Great West had no contract with ENH. (Dorsey, Tr. 1484; RFF ¶ 808). Therefore, One Health had a pressing need to deal with ENH in early October 2000 that had nothing to do with the Merger.

1161. One Health was vulnerable to ENH's price demands because "we knew that we had to get a contract with the hospital . . . essentially regardless of what the ultimate price was." (Neary, Tr. 619).

Response to Finding No. 1161:

This proposed finding is misleading. One Health needed a contract with ENH because of a fear by One Health that it could lose both ENH and Lake Forest, a situation that could have left One Heath without a viable network. (RFF-Reply ¶ 1160).

1162. One Health's meeting with ENH representatives resulted in a new agreement with an effective date of January 1st 2001. (Dorsey, Tr. 1439-42, 1457; Hillebrand, Tr. 1708, 1898; CX 5067 at 4, *in camera*; CX 266 at 1).

Response to Finding No. 1162:.

Respondent has no specific response.

One Health Surrendered to ENH's Pricing Demands and Contract Terms

1163. **REDACTED**

(Neary, Tr. 763-64, *in camera*; Dorsey, Tr. 1439-42; CX 2085 at 1, *in camera*).

Response to Finding No. 1163:

This proposed finding is misleading because it fails to explain that Evanston Hospital's pre-Merger One Health contract had been in place since 1996 and was also less favorable than HPH's contract. (RFF-Reply ¶ 1150). This rate change is yet another reflection of Evanston Hospital/ENH finally realizing through the Merger integration process that it had long been under-compensated for its academic hospital services. (RFF ¶¶ 322, 681, 687, 707, 719, 732, 754, 796, 864, 1111-1112; RFF-Reply ¶¶ 853-854, 959-1312, 1365, 1367, 1372, 1374-1376, 1378, 1395-1397).

Specifically, Evanston Hospital's pre-Merger Great West contract had a per diem rate of $1250 and $1225 for inpatient medical/surgical services on the PPO and POS products. (CX 5065 at 17). **REDACTED**

(Noether, Tr. 6103, *in camera*; RX 1912 at 34, *in camera*; RX 223 at GW 3988-89, *in camera*). And more important, pre-Merger HPH had a per diem rate of $1375 for inpatient medical services and a per diem rate of $1650 for surgical services. (CX 5059 at 17; RFF ¶ 794).

REDACTED

(Neary, Tr. 765-66, *in camera*).

Neary thus candidly testified that he "agreed that it had been several years since the [ENH] contracts had been renegotiated and that it was appropriate to – to increase some of the rates." (Neary, Tr. 608; RFF ¶ 796).

1164. ENH achieved the same rates for all three facilities in the renegotiated One Health contracts. (Dorsey, Tr. 1447).

Response to Finding No. 1164:

This proposed finding is misleading. Since one of the principles of the Merger was to create an integrated health system, ENH decided to cover all three hospitals in the same contract for each MCO at the same prices. (RFF-Reply ¶¶ 823, 908). As a consequence of having a single medical staff, there is no reason for ENH to negotiate different rates because a patient can see his or her doctor at any of the three hospitals – receiving the same product, so to speak. (RFF ¶ 12; RFF-Reply ¶ 907).

Even before the Merger, Evanston Hospital always had a single rate structure with One Health that included both Evanston Hospital and Glenbrook Hospital. (CX 5065 at 17-20). ENH simply proposed to extend the principle and efficiencies of a single rate. The trend in the Chicago area is for hospital systems to have one contract covering all of their hospitals. (RFF ¶¶ 187-189).

1165. **REDACTED**

(Hillebrand, Tr. 1947, *in camera*; *compare* CX 5067 at 15, *in camera*, CX 5059 at 17, *and* CX 5065 at 17, *in camera*).

Response to Finding No. 1165:

This proposed finding is misleading because discount-off-charges are a very common reimbursement methodology. Generally, discount-off-charges are the standard methodology for outpatient services. (RFF-Reply ¶ 799).

REDACTED

(RFF ¶ 82-85, *in camera*). Since 2000, Chicago area hospitals have pressed more aggressively for discount-off-charges provisions for inpatient services. (RFF ¶ 86).

REDACTED

(RFF ¶¶ 87-89, *in camera*).

1166. REDACTED
(CX 5067 at 15, *in camera*).

Response to Finding No. 1166:

This proposed finding is misleading. (RFF-Reply ¶ 1163, 1165).

1167. REDACTED

(Neary, Tr. 765, *in camera*).

Response to Finding No. 1167:

This proposed finding is misleading. (RFF-Reply ¶ 1163, 1165).

1168. REDACTED

(Neary, Tr. 765-66, *in camera*; Hillebrand, Tr. 1944, *in camera*; CX 5064 at 17, *in camera*).

Response to Finding No. 1168:

This proposed finding is misleading. (RFF-Reply ¶ 1163, 1165).

1169. REDACTED

(Hillebrand, Tr. 1944, *in camera*; CX 5064 at 17, *in camera*).

Response to Finding No. 1169:

This proposed finding is misleading. (RFF-Reply ¶ 1163, 1165). Moreover, had ENH truly had market power and "leverage" over One Health, it would have been able to keep its 90% of charges interim agreement for third trimester pregnant women in place, and not have had to accept a 10% increase in the discount on the final contract. (CCFF ¶ 1149; CX 5064 at 17, *in camera*). Finally, this proposed finding is misleading because it mischaracterizes Hillebrand's testimony. REDACTED

REDACTED (Hillebrand, Tr. 1944, *in camera*; CX 5064 at 17).

1170. REDACTED

(Neary, Tr. 765-66, *in camera*, Hillebrand, Tr. 1944, *in camera*).

Response to Finding No. 1170:

This proposed finding is misleading because

REDACTED

(RFF-Reply ¶ 1163, *in camera*).

1171. REDACTED

(Neary, Tr. 767, *in camera*; *compare* CX 5064 at 17, *in camera*, *and* CX 5058 at 18).

Response to Finding No. 1171:

This proposed finding is extremely misleading. Pre-Merger HPH had a stop loss threshold of $35,000. Evanston Hospital's pre-Merger contract, however, had *no* stop-loss provision in either the HMO or PPO contracts. (Neary, Tr. 632; RFF ¶ 792). Moreover, Evanston Hospital's contract contained a provision that capped Evanston Hospital's reimbursement: "In no event will Company or Payor pay more than the lesser of the Payment Rate or 80% of Hospital's usual billed charges."

REDACTED

(CX 5064 at 17, *in camera*; CX 5058 at 18). All of these

changes represent Evanston Hospital using HPH's contracts to negotiate rates that were far more appropriate for its academic reputation and services. (RFF-Reply ¶ 1168).

1172. **REDACTED**

(Neary, Tr. 767, *in camera*; CX 5058 at 18 (emphasis added)).

Response to Finding No. 1172:

This proposed finding is incomplete because

REDACTED

(RFF-Reply ¶ 1171, *in camera*).

1173. **REDACTED**

(Neary, Tr. 766-67, *in camera*; *compare* CX 5064 at 17, *in camera*, *and* CX 5058 at 18 (emphasis added)).

Response to Finding No. 1173:

This proposed finding is incomplete, vague and misleading. It again fails to explain that ENH's post-Merger stop-loss discounted rate was less favorable than pre-Merger HPH's. (RFF-Reply ¶ 1171).

REDACTED

(Neary, Tr. 767, *in camera*).

REDACTED

(Neary, Tr. 767, *in camera* (emphasis added)).

ENH Obtained a Significant Price Increase from One Health

1174. **REDACTED**

(CX 6282 at 6, *in camera*; Haas-Wilson, Tr. 2576-79, *in camera*. *See* CCFF 678-682, *in camera*).

Response to Finding No. 1174:

This proposed finding is misleading. (RFF-Reply ¶¶ 678-682).

1175. Over the course of the period in 2000 in which One Health had no contract with ENH (due to the contract termination), One Health learned through natural experiment that it could not market a network and maintain membership without the ENH system. (Dorsey, Tr. 1488; Neary, Tr. 617-19. *See* CCFF 1152-1158).

Response to Finding No. 1175:

This proposed finding is based on incomplete and unreliable information and, therefore, is extremely misleading. First, the One Health witnesses could not identify a single customer that was lost during the period in which the relationship between Great West and ENH was terminated. Nor could the One Health witnesses identify any sales that were lost to any specific customer, or quantify the revenue purportedly lost as a result of the termination. (RFF-Reply ¶ 1152). This proposed finding also fails to explain that Lake Forest threatened One Health with termination in the fall of 2000, thus putting at risk One Health's perfectly acceptable alternative network, which, in turn, created the need for One Health to come to terms with ENH for reasons unrelated to the Merger. (RFF-Reply ¶ 1160).

1176. Except for the short period of a few months when One Health had no contract with ENH, the hospital system lost no health plan customers over the course of the contract renegotiations in 2000. (Neary, Tr. 617-18; Dorsey, Tr. 1439, 1441-42, 1456; Hillebrand, Tr. 1707–08).

Response to Finding No. 1176:

This proposed finding is vague. The fact that ENH lost no health plan customers other than One Health and, in turn, One Health lost no identifiable employer customers, confirms that

ENH's rates and negotiation tactics were not anticompetitive. (RFF-Reply ¶ 1135). That ENH did not lose any other contracts is further confirmation that ENH's 2000 rates were reasonable and proper for a hospital system of ENH's reputation and capability.

1177. One Health proved that ENH could "drop" a health plan's contract and that the termination would "serve as [a] good example to [the] market." (CX 75 at 9).

Response to Finding No. 1177:

This proposed finding is irrelevant and based on unsubstantiated speculation. There is no proof that the negotiations with One Health had any impact on any other negotiations.

H. ENH Extracted a Significant Price Increase from Aetna

1. Pre-Merger Experience

1178. **REDACTED** (Mendonsa, Tr. 569, *in camera*).

Response to Finding No. 1178:

The proposed finding is repetitive and not supported by reliable evidence. (RFF-Reply ¶ 297). This statement by Aetna's representative, Mendonsa, should be afforded no weight because he **REDACTED** (Mendonsa, Tr. 556, *in camera*). In fact, he was not involved in the Chicago area until May 1997, over six months after the last pre-Merger contracts with HPH and Evanston Hospital were executed. (Mendonsa, Tr. 475). Aetna's last pre-Merger contracts with Evanston Hospital and HPH became effective in November 1, 1996 and July 1, 1996, respectively. (CX 5007 at1-2; CX 5001 at 2; RFF ¶ 744).

REDACTED

(Mendonsa, Tr. 484; Mendonsa, Tr. 561-62, *in*

camera; RFF ¶ 455). Mendonsa also testified that Northwestern Memorial provides coverage for the North Shore. (Mendonsa, Tr. 530, *in camera*).

1179. **REDACTED** (Mendonsa, Tr. 529, *in camera*).

Response to Finding No. 1179:

Respondent has no specific response other than to note that Aetna did not have insight into the financial and quality of care problems at HPH. (RFF ¶¶ 44-49).

1180. **REDACTED** (Chan, Tr. 690, *in camera*; CX 30 at 2).

Response to Finding No. 1180:

This proposed finding is not supported by any evidence and constitutes mere argument. The cited evidence in this proposed finding does not support the proposed finding. (Chan, Tr. 690 (acknowledging only that Evanston Hospital and HPH offered discounts to MCOs); CX 30 at 2 (listing discounts)).

1181. These substantial effective discounts ranged between 54% and 62% for Aetna's HMO and PPO products. (Chan, Tr. 688-89; CX 30 at 2).

Response to Finding No. 1181:

Respondent has no specific response other than to note that discounts at this level were outdated and below market. (RFF-Reply ¶ 1220).

1182. Aetna was also able to get favorable compromises on contract terms from Evanston pre-merger, such as reductions in rates for services that "were of greatest concern" to Aetna. (RX 84 at ENHL JL 001097; CX 2045 at 1).

Response to Finding No. 1182:

This proposed finding is incomplete, vague and misleading. (RFF ¶¶ 738-743). Evanston Hospital's pre-Merger history was more complex than this proposed finding indicates.

Aetna was perceived in the market as "anti-provider" and negotiated aggressively. (RFF ¶¶ 738-742). On the other hand, Sirabian's negotiating style was aimed towards achieving a "win-win" situation. (RFF ¶ 743). Aetna took advantage of Sirabian's approach and negotiated many concessions on terms and rates. (RFF ¶¶ 740-743).

1183. REDACTED

(Mendonsa, Tr. 530, *in camera*).

Response to Finding No. 1183:

This proposed finding is not based on reliable or credible evidence and is incomplete.

REDACTED

(RFF-Reply ¶ 1178). Therefore, his testimony as to the mind-set of Aetna's negotiators during those negotiations should be disregarded.

REDACTED

(Mendonsa, Tr. 530, *in camera*).

2. Post-Merger Experience

2000 Negotiation Experience - ENH Demanded a Price Increase from Aetna

1184. In November 1999, Bain targeted the Aetna contract as one with "significant upside potential."(CX 75 at 10).

Response to Finding No. 1184:

This proposed finding is incomplete. REDACTED

(RFF ¶ 689, *in camera*). Evanston Hospital's Aetna contract was characterized by its "poor performance," "weak structure" and "weak terms." (CX 75 at 9). Evanston Hospital's contract with Aetna was also nearly four years old in November 1999. (CX 5001 at 2). As a result, Bain recommended renegotiation of the Aetna contract as a

priority. (CX 75 at 10). The quotation in this proposed finding is not found on the cited page. (CX 75 at 10).

1185. **REDACTED**

(Mendonsa, Tr. 529-30, *in camera*).

Response to Finding No. 1185:

This proposed finding is misleading to the extent it suggests that there were no other competitors in the market. Aetna recognized that there are a large number of competing hospitals on the North Shore region of Chicago – including, Rush North Shore, Advocate Lutheran General, St. Francis, Lake Forest Hospital and Condell. (RFF ¶ 455).

1186. In February 2000, having achieved an additional $3.5 million per year on the United contract, Bain recommended that ENH give "immediate focus" to the "successful renegotiation" of the Aetna contract. (CX 67 at 2; CX 5 at 5; Hillebrand, Tr. 1820).

Response to Finding No. 1186:

This proposed finding is misleading because it suggests that ENH exercised market power as a result of the Merger. That was not the case. (RFF-Reply ¶ 1365).

1187. Bain estimated that ENH would be able to extract $1 million in additional net revenue per year from Aetna post-merger. (CX 67 at 32).

Response to Finding No. 1187:

This proposed finding is incomplete.

REDACTED

(RFF ¶ 754, *in camera*).

1188. **REDACTED**

(Mendonsa, Tr. 530, *in camera*).

Response to Finding No. 1188:

The first sentence of this proposed finding is not supported by the record.

REDACTED

(RFF-Reply ¶ 1178, *in camera*).

REDACTED

(Mendonsa, Tr. 530, *in camera*).

REDACTED (Mendonsa, Tr. 566, *in camera*).

REDACTED

(RFF-Reply ¶ 1187, *in camera*).

1189. **REDACTED**

(Mendonsa, Tr. 531, *in camera*; CX 123 at 1, *in camera*).

Response to Finding No. 1189:

Respondent has no specific response. (RFF ¶ 749).

1190. **REDACTED**

(Mendonsa, Tr. 547, *in camera*).

Response to Finding No. 1190:

This proposed finding is not supported by reliable or credible evidence, incomplete and misleading. **REDACTED**

Mendonsa, Tr. 559, *in camera*; RFF ¶¶ 184-186, *in camera*).

REDACTED

REDACTED (Mendonsa, Tr. 561, 573, *in camera*). Since Advocate Lutheran General is a close substitute in both product and geographic space, it is not surprising that a MCO like Aetna would not welcome termination of both Advocate Lutheran General and ENH. (RFF ¶¶ 411-416, 563-569).

Finally, Complaint Counsel failed to call as a witness any representative from any employer in Chicago. **REDACTED**

(RFF-Reply ¶¶ 999, 1009, 1013, 1080; Mendonsa, Tr. 547-48, *in camera*). Accordingly, the testimony relied on in this proposed finding should be given little or no weight.

1191. **REDACTED**

(Mendonsa, Tr. 548, *in camera*).

Response to Finding No. 1191:

This proposed finding is not based on reliable or credible evidence. Mendonsa lacked adequate foundation to testify as to how employers attract and retain employees. (Mendonsa, Tr. 475). Furthermore, Mendonsa was not qualified as an expert witness.

This proposed finding also relies upon hearsay evidence without sufficient foundation. (RFF-Reply ¶ 1190). As a result, the evidence upon which this finding is based should be given little or no weight.

1192. **REDACTED**
(Mendonsa, Tr. 532-33, *in camera*; CX 123 at 1, *in camera*).

Response to Finding No. 1192:

This proposed finding is not supported by the cited evidence.

REDACTED (Mendonsa, Tr. 532-33, *in camera*). This proposed finding, therefore, constitutes unsubstantiated argument, not a proposed finding of fact.

1193. **REDACTED**

(Mendonsa, Tr. 532-33, *in camera*).

Response to Finding No. 1193:

This proposed finding is incomplete and misleading.

REDACTED (RFF ¶¶ 689, 745, *in camera*).

1194. **REDACTED**

(Mendonsa, Tr. 533-34, *in camera*).

Response to Finding No. 1194:

This proposed finding is misleading.

REDACTED

(Mendonsa, Tr. 533-34, 565, *in camera*).

REDACTED

(Mendonsa, Tr. 565-66, *in camera*). **REDACTED**

(RFF-Reply ¶ 1184, *in camera*).

REDACTED

REDACTED (RFF ¶¶ 1118-1119, 1151, *in camera*).

1195. REDACTED (Mendonsa, Tr. 531-34, *in camera*).

Response to Finding No. 1195:

This proposed finding is incomplete and misleading. Aetna acknowledged that there are several hospitals that compete with the ENH hospitals. (RFF-Reply ¶¶ 1178, 1185). In addition, the Advocate hospitals, which include Advocate Lutheran General, were out of Aetna's network at the time. (RFF-Reply ¶ 1190). Therefore, Aetna's reluctance to terminate was unrelated to the Merger.

ENH Would Not Compromise with Aetna

1196. REDACTED (Mendonsa, Tr. 534, 536, *in camera*; CX 2447 at 1, *in camera*).

Response to Finding No. 1196:

This proposed finding is misleading and not supported by the record.

REDACTED

(Mendonsa, Tr. 535-36, *in camera*).

This proposed finding also mischaracterizes the record. The meeting between Aetna and ENH was very "friendly." (Hillebrand, Tr. 1895-96).

REDACTED

REDACTED

(Mendonsa, Tr. 539-40, *in camera*; Hillebrand, Tr. 1895-96; CX 2447 at 1, *in camera*).

1197. **REDACTED**

(Mendonsa, Tr. 535-36, *in camera*).

Response to Finding No. 1197:

This proposed finding is incomplete and misleading. During the meeting, Aetna presented its concerns and the parties came to a mutually acceptable agreement.

REDACTED

(Mendonsa, Tr. 535-36, *in camera*). **REDACTED**

(RFF ¶¶ 750-751, *in camera*).

REDACTED

(RFF ¶ 753, *in camera*; Mendonsa, Tr. 539, *in camera*).

REDACTED

(RFF-Reply ¶ 1188, *in camera*; RFF ¶¶ 750-753, *in camera*; Mendonsa, Tr. 564, *in camera*).

1198. **REDACTED**

(Mendonsa, Tr. 536, *in camera*).

Response to Finding No. 1198:

This proposed finding is sensationalized and misleading. **REDACTED**

(RFF-Reply ¶ 1197, *in camera*). **REDACTED**

(RFF-Reply ¶ 1197, *in camera*; CX 5008 at 1, *in camera*).

1199. **REDACTED**

(Mendonsa, Tr. 536, *in camera*).

Response to Finding No. 1199:

This proposed finding is incomplete and misleading. (RFF-Reply ¶¶ 1196-1197).

1200. **REDACTED**

(Mendonsa, Tr. 536, *in camera*).

Response to Finding No. 1200:

This proposed finding is vague and misleading.

REDACTED

(RFF-Reply ¶¶ 1196-1197, *in camera*).

REDACTED

(RFF-Reply ¶¶ 1196-1197, *in camera*).

1201. **REDACTED**

(Mendonsa, Tr. 536-37, *in camera*.

See Mendonsa, Tr. 537 (

REDACTED

), *in camera*).

Response to Finding No. 1201:

This proposed finding is speculative and without foundation nor evidentiary support.

REDACTED

(Mendonsa, Tr. 536-37, 540, *in camera*; RFF-Reply ¶¶ 1196-1197, *in camera*). The cited testimony is not based on reliable evidence.

REDACTED

(Mendonsa, Tr. 547-48, *in camera*). Accordingly, this proposed finding should be given no weight. (RFF-Reply ¶ 1190).

1202. Knowing the futility of walking away from ENH when it might cause Aetna to lose business, health plan representatives did not tell Ms. Chan that Aetna would redirect patient flow to other hospitals as a result of the price increase. (Chan, Tr. 703).

Response to Finding No. 1202:

This proposed finding is not supported by the record and misleading. Selective contracting has never been prevalent in the Chicago area. (RFF ¶¶ 75-76). Therefore, it is not surprising that MCOs did not use the threat of redirection to other hospitals.

REDACTED

(Mendonsa, Tr. 562-63, *in camera*).

1203. Aetna's renegotiation meeting with ENH was "fairly brief." (Hillebrand, Tr. 1895-96).

REDACTED

(Hillebrand, Tr. 1895-97; Mendonsa, Tr. 539, *in camera*; CX 2447 at 1, *in camera*).

Response to Finding No. 1203:

This proposed finding is inaccurate.

REDACTED

(RFF-Reply ¶¶ 1196-1197, *in camera*). The cited evidence does not support the text of the proposed finding. (Hillebrand, Tr. 1895-97; Mendonsa, Tr. 539, *in camera*; CX 2447, *in camera*).

Aetna Could Not Walk Away from ENH

1204. **REDACTED**

(Mendonsa, Tr. 518, 520, 530, *in camera*).

Response to Finding No. 1204:

This proposed finding is not based on reliable or credible evidence. (RFF-Reply ¶¶ 1178, 1183).

REDACTED

(RFF-Reply ¶¶ 1190, 1195, *in camera*).

1205. **REDACTED**

(Mendonsa, Tr. 516-18, 520, 530, *in camera*).

Response to Finding No. 1205:

This proposed finding is not supported by the record.

REDACTED

(RFF-Reply ¶¶ 1190, 1195, *in camera*).

REDACTED

; (Mendonsa, Tr. 543-44, 568-69, *in camera*).

1206. **REDACTED**

(Mendonsa, Tr. 516-18, 520, 530, *in camera*).

Response to Finding No. 1206:

This proposed finding is repetitive, not supported by the record and misleading. (RFF-Reply ¶¶ 1190, 1201, 1204-1205).

1207. **REDACTED**

(Mendonsa, Tr. 517-18, 530, *in camera*).

Response to Finding No. 1207:

This proposed finding is incomplete. In recent years, Chicago consumers have demanded broad provider networks. (RFF ¶ 58). Consequently, selective contracting is not prevalent. (RFF ¶¶ 75-76).

1208. **REDACTED**

(Mendonsa, Tr. 543-44, 568-69, *in camera*).

Response to Finding No. 1208:

This proposed finding is incorrect and misleading.

REDACTED

(RFF-Reply ¶¶ 1196-1197, *in camera*).

1209. **REDACTED**

(Mendonsa, Tr. 541, *in camera*).

Response to Finding No. 1209:

This proposed finding is false, misleading and not supported by the record.

REDACTED

(Mendonsa, Tr. 561, 573, *in camera*). This fact was clearly established at trial:

REDACTED

(Mendonsa, Tr. 573, *in camera*).

Consequently, this proposed finding is not supported by the record and should be disregarded.

1210. REDACTED

(Mendonsa, Tr. 568, *in camera*).

Response to Finding No. 1210:

This proposed finding lacks foundation and is misleading. The cited testimony reflects unreliable lay opinion from a non-expert witness. (RFF-Reply ¶ 1190).

REDACTED

(RFF ¶¶ 389(c), (e); 568, *in camera*). REDACTED

(RFF-Reply ¶ 1209, *in camera*).

Aetna Acquiesced to ENH's Price Increase

1211. REDACTED (Mendonsa, Tr. 539, *in camera*; Hillebrand, Tr. 1948, *in camera*; CX 2447 at 1, *in camera*).

Response to Finding No. 1211:

Respondent has no specific response.

1212. REDACTED

REDACTED (Mendonsa, Tr. 533-34, *in camera*).

Response to Finding No. 1212:

This proposed finding is incomplete and misleading.

REDACTED

(Mendonsa, Tr. 533-34, *in camera*).

REDACTED

(RFF-Reply ¶ 1194, *in camera*).

In addition, the 2000 contract was still in force through early 2005. (Hillebrand, Tr. 1897). Accordingly,

REDACTED

(Mendonsa, Tr. 563-64, *in camera*; Hillebrand, Tr. 1897). The increases discussed in this proposed finding should be viewed in this broader context.

1213. REDACTED
(Mendonsa, Tr. 540, *in camera*).

Response to Finding No. 1213:

This proposed finding is vague and misleading

REDACTED

(Mendonsa, Tr. 539-40, *in camera*).

REDACTED (RFF-Reply ¶¶ 1196-1197, *in camera*).

1214. REDACTED
(Mendonsa, Tr. 538-39, 570-71, *in camera*).

Response to Finding No. 1214:

This proposed finding is incomplete and misleading.

REDACTED

(Mendonsa, Tr. 565, *in camera*).

REDACTED (Mendonsa, Tr. 565-66, *in camera*).

REDACTED

(Mendonsa, Tr. 563-64, *in camera*; Hillebrand, Tr. 1897).

REDACTED

(Noether, Tr. 6097, *in camera*).

1215. **REDACTED** (Mendonsa, Tr. 539-40, *in camera*; Mendonsa, Tr. 478).

Response to Finding No. 1215:

This proposed finding is incorrect and misleading. Mendonsa did not even come to the Chicago area for Aetna until May 1997. (Mendonsa, Tr. 475). Prior to that, he did not have any responsibility for contracting with hospitals. Mendonsa worked for Aetna's corporate offices in Connecticut selling the HMO product to national employers with over 3000 employees. (Mendonsa, Tr. 477). Prior to that, Mendonsa worked for Ernst & Young as a consultant, not as a contract negotiator. (Mendonsa, Tr. 478).

REDACTED

(Mendonsa, Tr. 475-77; Mendonsa, Tr. 556, *in camera*). As a result, this proposed finding is misleading because

although Mendonsa has been in the health care industry for some time, he had contract negotiation responsibilities for only a small fraction of that time.

1216. REDACTED

(Mendonsa, Tr. 534, *in camera*).

Response to Finding No. 1216:

This proposed finding is duplicative, incomplete and misleading. (RFF-Reply ¶ 1212).

1217. REDACTED (Hillebrand, Tr. 1952, *in camera*).

Response to Finding No. 1217:

This proposed finding is confusing, vague and misleading. (RFF-Reply ¶ 869).

1218. REDACTED

(Mendonsa, Tr. 545, *in camera*).

Response to Finding No. 1218:

This proposed finding is incomplete and misleading.

REDACTED

(RFF-Reply ¶¶ 1194, 1212, *in camera*).

1219. REDACTED (Mendonsa, Tr. 546, *in camera*).

Response to Finding No. 1219:

This proposed finding is repetitive, incomplete and misleading. (RFF-Reply ¶¶ 1194, 1212).

1220. REDACTED

REDACTED

(*Compare* CX 5001 at 8, CX 5007 at 10, *and* CX 5008 at 5, *in camera*. *See* CCFF 860-869, *in camera*).

Response to Finding No. 1220:

This proposed finding is repetitive, illogical, speculative and misleading. (RFF-Reply ¶ 863). **REDACTED**

(RFF-Reply ¶ 860, *in camera*). This proposed finding, however, appears to suggest that ENH should have been locked into those outdated and under-market rates – a suggestion that makes no logical sense.

REDACTED

(Mendonsa, Tr. 533-34, 564, *in camera*).

1221. **REDACTED**

(CX 5008 at 1, *in camera*).

Response to Finding No. 1221:

Respondent has no specific response.

ENH Obtained a Significant Price Increase from Aetna

1222. In Mr. Neaman's October 2000 report to the board of directors, he estimated the annualized economic value of the renegotiation of the Aetna contract to be $3 million. (CX 17 at 7).

Response to Finding No. 1222:

This proposed finding is incomplete and misleading.

REDACTED

(RFF ¶ 754, *in camera*).

REDACTED

(Mendonsa, Tr. 564, *in camera*; RFF ¶¶ 738-756, *in camera*).

1223. Mr. Neaman's figure of $3 million was $2 million more than even Bain's February 2000 prediction of the increase in annual net revenue per year from the Aetna contract. (CX 17 at 7; CX 67 at 32. *See* CCFF 1187).

Response to Finding No. 1223:

This proposed finding is incomplete and misleading. (RFF-Reply ¶¶ 1187, 1222).

1224. **REDACTED**

(CX 6279 at 18, in camera; Haas-Wilson, Tr. 2625, in camera. *See* CCFF 661-664, *in camera*).

Response to Finding No. 1224:

This proposed finding is misleading. (RFF-Reply ¶¶ 661-664).

1225. **REDACTED**

} (CX 6279 at 18, *in camera*; Haas-Wilson, Tr. 2565, 2625-26, 2612-13, *in camera*).

Response to Finding No. 1225:

This proposed finding is misleading. (RFF-Reply ¶¶ 661-664).

I. ENH Extracted a Significant Price Increase from Unicare

1. Pre-Merger Experience

1226. In 2000 Unicare acquired Rush Prudential, another health plan. (Holt-Darcy, Tr. 1413).

REDACTED

(Holt-Darcy, Tr. 1504-05, *in camera*).

Response to Finding No. 1226:

Respondent has no specific response other than to note that the cited evidence does not support the text of the finding. (RFF ¶¶ 168, 856-57, 859-861; Holt-Darcy, Tr. 1504-05, *in camera*).

1227. **REDACTED**

(Holt-Darcy, Tr. 1505-07, *in camera*).

Response to Finding No. 1227:

This proposed finding is confusing and misleading.

REDACTED (Holt-Darcy, Tr. 1506, *in camera*).

REDACTED

(*Compare* Holt-Darcy, Tr. 1506-07, *in camera*, with RFF ¶ 77). In any event, properly defined, before the Merger, Evanston Hospital was an academic hospital with tertiary services and HPH was a community hospital. (RFF ¶¶ 30-33, 41-43).

1228. **REDACTED**

(Holt-Darcy, Tr. 1506-07, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1506-07, *in camera*).

Response to Finding No. 128:

Respondent has no specific response. (RFF-Reply ¶ 1227).

1229. **REDACTED**

(Holt-Darcy, Tr. 1509, *in camera*).

Response to Finding No. 1229:

This proposed finding is inaccurate and confusing. Holt-Darcy did not work for Unicare before the Merger. She worked for Rush Prudential, a different company. (Holt-Darcy, Tr. 1412-13). After the Merger, Unicare acquired Rush Prudential. (RFF-Reply ¶ 1226).

REDACTED

REDACTED (Holt-Darcy, Tr. 1504, 1519, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1509, *in camera*).

To the extent that this proposed finding is limited to Holt-Darcy's experience with Rush Prudential, Respondent has no further specific response. (RFF ¶¶ 30-32).

1230. REDACTED

(Holt-Darcy, Tr. 1603, *in camera*).

Response to Finding No. 1230:

This proposed finding is unsubstantiated, incomplete and unreliable. This proposed finding relies wholly on Holt-Darcy's speculations as to the knowledge and strategy of hospitals, not Unicare. REDACTED

(Holt-Darcy, Tr. 1593-94, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1594, *in camera*).

1231. REDACTED

(Holt-Darcy, Tr. 1602, *in camera*)

Response to Finding No. 1231:

This proposed finding is confusing and immaterial.

REDACTED (RFF-Reply ¶ 1230, *in camera*).

1232. REDACTED

(Holt-Darcy, Tr. 1520, *in camera*).

Response to Finding No. 1232:

This proposed finding is unsubstantiated and misleading.

REDACTED (RFF ¶ 620, *in camera*). Similarly, HPH's last pre-Merger contract with Rush Prudential dated from 1994 as well. (RFF ¶ 859). The contract and rates at the time of the Merger were outdated.

1233. **REDACTED**
(Holt-Darcy, Tr. 1521, *in camera*).

Response to Finding No. 1233:

This proposed finding is incorrect and misleading.

REDACTED

(CX 215 at 1; CX 216 at 15, *in camera*).

REDACTED

(CX 215 at 1; CX 216 at 15, *in camera*).

REDACTED

(RX 630 at AHC 1558, *in camera*).

1234. **REDACTED**

(Holt-Darcy, Tr. 1520, *in camera*; CX 75 at 6. *See* Holt-Darcy, Tr. 1597 (**REDACTED**), *in camera*).

Response to Finding No. 1234:

This proposed finding is incomplete and misleading.

REDACTED

(RFF ¶¶ 857-858, *in camera*).

REDACTED

REDACTED (Holt-Darcy, Tr. 1548, *in camera*). Bain's analysis confirmed that Evanston Hospital's pre-Merger rates with Unicare were below market. (CX 75 at 6).

1235. REDACTED

(Holt-Darcy, Tr. 1519-20, *in camera*).

Response to Finding No. 1235:

This proposed finding is unsubstantiated and misleading.

REDACTED

(Holt-Darcy, Tr. 1520, *in camera*). Moreover, this proposed finding confirms the learning about demand theory. REDACTED

(Holt-Darcy, Tr. 1520, 1590, 1592-93, *in camera*).

1236. REDACTED

(Holt-Darcy, Tr. 1520, *in camera*; CX 5091 at 1).

Response to Finding No. 1236:

This proposed finding is incomplete and misleading.

REDACTED

(*Compare* CX 5085 at 1; *with* CX 5075 at 17-18, *in camera*).

REDACTED

(*Compare* CX 5085 at 1; *with* CX 5075 at 17-18, *in camera*).

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

In the matter of	)	
	)	Docket No. 9315
Evanston Northwestern Healthcare Corporation,	)	**Public Record**

RESPONDENT'S REPLIES TO COMPLAINT COUNSEL'S PROPOSED FINDINGS OF FACT

VOLUME VI of XI

WINSTON & STRAWN LLP

35 West Wacker Dr.
Chicago, IL 60601-9703
(312) 558-5764

1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000

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1237. **REDACTED**

(Holt-Darcy, Tr. 1520, *in camera*; CX 5091 at 1).

Response to Finding No. 1237:

This proposed finding is immaterial, incomplete and misleading.

REDACTED

(CX 215 at 1;

CX 216 at 15, *in camera*; CX 5076 at 10; CX 5085 at 1, *in camera*; CX 5091 at 1).

2. Post-Merger Experience

2000 Negotiation Experience - ENH Demanded a Price Increase from Unicare

1238. **REDACTED**

(Holt-Darcy, Tr. 1547–48, 1597, 1599-1600, *in camera*; CX 216 at 1, *in camera*).

Response to Finding No. 1238:

This proposed finding is incomplete.

REDACTED

(RFF-Reply ¶ 833, *in camera*; RFF ¶ 857, *in camera*).

1239. **REDACTED**

(Holt-Darcy, Tr. 1548-49; *compare* CX 216 at 1, 15, *in camera, and* CX 5091 at 1).

Response to Finding No. 1239:

This proposed finding is incomplete and misleading.

REDACTED

(Holt-Darcy, Tr. 1549, *in camera*).

Consequently, this proposed finding is also immaterial.

1240. In fact, Rush Prudential had been paying Evanston higher rates than many health plans prior to the merger. (CX 74 at 9). In 1999, Rush Prudential paid higher per diems for ICU, medical, and surgical services than Blue Cross/Blue Shield, Aetna, PHCS, United, Preferred, and Cigna. (CX 74 at 9).

Response to Finding No. 1240:

This proposed finding is misleading. This proposed finding ignores that comparing total inpatient revenue per day figures, the Rush Prudential contract reimbursed Evanston Hospital lower than several MCOs' pre-Merger rates, including HPH's rates with PHCS, Preferred Plan, United, Healthstar, Health Network, Cigna, Health Direct and Principal; as well as Evanston Hospital's rates with HMO Illinois and Health Network. (CX 75 at 6).

1241. **REDACTED**
(Holt-Darcy, Tr. 1527, 1535, *in camera*; CX 124 at 2, *in camera*).

Response to Finding No. 1241:

This proposed finding is vague and misleading.

REDACTED

(RFF ¶¶ 865, 869, 871-873, *in camera*; RFF ¶ 866).

1242. **REDACTED**
(Holt-Darcy, Tr. 1527, *in camera*; CX 124 at 1-2, *in camera*. *See* Holt-Darcy, Tr. 1535 (**REDACTED**), *in camera*).

Response to Finding No. 1242:

This proposed finding is misleading. **REDACTED**

(RFF ¶¶ 184-186, *in camera*).

REDACTED (RX 665; RX 682, *in camera*).

1243. **REDACTED**

(CX 124 at 1, *in camera*).

Response to Finding No. 1243:

Respondent has no specific response. (RFF ¶ 865).

1244. **REDACTED**

(Holt-Darcy, Tr. 1533, *in camera*).

Response to Finding No. 1244:

This proposed finding is misleading. (RFF-Reply ¶ 1242).

REDACTED (RFF-Reply ¶ 1242, *in camera*).

REDACTED (RX 881, *in camera*). **REDACTED** (RX 881 at 1-2, *in camera*).

1245. **REDACTED**

(Holt-Darcy, Tr. 1533-35, *in camera*; CX 124 at 1-2, *in camera*).

Response to Finding No. 1245:

This proposed finding is not supported by the cited evidence.

REDACTED

(Holt-Darcy, Tr. 1533-35, *in camera*; CX 124 at 1-2, *in camera*).

REDACTED

REDACTED (RX 682 at 1-2, *in camera*; RFF-Reply ¶ 1242, *in camera* (**REDACTED**

).

1246. **REDACTED**

(Holt-Darcy, Tr. 1528, *in camera*).

Response to Finding No. 1246:

This proposed finding is misleading.

REDACTED

(CX 5085 at 1-2; CX 5091 at 1-2; CX 216 at 1-2, 14-15, *in camera*; RFF ¶ 34 (explaining that "Evanston Hospital Corporation" is the same entity as "Evanston Northwestern Healthcare"). **REDACTED**

(Holt-Darcy, Tr. 1507-08, *in camera*).

1247. **REDACTED**
(Holt-Darcy, Tr. 1528-29, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1528-29, *in camera*).

Response to Finding No. 1247:

This proposed finding is incomplete and misleading. The ENH's unique single-entity integration justifies unified pricing. (RFF-Reply ¶¶ 824, 907-908).

REDACTED

(RFF-Reply ¶ 1246, *in camera*).

1248. **REDACTED**
(Holt-Darcy, Tr. 1527, 1535-36, *in camera*; CX 124 at 2-3, *in camera*).

Response to Finding No. 1248:

Respondent has no specific response except to note that

REDACTED

(RFF ¶¶ 856, 859; RFF ¶¶ 857-858, *in camera*).

1249. **REDACTED**

(Holt-Darcy, Tr. 1527, 1535-36, *in camera*; Hillebrand, Tr. 1944, *in camera*; CX 124 at 2-3, *in camera*).

Response to Finding No. 1249:

This proposed finding is incorrect and misleading. **REDACTED**

(CX 124 at 2-3, *in camera*; Holt-Darcy, Tr. 1527, 1535-36, *in camera*). This proposed finding implies that ENH had the intent or ability to unilaterally change the structure of that term of the contract.

REDACTED (CX 5075 at 17, *in camera*).

REDACTED

(RX 881 at 2, *in camera*).

REDACTED (RX 881 at 2, *in camera*).

1250. **REDACTED**

(Holt-Darcy, Tr. 1527, 1536, *in camera*; CX 124 at 2-3, *in camera*; CX 5091 at 1).

Response to Finding No. 1250:

This proposed finding is misleading.

REDACTED

(CX 215 at 1; CX 216 at 15, *in*

camera; CX 5076 at 10; CX 5085 at 1; CX 5091 at 1). **REDACTED**

(CX 124 at 2-3, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1570-71, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1570-71, *in camera*).

Unicare's Analysis Showed a Significant Price Increase over Pre-Merger Contracts

1251. **REDACTED**

(Holt-Darcy, Tr. 1503-04, *in camera*).

Response to Finding No. 1251:

This proposed finding is irrelevant and misleading. **REDACTED**

(Holt-Darcy, Tr. 1504, *in camera* (emphasis added)).

1252. **REDACTED**

(Holt-Darcy, Tr. 1536, 1543, *in camera*).

Response to Finding No. 1252:

This proposed finding is misleading and irrelevant because

REDACTED (Holt-Darcy, Tr. 1536, *in camera*).

1253. **REDACTED**

(Holt-Darcy, Tr. 1536, 1539, *in camera*).

Response to Finding No. 1253:

This proposed finding is misleading and irrelevant to the extent

REDACTED (Holt-Darcy, Tr. 1536, *in camera*).

1254. **REDACTED**

(Holt-Darcy, Tr. 1502-03, *in camera. See* Holt-Darcy, Tr. 1503 (**REDACTED**), *in camera. See* CCFF 1238, *in camera*).

Response to Finding No. 1254:

This proposed finding is confusing, vague and not supported by the cited evidence.

REDACTED

(CX 129 at 1, *in camera*). Rates on the Rush Prudential contract were last negotiated in 1994. (CX 5085 at 1; CX 5091 at 1). **REDACTED**

(Holt-Darcy, Tr. 1502-03, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1502-03, *in camera*).

1255. **REDACTED**

(Holt-Darcy, Tr. 1503, 1597, 1599-1600, *in camera. See* CCFF 1238, *in camera*).

Response to Finding No. 1255:

This proposed finding is incorrect and misleading. In 2000, ENH was, in fact, updating rates that had not been adjusted since 1994. (RFF-Reply ¶ 1254). This proposed finding mischaracterizes the evidence. **REDACTED**

REDACTED

(Holt-Darcy, Tr. 1502-03, *in camera*; RFF-Reply ¶ 1254, *in camera*).

1256. REDACTED

(Holt-Darcy, Tr. 1536-37, 1542, *in camera*).

Response to Finding No. 1256:

This proposed finding is blatantly false and contradicted by the evidence.

REDACTED

(Holt-Darcy, Tr. 1541, *in camera* (emphasis added)). REDACTED

(Holt-Darcy, Tr. 1542, *in camera*). This proposed finding, therefore, should be completely disregarded.

1257. REDACTED

(Holt-Darcy, Tr. 1541, *in camera*).

Response to Finding No. 1257:

This proposed finding is false and contradicted by the cited testimony.

REDACTED

(Holt-Darcy, Tr. 1541, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1541, *in camera*). After six years, the HMO fixed medical/surgical rate were increased only $50. (RFF ¶ 871).

Unicare Felt It Necessary to Involve Senior Network Managers in the ENH Negotiations

1258. **REDACTED**

(Holt-Darcy, Tr. 1501-02, *in camera*).

Response to Finding No. 1258:

This proposed finding is incomplete and misleading.

REDACTED (RFF-Reply ¶¶ 1242, 1245, *in camera*).

1259. **REDACTED**

(Holt-Darcy, Tr. 1540, *in camera*).

Response to Finding No. 1259:

This proposed finding is incomplete and misleading.

REDACTED

(RFF ¶ 867; Holt-Darcy, Tr. 1540, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1540, *in camera*; RFF ¶¶ 162-163, 166; RFF ¶¶ 167-168, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1540, *in camera*).

1260. **REDACTED**

REDACTED

(Holt-Darcy, Tr. 1540, *in camera*)

Response to Finding No. 1260:

Respondent has no specific response.

1261. REDACTED

(Holt-Darcy, Tr. 1540, ***in camera***)

Response to Finding No. 1261:

This proposed finding is incomplete and misleading. REDACTED

(RFF ¶¶ 867-868, 876, *in camera*). REDACTED

(RFF-Reply ¶ 1259, *in camera*). REDACTED

(RFF ¶¶ 867, 876, *in camera*).

ENH Would Not Compromise with Unicare on Rates

1262. REDACTED

(Holt-Darcy, Tr. 1530, 1544, *in camera*).

Response to Finding No. 1262:

Respondent has no specific response.

1263. REDACTED

(Holt-Darcy, Tr. 1545-46, *in camera*).

Response to Finding No. 1263:

Respondent has no specific response.

1264. REDACTED

(Holt-Darcy, Tr. 1530, *in camera*).

Response to Finding No. 1264:

This proposed finding is incorrect and not supported by reliable evidence. (RFF-Reply ¶ 1265).

1265. REDACTED

(Holt-Darcy, Tr. 1529-30, 1544-45, *in camera*).

Response to Finding No. 1265:

This proposed finding is incorrect and not supported by reliable evidence. The contract negotiated between Unicare and ENH proves that this was neither a "take it or leave it" negotiation nor that the result reflects market power from the Merger.

REDACTED (RFF-Reply ¶¶ 1256-57; RFF ¶ 870, *in camera*). REDACTED

(Holt-Darcy, Tr. 1541, *in camera*).

REDACTED

(RFF ¶ 871, *in camera*).

REDACTED

(*Compare* CX 124 at 2, *in camera*; CX 5075 at 17, *in camera*). REDACTED

(RFF ¶ 872, *in camera*). REDACTED

(RFF ¶ 872, *in camera*).

1266. REDACTED

(Holt-Darcy, Tr.1545, *in camera*).

Response to Finding No. 1266:

This proposed finding is not supported by the record. REDACTED

(RFF ¶ 459, *in camera*).

REDACTED

, (RFF ¶ 459, *in camera*). ENH also competes in a broad geographic market. In fact, Unicare's own definition of "sufficient access" includes any hospital within 30 miles. (RFF ¶ 560).

1267. REDACTED

(Holt-Darcy, Tr. 1546, *in camera*).

Response to Finding No. 1267:

This proposed finding is not supported by reliable evidence and misleading.

REDACTED

(RFF ¶ 858, *in camera*; CX 216 at 9, 12, *in camera*). Also, ENH's negotiating strategy, as advised by Bain, was to propose rates higher than what it might ultimately be satisfied with. (RFF ¶ 715).

1268. REDACTED

(Holt-Darcy, Tr. 1547, *in camera*).

Response to Finding No. 1268:

This proposed finding is misleading. ENH did not anticipate that Unicare would accept its proposal. (RFF ¶¶ 713-714). Instead, it prepared for Unicare's counterproposal.

REDACTED (RX 881, *in camera*). REDACTED

REDACTED

(RFF-Reply ¶ 1267, *in camera*).

1269. REDACTED (Holt-Darcy, Tr. 1547, *in camera*). REDACTED (Holt-Darcy, Tr. 1547, *in camera*).

Response to Finding No. 1269:

This proposed finding is contrived, sensationalized and misleading.

REDACTED

(RFF-Reply ¶ 1267, *in camera*).

1270. REDACTED

(Holt-Darcy, Tr. 1546, *in camera*).

Responsive to Finding No. 1270:

This proposed finding is not based on credible evidence. Unicare is not a small player struggling to get by. Instead, it is a product marketed by its parent, Wellpoint. (RFF ¶¶ 162-163, 165-166). In 2003, Wellpoint held over $14.7 billion in total assets and earned over $935 million. (RFF ¶ 164). By contrast, in 2000, Wellpoint earned $342 million in net income. (RFF ¶ 164). Therefore, ENH properly rejected Unicare's claim because Wellpoint (and its subsidiaries) could and would remain competitive in the marketplace. (RFF ¶¶ 164-165).

1271. Unicare representatives did not threaten to walk away from ENH's price demands and redirect patient flow to other facilities during the meeting. (Chan, Tr. 703).

Response to Finding No. 1271:

This proposed finding is misleading. Selective contracting simply has not played a role in the Chicago market. (RFF ¶¶ 75-76). Chicago consumers demand broad networks with few

restrictions from their managed care plans. (RFF ¶ 58).

REDACTED

(RFF-Reply ¶¶ 1230-1231, *in camera*). Another contributing factor was the contemporaneous Unicare merger with Rush Prudential. (RFF-Reply ¶ 1261).

1272. **REDACTED**
(Holt-Darcy, Tr. 1550, *in camera*).

Response to Finding No. 1272:

Respondent has no specific response.

1273. **REDACTED**

(Holt-Darcy, Tr. 1550-51, *in camera*).

Response to Finding No. 1273:

This proposed finding is misleading and contradicted by the evidence.

REDACTED

(RFF-Reply ¶ 1265).

1274. **REDACTED**
(CX 129 at 1, *in camera*).

Response to Finding No. 1274:

Respondent has no specific response.

1275. **REDACTED**

(CX 129 at 1, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1560, *in camera*; CX 129 at 1, *in camera*).

Response to Finding No. 1275:

This proposed finding is not based on reliable or credible evidence.

REDACTED

REDACTED (CX 129 at 1, *in camera*). As a result, this statement should be given little weight. And Chan testified that, even without the Merger, Evanston Hospital was a "very desirable hospital that had a "lock" on the North Shore. (Chan, Tr. 705). She further testified that HPH "could not replace" Evanston Hospital, and that Evanston Hospital's true competitors were hospitals like Northwestern Memorial and Advocate Lutheran General. (Chan, Tr. 706). As a result, the Merger did not make a difference to MCOs, i.e., the importance of Evanston Hospital to a MCO did not differ from the importance of Evanston Hospital and HPH together to a MCO. (RX 2047 at 38 (Ogden Dep.)).

REDACTED

(Holt-Darcy, Tr. 1588, *in camera*).

1276. REDACTED

(Holt-Darcy, Tr. 1551, *in camera*).

Response to Finding No. 1276:

This proposed finding is inconsistent with the evidence and misleading.

REDACTED

(RFF-Reply ¶ 1265, *in camera*).

1277. REDACTED

(Holt-Darcy, Tr. 1551, *in camera*; CX 5907 at 1, *in camera*).

REDACTED

(CX 5907 at 1; *in camera*).

REDACTED

(Holt-Darcy, Tr. 1525, *in camera*).

Response to Finding No. 1277:

This proposed finding is incomplete. REDACTED

(RFF-Reply ¶ 1265, *in camera*).

REDACTED

(RFF-Reply ¶¶ 1265, 1278, *in camera*). REDACTED

(Holt-Darcy, Tr. 1579-80, *in camera*).

1278. In response to Unicare's counter-proposal, Mr. Gilbert recommended that Mr. Hillebrand send a termination letter to Unicare so that the health plan would "take [ENH's] proposals more seriously." (RX 885 at ENH JL 005396).

Response to Finding No. 1278:

This proposed finding is incomplete and misleading. Gilbert explained that the reason Unicare's proposal was unacceptable was because it attempted to eliminate a stop loss provision to protect ENH for PPO patients. (RX 885 at ENH JL 5396; RFF ¶ 93).

1279. On June 14, 2000, Mr. Hillebrand took Mr. Gilbert's advice and sent a letter to Unicare stating that the hospital system could not accept the rates as proposed and providing "written notice of termination for both hospital and physician agreements with Unicare effective September 15, 2000." (RX 885 at ENH JL 005396; CX 2063 at 1).

Response to Finding No. 1279:

This proposed finding is incomplete and misleading. ENH wanted to continue its relationship with Unicare. (CX 2063 at 1). ENH invited Unicare's negotiators to contact them immediately if they were willing to reconsider their unacceptable proposal. (CX 2063 at 1; RFF-Reply ¶ 1278).

1280. In the letter, Mr. Hillebrand told Ms. Stoll that ENH would only move forward with a Unicare contract only if the health plan was "willing to reconsider" its counter-proposal. (CX 2063 at 1, *in camera*).

Response to Finding No. 1280:

Respondent has no specific response. (RFF-Reply ¶¶ 1278-1279).

Unicare Could Not Walk Away from ENH

1281. REDACTED (Holt-Darcy, Tr. 1552-53, 1568, *in camera*).

Response to Finding No. 1281:

This proposed finding lacks foundation. REDACTED (Holt-Darcy, Tr. 1583, *in camera*). REDACTED (Holt-Darcy, Tr. 1583, *in camera*). REDACTED (Holt-Darcy, Tr. 1583, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1552-53, 1568, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1553, *in camera*).

1282. REDACTED (Holt-Darcy, Tr. 1552, 1554, *in camera*).

Response to Finding No. 1282:

This proposed finding lacks foundation and is not supported by the evidence. Complaint Counsel did not call a single employer in this case.

REDACTED

(RFF-Reply ¶ 1281, *in camera*).

REDACTED

REDACTED (Holt-Darcy, Tr. 1552-54, *in camera*).

1283. **REDACTED** (Holt-Darcy, Tr. 1552-53, *in camera*. *See* Holt-Darcy, Tr. 1602 (**REDACTED**), *in camera*).

Response to Finding No. 1283:

This proposed finding is not based upon reliable or credible evidence. (RFF-Reply ¶¶ 1281-1282). This proposed finding is based on nothing but unsupported and unreliable opinion and speculation. (RFF-Reply ¶¶ 1281-1282).

1284. **REDACTED** (Holt-Darcy, Tr. 1552, *in camera*).

Response to Finding No. 1284:

This proposed finding is not based on reliable or credible evidence. (RFF-Reply ¶¶ 1281-82). **REDACTED** (RFF-Reply ¶ 1266, *in camera*).

1285. **REDACTED** (Holt-Darcy, Tr. 1552-53, *in camera*).

Response to Finding No. 1285:

This proposed finding is not based upon reliable or credible evidence.

REDACTED (RFF-Reply ¶¶ 1281-1282, *in camera*).

1286. **REDACTED** (Holt-Darcy, Tr. 1552-53, *in camera*).

Response to Finding No. 1286:

This proposed finding is not based on any reliable or credible evidence. (RFF-Reply ¶¶ 1281-1282, 1284).

1287. REDACTED (Holt-Darcy, Tr. 1554, *in camera*).

Response to Finding No. 1287:

This proposed finding is not based on any reliable or credible evidence and is incomplete and misleading. (RFF-Reply ¶¶ 1281-1282). REDACTED

(RFF-Reply ¶ 1282, *in camera*).

1288. REDACTED (Holt-Darcy, Tr. 1513-14, 1562, *in camera*; CX 5075 at 17, *in camera*).

Response to Finding No. 1288:

This proposed finding is false and not supported by the record. REDACTED

(RFF-Reply ¶ 1265).

REDACTED

(RFF-Reply ¶ 1265, *in camera*). The cited evidence does not even support the text of the proposed finding. (Holt-Darcy, Tr. 1513-14, 1562, *in camera*).

ENH Obtained a Significant Price Increase from Unicare

1289. REDACTED (Holt-Darcy, Tr. 1536, 1539, 1563, *in camera*; CX 5075 at 17, *in camera*; CX 124 at 1, *in camera*).

Response to Finding No. 1289:

This proposed finding is false and misleading.

REDACTED

(Holt-Darcy, Tr. 1535-36, 1539, *in camera*).

REDACTED (RFF-Reply ¶ 1265, *in camera*). Therefore, the actual increase negotiated in the Unicare-ENH contract is below the figures relied on in this proposed finding.

1290. **REDACTED**

(Holt-Darcy, Tr. 1536, 1543, 1563, *in camera*).

Response to Finding No. 1290:

This proposed finding is not supported by reliable evidence.

REDACTED

(RFF-Reply ¶ 1265, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1536, 1539, 1543, 1563, *in camera*).

1291. **REDACTED**

(Holt-Darcy, Tr. 1563, 1600, *in camera*; CX 5907 at 1, *in camera*).

Response to Finding No. 1291:

This proposed finding is misleading. **REDACTED**

(CX 5907 at 1, *in camera*). **REDACTED** (Holt-Darcy, Tr. 1578-79, *in camera*). **REDACTED**

(Holt-Darcy, Tr. 1523, *in camera*).

REDACTED

(RFF-Reply ¶ 1257; RFF ¶ 870, *in camera*).

1292. REDACTED

(Holt-Darcy, Tr. 1564-65, *in camera*).

Response to Finding No. 1292:

This proposed finding is misleading. REDACTED

(RFF-Reply ¶ 1257). REDACTED

(RFF ¶ 103, *in camera*).

1293. REDACTED

(Holt-Darcy, Tr. 1565, *in camera*).

Response to Finding No. 1293:

This proposed finding is misleading. REDACTED

(RFF ¶ 867, *in camera*). REDACTED

(RFF-Reply ¶ 1282, *in camera*).

1294. REDACTED

(Holt-Darcy, Tr. 1565, *in camera*).

Response to Finding No. 1294:

This proposed finding is incomplete, misleading and not based on any reliable evidence. Holt-Darcy had no direct dealings with any Unicare customer. (Holt-Darcy, Tr. 1583, *in camera*; RFF-Reply ¶ 1281; RFF ¶¶162-165).

1295. REDACTED

(CX 6279 at 4, *in camera*; Haas-Wilson, Tr. 2536 (citing DX 7009 at 1, *in camera*), *in camera*).

Response to Finding No. 1295:

This proposed finding is misleading. (RFF-Reply ¶¶ 426-427).

1296. REDACTED

(Haas-Wilson, Tr. 2536, *in camera*).

REDACTED

(CX 6279 at 5, *in camera*).

Response to Finding No. 1296:

This proposed finding is misleading. (RFF-Reply ¶¶ 459-460).

The Merger Strengthened ENH's Negotiating Position in the North Shore with Health Plans

1297. REDACTED

(Holt-Darcy, Tr. 1518-19, *in camera*).

Response to Finding No. 1297:

This proposed finding is incomplete. (RFF-Reply ¶ 1298). REDACTED

(RFF ¶¶ 454, 458-460; RFF ¶¶ 455-457, *in camera*).

1298. REDACTED

(Holt-Darcy, Tr. 1518-19, *in camera*).

Response to Finding No. 1298:

This proposed finding is incomplete. REDACTED

(RFF ¶¶ 454, 458-460; RFF ¶¶ 455-

457, *in camera*). REDACTED

1298, *in camera*). REDACTED

(CCFF ¶ 1297, *in camera*). REDACTED

(RFF ¶ 390 (a), *in camera*). REDACTED

Moreover, this proposed finding relies solely on the testimony of Holt-Darcy, REDACTED (RFF-Reply ¶¶ 1281-1282, *in camera*). REDACTED (RFF-Reply ¶¶ 1281-1282, *in camera*). REDACTED

(RFF-Reply ¶¶ 1281-1282, *in camera*).

1299. REDACTED

(Holt-Darcy, Tr. 1510, *in camera*)

Response to Finding No. 1299:

This proposed finding is vague and not supported by the record.

REDACTED

, (RFF-Reply ¶¶ 1281-1282, *in camera*). This proposed finding also is contradicted by the testimony in this case. According to Holt-Darcy, Unicare's standard for "sufficient access" is to have a hospital within 30 miles of where its

members live and work. (RFF ¶ 460). **REDACTED**

(RFF ¶ 387, *in camera*).

1300. **REDACTED**

(Holt-Darcy, Tr. 1511, *in camera*.

See Holt-Darcy, Tr. 1510 (**REDACTED**

), *in camera*).

Response to Finding No. 1300:

This proposed finding is vague, unsupported by the evidence and constitutes unsubstantiated opinion testimony by an unreliable witness. (RFF-Reply ¶¶ 1266, 1281-1282).

REDACTED

(RFF ¶ 397, *in camera*). **REDACTED**

(RFF ¶ 397, *in camera*). The referral and patient travel patterns demonstrated that the North Shore is a competitive environment and that HPH was not Evanston Hospital's closest competitor. (RFF ¶ 397). **REDACTED**

(RFF ¶ 398, *in camera*).

1301. **REDACTED**

(Holt-Darcy, Tr. 1529, *in camera*).

Response to Finding No. 1301:

This proposed finding is contradicted by the facts.

REDACTED

(RFF-Reply ¶¶ 1265-1266). **REDACTED**

REDACTED

(RFF ¶ 871, *in camera*).

1302. REDACTED (Holt-Darcy, Tr. 1561, *in camera*).

Response to Finding No. 1302:

This proposed finding is exaggerated and misleading.

REDACTED (RFF-Reply ¶ 1266, *in camera*). REDACTED

(RFF-Reply ¶¶ 1232, 1254, *in camera*).

1303. REDACTED

(Holt-Darcy, Tr. 1528, 1560-61, *in camera*).

Response to Finding No. 1303:

This proposed finding in not based on reliable or credible evidence.

REDACTED

(RFF-Reply ¶ 1246, *in camera*). As a fully integrated health care delivery system, ENH simply brought the same principles to bear when it synergized with HPH. (RFF-Reply ¶¶ 824-825).

1304. REDACTED

(Holt-Darcy, Tr. 1560-61, *in camera*).

Response to Finding No. 1304:

This proposed finding is false, not based on reliable evidence and misleading. REDACTED

(RFF-Reply ¶¶ 1289-1290, *in camera*). REDACTED

REDACTED

(RFF ¶ 859, *in camera*). REDACTED

(RFF ¶ 859, *in camera*).

REDACTED (RFF-Reply ¶¶ 1254-1255, 1264, *in camera*).

J. ENH Also Extracted a Significant Price Increase from Other Health Plans That Did Not Testify at Trial

1305. REDACTED (*See* Chan, Tr. 697-98; CX 17 at 8; CX 24 at 8-10, *in camera*; CX 121 at 1, *in camera*).

Response to Finding No. 1305:

This proposed finding is not supported by the evidence. This proposed finding cites the testimony of Chan that does not support the text of the proposed finding. (Chan, Tr. 697-98). Moreover, the rate increases negotiated between MCOs and ENH are not related to market power. (RFF-Reply ¶ 373-745, 822-1337).

Complaint Counsel refused to call witnesses from many MCOs. However, while Complaint Counsel can only point to increases in revenue, it is clear that the evidence demonstrated that these renegotiations simply tracked the annual inflation of costs and/or ENH's learning about demand. (RFF-Reply ¶¶ 1306-1310; RFF ¶ 519).

1306. Cigna also did poorly in its 2000 contract renegotiations with ENH. (Chan, Tr. 697-8). In an October 2000 report to ENH's board of directors, Mr. Neaman estimated the June 2000 renegotiation of the Cigna contract to be worth $3 million in annualized economic value. (CX 17 at 8).

Response to Finding No. 1306:

This proposed finding is misleading. Before the Merger, Evanston Hospital had not negotiated a new contract with Cigna since 1995. (RFF ¶ 778). HPH had not renegotiated its

rates since 1993. Yet, its contract was superior to Evanston Hospital's. (RFF ¶ 779-781). ENH negotiated a corrective adjustment to its rates with Cigna and the parties executed a new contract. (RFF ¶¶ 782-784).

1307. In that same report to the board, Mr. Neaman also noted that the Humana contract renegotiation had resulted in $2 million of additional annualized economic value. (CX 17 at 8).

Response to Finding No. 1307:

This proposed finding is misleading. The evidence showed that Humana and ENH negotiated a rate increase in 2000 that had nothing to do with the Merger. (RFF ¶¶ 814-819, 822-825).

1308. **REDACTED**

(CX 24 at 8, *in camera*; CX 121, *in camera*).

Response to Finding No. 1308:

This proposed finding is misleading. Evanston Hospital's contract with CCN was outdated and under-market. HPH's contract rates with CCN were significantly higher than Evanston Hospital's rates. In 2000, ENH and CCN updated their rates to a fair market level. CCN negotiated rates with the ENH system that were actually more favorable than those that it had with HPH before the Merger. (RFF ¶¶ 785-789).

1309. **REDACTED**

(CX 24 at 9, *in camera*).

Response to Finding No. 1309:

This proposed finding is insufficient and misleading. There is no evidence to suggest that this revenue increase is not an increase to account for inflation of costs.

1310. **REDACTED** (CX 24 at 10, *in camera*).

Response to Finding No. 1310:

This proposed finding is misleading. In 2000, ENH and Preferred Plan agreed to rates more favorable to Preferred Plan than what were in place at HPH before the Merger. (RFF ¶¶ 849-852). The new contract included a greater discount-off-charges than what was in place at HPH before the Merger. (RFF ¶ 852).

1311. In October 2000, Mr. Neaman reported to ENH's board of directors that the renegotiation of some other small PPO agreements in January 2000 alone had resulted in $1 million in estimated annualized economic value. (CX 17 at 5).

Response to Finding No. 1311:

This proposed finding is misleading. Mere increases in revenue are not indicia of anticompetitive effects. (RFF ¶ 519).

1312. Mr. Neaman's October 2000 memo to the board of directors noted that, through the merger, "some $24 million of revenue enhancements have been achieved – mostly via managed care renegotiations" (CX 17 at 1).

Response to Finding No. 1312:

This proposed finding is incomplete and misleading because the cited revenue enhancements were not a result of market power but, instead, a result of ENH bringing its rates to market levels through the Merger integration process. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374-1376, 1378, 1395-1397).

K. ENH's Price Increases Were Contrary to Market Trends to Hold Pricing Flat or to Discount Further

1313. ENH's price increases occurred in an environment where the price trend for hospitals has been flat at best. Before the merger, Evanston and Highland Park leadership believed that health plans would increase pricing pressures on hospitals. (Neaman, Tr. 1042; CX 442. *See* CCFF 778-789).

Response to Finding No. 1313:

This proposed finding is not supported by the record. (RFF-Reply ¶¶ 778-789). Complaint Counsel's reliance upon the phrase "pricing pressure" is vague. (RFF-Reply ¶¶ 778-789).

1314. **REDACTED** (Chan, Tr. 688-90, 716-20; CX 30 at 2; Chan, Tr. 824-26, *in camera*). **REDACTED** (Chan, Tr. 824-26, *in camera*; Chan, Tr. 716-20; CX 30 at 2).

Response to Finding No. 1314:

This proposed finding is vague, misleading and mischaracterizes the cited evidence. Neither Chan nor Complaint Counsel gave any indication of what "substantial" means. As a general matter, HPH's discounts were smaller than those negotiated by Evanston Hospital, thus leading to the discrepancies learned by ENH during the Merger. (RFF-Reply ¶¶ 656-733). Even the most cursory comparison reveals that HPH offered lower discounts to MCOs than Evanston Hospital. (CX 30 at 2). For example, for PHCS, Evanston Hospital had a 51.98% discount as compared to HPH's 17%. (CX 30 at 2; Chan, Tr. 718-19). Similarly, for United, Evanston Hospital's discount was over 60% compared to HPH's 15%. (CX 30 at 2; Chan, Tr. 719-20).

1315. For example, as early as the beginning of 1998, Mr. Hillebrand lamented to Evanston's board of directors that the hospital was experiencing "significant reductions in reimbursement" from both Blue Cross and Humana. (CX 2037 at 2-3; Neaman, Tr. 1151-52).

Response to Finding No. 1315:

Respondent has no specific response.

1316. **REDACTED** (Chan, Tr. 688-90, 716-20; CX 30 at 2; Chan, Tr. 824-26, *in camera*). **REDACTED**

(Chan, Tr. 688-90, 716-20; CX 30 at 2; Chan, Tr. 824-26, *in camera*).

Response to Finding No. 1316:

This proposed finding is not supported by the cited evidence.

REDACTED

(Chan, Tr. 688-90, 716-20; CX 30 at 2; Chan, Tr. 824-26, *in camera*). There is no evidence that rates at Evanston Hospital depended on, or related to, the rates negotiated at HPH before the Merger. In fact, every MCO witness competent to so testify on the issue conceded that they never played HPH off Evanston Hospital (or vice versa) when negotiating rates. (RFF ¶¶ 974-981).

1317. **REDACTED** (Chan, Tr. 688-90, 716-20; CX 30 at 2; Chan, Tr. 824-26, *in camera*). **REDACTED** (Chan, Tr. 688-90, 716-20; CX 30 at 2; Chan, Tr. 824-26, *in camera*).

Response to Finding No. 1317:

This proposed finding is misleading. **REDACTED**

RFF-Reply ¶ 1178, *in camera*) **REDACTED**

(RFF ¶¶ 102-103).

REDACTED

(RFF-Reply ¶¶ 1178, 1184, 1194, 1212, 1220, 1222, *in camera*).

1318. **REDACTED**

(Chan, Tr. 823-24, *in camera*. *See also* Chan, Tr. 782-83, *in camera*; CX 1095 at 6; CX 439 at 8. *See* CCFF 778-789).

Response to Finding No. 1318:

This proposed finding is not supported by the evidence.

REDACTED

(CCFF ¶¶ 1316-1317, *in camera*). **REDACTED**

(RFF-Reply ¶ 1317, *in camera*). The evidence showed that rates should have increased as a result of cost increases, the Balanced Budget Act and other economic causes. (RFF ¶¶ 105-115).

1319. **REDACTED**

(CX 1095 at 6; Chan, Tr. 673; Chan, Tr. 787, *in camera*. *See* CX 439 at 8).

Response to Finding No. 1319:

This proposed finding is incomplete and vague. This proposed finding does not relate to any "pressure" on prices, as the title of this subheading suggests. Instead, the cited evidence relates only to the possibility that MCOs would seek to change payment methodology (i.e., discount-off-charges to fixed rates). (RFF-Reply ¶¶ 781-784). To that end, this proposed finding is misleading. (RFF-Reply ¶ 781-784). In any event, before the Merger, HPH maintained discount-off-charges contracts for inpatient services with several MCOs. (RFF ¶¶ 85, 94, 666, 785, 851, 882).

1320. **REDACTED**

(Chan, Tr. 794, *in camera*; *See* CX 439 at 8 (June, 1998 presentation to the Highland Park board of directors finance committee showing Highland Park's projected 1998 effective discount to health plans increasing from 34.3% to 34.9%).

Response to Finding No. 1320:

This proposed finding is not supported by the evidence and is very misleading. Under per diem contracts, even as costs increase, reimbursement stays the same. (RFF ¶ 92). As a result, every year as costs inflate, the per diem rates stay the same – which results in an incremental increase in effective discount. (CX 439 at 8).

REDACTED

(Chan, Tr. 794, *in camera*; CX 439 at 8). The evidence relied on in this proposed finding does not support the proposition that "pre-merger health plan pressure" for lower rates caused this increase.

1321. **REDACTED** (Chan, Tr. 819-20, *in camera*; CX 1099 at 1-67, *in camera*).

Response to Finding No. 1321:

Respondent has no specific response.

1322. Highland Park's own executives admitted that Highland Park could not have achieved price increases with health plans prior to the merger. (Spaeth, Tr. 2201-02, 2172-73).

Response to Finding No. 1322:

This proposed finding is not supported by the cited evidence and is misleading. Before the Merger, HPH's rates were largely better than even some academic hospitals in Chicago, namely, Evanston Hospital. (RFF ¶¶ 658, 679). Whereas Evanston Hospital's rates were far below their appropriate value, HPH's rates were closer to fair market value. Moreover, Spaeth only speculated that although HPH could have tried to renegotiate contracts higher, he did not know whether such an attempt would be successful. (Spaeth, Tr. 2172-73). In addition, Spaeth was never personally involved in managed care negotiations. (Spaeth, Tr. 2298-99).

1323. Highland Park executives knew that the hospital could not sustain a strategy in which it would lose contracts or be eliminated from a health plan's network. Such a strategy would have proved very difficult for the hospital to stick to. (Spaeth, Tr. 2172-73, 2178).

Response to Finding No. 1323:

This proposed finding is not supported by the record. The cited pages of testimony do not support the text of this finding.

1324. REDACTED

(Hillebrand, Tr. 1704-07. *See* CCFF 817-821, 822-842, 848-859, 884-903, 918-924, 936-951).

Response to Finding No. 1324:

This proposed finding is inaccurate and misleading. There was no distinct downward trend in rates paid by MCOs during the pre-Merger period. To the contrary, the MCO witnesses agreed that contract renegotiations resulted in annual increases. (Holt-Darcy, Tr. 1502-03, *in camera* (REDACTED); Mendonsa, Tr. 533-34, *in camera* (REDACTED). Moreover, the contracts negotiated and mutually agreed to by MCOs in the negotiations after the Merger were not above fair market levels.

1325. Mr. Spaeth does not believe that the downward trend in pricing before the merger has changed after the merger. (Spaeth, Tr. 2201-02).

Response to Finding No. 1325:

This proposed finding is vague and misleading. Spaeth merely recognized that MCOs, by their nature, seek to pay less for more services. (Spaeth, Tr. 2201-02). As a result, the relationship between hospitals and MCOs is always "strained." (Spaeth, Tr. 2297-98). The cited testimony is unrelated to the Merger. Moreover, Spaeth was not personally involved in managed care negotiations. (Spaeth, Tr. 2298-99).

1326. Similarly, both Mr. Neaman and Mr. Hillebrand claimed that health plans' bargaining positions have *increased* since the merger. (Neaman, Tr. 1269-71; Hillebrand, Tr. 1725-26 (emphasis added)).

Response to Finding No. 1326:

This proposed finding is misleading. MCO bargaining power is increasing in the Chicago area. ENH is, and always has been, at a disadvantage against the sophistication and wealth of MCOs. (Hillebrand, Tr. 1725-26). MCOs in the Chicago area continue to amass volume and consolidate. In the mid-nineties, United acquired several other health plans. (RFF ¶ 177; Neaman, Tr. 1269-71). Wellpoint, a major national firm, acquired Rush Prudential in 2000. (RFF ¶¶ 163, 168).

1327. **REDACTED**

(Hillebrand, Tr. 1704-07. *See* CCFF 652-692).

Response to Finding No. 1327:

This proposed finding is misleading. ENH was able to negotiate one-time corrective adjustments for several MCOs after it learned that its rates and contracts were under-market. (RFF-Reply ¶¶ 652-692; RFF ¶¶ 656-923, 1110-1155). Moreover, this proposed finding concedes that other hospitals were negotiating increases, not decreases as Complaint Counsel asserts was the "trend." (*Compare* CCFF ¶ 1327 *with* CCFF ¶¶ 1324-25).

1328. **REDACTED**

(Hillebrand, Tr. 1708-09 (admitting that health plan attempts to take away post-merger price increases obtained in 2000 failed); Chan, Tr. 710 (Ms. Chan testified that ENH had more "leverage" after the merger); Chan, Tr. at 839 (

REDACTED

), *in camera*. *See* CCFF 652-692, 817-842, 848-859, 884-903, 918-924, 936-951, *in camera*).

Response to Finding No. 1328:

This proposed finding is false. In 2000, ENH learned that it had undervalued its hospitals in rate negotiations in the past. (RFF ¶¶ 656-923, 1110-1155). Through renegotiations, ENH brought its prices up to fair market levels. (RFF ¶¶ 734-923). Since these prices were at fair market levels, MCOs have not been able to take advantage of ENH and reduce them to below-market levels. (Hillebrand, Tr. 1709; RFF-Reply ¶¶ 652-692, 817-842, 848-859, 884-903, 918-924, 936-951).

L. ENH Increased Its Net Revenues from Health Plans by a Minimum of $18 Million Annually Due Just to the 2000 Managed Care Contract Re-Negotiations

1329. With the exception of losing One Health for a short period of time, ENH did not lose a single health plan over the course of the 2000 contract renegotiations. (Neary, Tr. 617-18; Dorsey, Tr. 1438-39, 1441-42, 1456; Hillebrand, Tr. 1707–08).

Response to Finding No. 1329:

Respondent has no specific response.

1330. In October 2000, Mr. Neaman sent a memorandum to the board of directors with an attached "Sequential Listing of Accomplishments" of the merger. (CX 17 at 1, 5). Mr. Neaman reported that the re-negotiation of the United, PHCS, Aetna, Blue Cross/Blue Shield, and Cigna contracts had resulted in an annualized economic value of $15 million ($3 million per health plan). (CX 17 at 5-8). ENH realized an additional $3 million annually from the re-negotiation of the Humana contract and from the re-negotiation of other smaller PPO contracts ($2 million for Humana and $1 million for some smaller contracts combined). (CX 17 at 5, 8). As of October, ENH's had achieved this additional $18 million per year through the managed care contract renegotiations. (CX 17 at 5-8; Hillebrand 1708-09. *See* CX 13 at 1 (In July 2000, Mr. Neaman reported an additional $16 million/year in total managed care re-negotiation benefits to the board); CX 17 at 8 (September 2000 Humana contract re-negotiation resulted in $2 million annualized economic revenue)).

Response to Finding No. 1330:

This proposed finding is misleading because the above-listed contract improvements are a direct result of ENH using the knowledge of pre-Merger HPH's rates to reach the appropriate

level of reimbursement in the competitive marketplace. (RFF-Reply ¶¶ 853-854, 1365, 1367, 1372, 1374-1376, 1378, 1395-1397). This proposed finding also refers to the $3 million enhancement from the Blue Cross renegotiation, yet Complaint Counsel has not asserted that this $3 million enhancement was the result of ENH's market power. (RFF-Reply ¶ 1375). Moreover, this proposed finding includes $3 million from Cigna and $2 million from Humana. Complaint Counsel did not call any representatives from these MCOs. Nor did Complaint Counsel call any representatives from the "Other (smaller)" PPOs, which constituted another $1 million in contract improvements.

1331. Using Mr. Hillebrand's January 2000 report of a $3.5 million annualized economic benefit from the United contract instead of Mr. Neaman's $3 million figure, ENH's total annualized economic revenue from the re-negotiation of managed care contracts increases from $18 million to $18.5 million. (CX 5 at 5; Hillebrand, Tr. 1820. *See* CX 17 at 5-8 (1/00 "Other (smaller) PPO agreement re-negotiations" ($1 million), 3/00 "Private Healthcare re-negotiation" ($3 million), 5/00 "Renegotiated Aetna contract" ($3 million), 6/00 "Blue Cross Contract re-negotiation" ($3 million), 6/00 "Cigna Contract re-negotiation" ($3 million), and 9/00 "Humana Contract Re-negotiations" ($2 million)).

Response to Finding No. 1331:

Whether ENH's annualized economic revenue was $18 million or $18.5 million, this proposed finding is still misleading for the same reasons previously detailed. (RFF-Reply ¶ 1330). Nevertheless, the $18 million figure is the more accurate of the two figures because it was calculated in October 2000, giving ENH ten months to better analyze the impact of the United contract.

1332. Evanston alone "had never achieved" a price increase as high as $18 million before the merger. (Hillebrand, Tr. 1722).

Response to Finding No. 1332:

This proposed finding is misleading to the extent it implies ENH exercised market power to achieve this $18 million. (RFF-Reply ¶ 1330). ENH achieved this $18 million because most

of pre-Merger Evanston Hospital's contracts were significantly outdated and under-market. (RFF ¶¶ 694-703; RFF-Reply ¶¶ 856, 1434, 1786).

1333 **REDACTED**

(Dorsey, Tr. 1439-42, 1457; Hillebrand, Tr. 1707-08, 1898; Sirabian, Tr. 5717; CX 5067 at 4, *in camera*).

Response to Finding No. 1333:

This proposed finding is not supported by the evidence and misleading. The additional revenue derived from these renegotiations is a direct result of ENH using the knowledge of pre-Merger HPH's rates to bring outdated, under-market contracts to market levels. (RFF-Reply ¶¶ 857, 1365, 1367, 1372, 1374-1376, 1378, 1395-1397). Moreover, the $18 million figure includes at least $8 million from contracts that were not placed at issue during trial. (RFF-Reply ¶¶ 854, 1330; RFF ¶¶ 757-784, 814-826 (explaining that Blue Cross, Humana, and Cigna negotiations were not anticompetitive)).

1334. This $18 - $18.5 million in additional annualized net revenue does not include any additional revenue achieved through the shifting of health plans to the higher (in terms of rates) of the Evanston or Highland Park pre-merger contracts. (CX 17 at 5-8; CX 5 at 5; CX 13 at 1).

Response to Finding No. 1334:

This proposed finding is false and is completely unsupported by any evidence. Nothing suggests that the adoption of the higher contract was ignored in CX 17, CX 5 or CX 13. (RFF-Reply ¶ 858).

1335. This $18 - $18.5 million in additional annualized net revenue does not include any additional revenue achieved through ENH's adoption in 2000 of the higher of the Highland Park or Evanston pre-merger chargemaster rates. (CX 17 at 5-8; CX 5 at 5; CX 13 at 1).

Response to Finding No. 1335:

The additional revenue achieved through the 2000 chargemaster consolidation is easily identifiable in the documents listing Merger-related accomplishments. For example, CX 17 specifically enumerates "Unified Pricing Structure – 12,000 items" (CX 17 at 5; CX 13 at 4). Logically, the additional $5 million from the "unified pricing structure" is not included in the $18-18.5 million increase from *contract* renegotiations. Like the *contract* renegotiations, the $5 million was just another aspect of the overall Merger integration process and part of the (successful) attempt to standardize care and promote cost efficiency across the entire ENH system. (RFF-Reply ¶ 1481; RFF ¶¶ 928-931).

1336. This $18 - $18.5 million in additional annualized net revenue does not include any additional revenue achieved through ENH's chargemaster increases in 2002 and later. (CX 17 at 5-8; CX 5 at 5; CX 13 at 1).

Response to Finding No. 1336:

This proposed finding is misleading to the extent it implies a connection between ENH's 2002 chargemaster increases and the 2000 contract renegotiations. There is no such connection. (RFF-Reply ¶¶ 858, 1393; RFF ¶¶ 847, 942-943, 963).

ENH's chargemaster, like those of other providers, is a fluid document, changing roughly 100 times every month as Medicare issues new codes for new services and changes the terminology for existing services, and as ENH initiates its own new clinical services. (RFF ¶¶ 927, 941). Therefore, price changes are to be expected. More importantly, the increases cited by Complaint Counsel came about as part of ENH's attempts to bring its prices to market and to streamline and harmonize its chargemaster, tasks it failed to fully accomplish back in 2000. (RFF ¶¶ 932-964). Moreover, Evanston Hospital would have made these very same price increases had the Merger not taken place. (RFF ¶¶ 935, 939, 947-948, 964).

1337. None of ENH's annualized revenue increases "could have been achieved by either Evanston or Highland Park alone." (CX 17 at 2. *See* CX 13 at 1 ("Neither Evanston nor Highland Park alone could achieve these results.")).

Response to Finding No. 1337:

This proposed finding is misleading. Reading CX 17 in context makes it clear that the memo was an effort by Neaman, as CEO, to thank everyone who participated in the Merger integration for their "leadership, support, and encouragement with our collective merger integration efforts." (CX 17 at 2). The accomplishments of the Merger that could not have been done "alone" included ten major goals, including, among other things: (1) the "full functional merger of Board, Management, Employees, and Medical Staff"; (2) the full integration of all business functions; (3) "[r]edevelopment of HPH site," including the addition of new services and facilities; (4) cost improvements; (5) expanding the academic base to HPH; and (6) numerous other activities that were done as part of a team – rather than "alone." (CX 17 at 4; CX 13 at 3; RFF ¶¶ 291-294). None of the referenced accomplishments referred to market power. (RFF-Reply ¶ 1379).

Indeed CX 13 and 17 are just additional reflections of how Evanston Hospital learned about its value in the marketplace. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374-1376). Evanston Hospital alone could not have secured appropriate rates from MCOs without the Merger because Evanston Hospital would have never learned that its contract rates were lower than those of a local community hospital.

M. When Hospitals Increase Their Prices, Health Plans Pass the Price Increases on to Their Customers

1338. **REDACTED** (Ballengee, Tr. 239, *in camera*; Mendonsa, Tr. 483; Dorsey, Tr. 1450).

Response to Finding No. 1338:

This proposed finding is misleading to the extent it suggests that MCOs must pass any cost increases on to consumers. Complaint Counsel did not call a single employer to testify in this matter. Instead, it relies on the self-serving testimony of unreliable MCO witnesses.

REDACTED

(RX 1346 at BCBSI-ENH 5536; RX 1393 at ENHL BW 3691, *in camera*).

Second, the MCOs themselves are making millions of dollars in profits, while their customers purportedly are absorbing any price increases. For instance, Health Care Service Corporation, the parent of Blue Cross, posted net gains of over $624 million in 2003, $387 million in 2001 and $173 million in 2000. (RX 1587 at 7; RX 1198 at 6). Humana is one of the nation's largest publicly traded health benefits companies, based on 2003 revenues of $12.2 billion. (RX 1743 at 4, 27). In 2003, PHCS reported that its net revenue climbed to $153 million, an increase of 6% over 2002. (RX 1615 at 3). Further, PHCS's earnings exploded by "an astounding 50%" in 2003. (RX 1615 at 3). As of February 2005, United Health Group was worth over $30 billion. (Foucre, Tr. 939). Cigna posted net income of $668 million in its 2003 financial statements. (RX 1742 at 54). Even the smaller, MCOs are making millions. For instance, First Health, which acquired CCN in August 2001 had net income of $152,734,000 in 2003, up from $132,938,000 in 2002, $102,920,000 in 2001, and $82,619,000 in 2000. (RX 1661 at 50; RX 1469 at 104).

Finally, this proposed finding is not based on reliable evidence. PHCS's direct customers are insurance companies and third party administrators, not employers. (RFF-Reply ¶ 1057). The testimony of Dorsey and Mendonsa on this topic should be limited to their knowledge and experience at One Health and Aetna, respectively. Even then, this testimony is speculative and based on hearsay. (Mendonsa, Tr. 483; Dorsey, Tr. 1450).

1339. Unexpected price increases adversely affect the profitability of the self-insured's business because these price increases have a "direct impact" the business' "bottom line." (Mendonsa, Tr. 483).

Response to Finding No. 1339:

This proposed finding is misleading. Insurance companies are in the business of accounting for so-called "unexpected" possibilities. MCOs can and do negotiate terms into contracts that are designed to control for any cost increases. (RFF-Reply ¶ 925). Similarly, hospitals attempt to negotiate terms that protect the providers of health care from absorbing all of the risk associated with providing medical care to patients. (RFF ¶¶ 81, 93).

Hospitals, in general, seek discount-off-charges or other methodologies that protect them from risk. (RFF ¶¶ 81, 86). MCOs react to those proposals by negotiating escalator clauses or fixed rates. (RFF ¶¶ 87-90, 750-751, 846-847, 870-872). In the end, the parties reach mutually-acceptable arrangements.

1340. **REDACTED** (Mendonsa, Tr. 483-84; Mendonsa, Tr. 549, *in camera*; Ballengee, Tr. 239, *in camera*; Dorsey, Tr. 1450).

Response to Finding No. 1340:

This proposed finding is misleading and based on speculation. (RFF-Reply ¶¶ 1338-1339). Insurance companies are in the business of preparing for the "unforeseen." Contract renegotiations are not unforeseeable. Many contracts have termination dates, after which they

would have to be renegotiated. (RFF-Reply ¶ 1267; RFF ¶ 858). Others are evergreen, where both the MCO and hospital can initiate renegotiation as they see fit. (RFF ¶¶ 598, 613, 648).

1341. **REDACTED**

(Mendonsa, Tr. 549, *in camera*).

Response to Finding No. 1341:

This proposed finding is based on speculation and reflects an improper and unreliable lay opinion. (RFF-Reply ¶¶ 1338-1339).

1342. In response to ENH's rate increases to PHCS in 2000, PHCS's customers "had to raise their rates significantly in – the premiums to accommodate the increased rates at Evanston." (Ballengee, Tr. 196-97).

Response to Finding No. 1342:

This proposed finding is not based on any reliable evidence. Complaint Counsel did not call a single employer witness. Instead, it relied on hearsay, admitted over Respondent's objection, with little indicia of reliability. Such testimony is entitled to little or no weight. (Ballengee, Tr. 180, 183). The cited MCO, PHCS, is not even an insurance company. (RFF ¶¶ 156-158).

1343. **REDACTED**

(Mendonsa, Tr. 483-84; Mendonsa, Tr. 549, *in camera*).

Response to Finding No. 1343:

This proposed finding is misleading and constitutes an improper lay opinion. Whereas once an employer drops its health plan, the MCO can ignore the patient, hospitals do not have that luxury. Once a patient loses his or her insurance, ENH still must treat that patient even if it is unlikely to be paid for its services. (RFF ¶ 15). According to federal regulations, hospitals must provide emergency care to all who require it, regardless of their ability to pay. (RFF ¶

106). As a result, hospitals must protect themselves by assuring that they are receiving fair market rates from its paying customers.

1344. **REDACTED**

(Newton, Tr. 365; CX 17 at 5-8; CX 5 at 5; CX 13 at 1; Hillebrand, Tr. 1704-09; Chan, Tr. 709-10, *in camera*. *See* CCFF 652-692, 817-842, 848-859, 884-859, 884-903, 918-924, 936-951).

Response to Finding No. 1344:

This proposed finding is false. (RFF-Reply ¶¶ 652-92, 817-842, 848-859, 884, 903, 918-24, 936-951). The evidence cited does not support this proposed finding. (RFF-Reply ¶¶ 854, 1365, 1374-1376, 1379, 1387).

1345. ENH would not have possessed the leverage needed to extract these terms absent the merger. (*See* CX 13 at 1 (In referring to managed care renegotiations, Mark Neaman told the ENH board of directors that "neither Evanston nor Highland Park alone could achieve these results.)).

Response to Finding No. 1345:

This proposed finding is misleading and false. The evidence cited mistakenly implies that Neaman was referring to market power gained from the Merger. CX 13 is just another reflection of how Evanston Hospital learned about its value in the marketplace. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374, 1375). Evanston Hospital alone could not have secured appropriate rates from MCOs without the Merger because Evanston Hospital would have never learned that its contract rates were under-market. Moreover, Evanston Hospital and HPH alone could not have achieved many of the other benefits of Merger integration – such as expanding and enhancing services at HPH, generating significant cost savings, expanding Evanston Hospital's academic base to HPH and clinical rationalization. (CX 13 at 3; RFF ¶¶ 291-294).

Finally, when the statement cited by Complaint Counsel is read within the context of the entire document, it is clear that the memo was an effort by Neaman, as the CEO of the organization, to boost morale and emphasize team-building by thanking everyone who participated in the Merger integration. (CX 13 at 1).

XI. DIRECT EVIDENCE OF ANTICOMPETITIVE EFFECTS: PARTY ADMISSIONS

A. Party Documents Regarding Merger Creating Market Power

1346. **REDACTED** (CX 3 at 2; CX 1879 at 3-4; CX 1 at 3; CX 2 at 7; CX 4 at 1-2, 9; CX 1566 at 9; Neaman, Tr. 1138, *in camera*), **REDACTED** (CX 5 at 5; CX 6 at 7; CX 2070 at 3; CX 12 at 2; CX 13 at 1; CX 16 at 1; CX 17 at 2), **REDACTED** (CX 1519 at 1-2; CX 30 at 1; CX 23 at 2; CX 24 at 2, *in camera*; CX 26 at 1; CX 25 at 9; CX 31 at 1).

Response to Finding No. 1346:

This proposed finding is incorrect. The cited ENH documents do not illustrate that Evanston Hospital and HPH sought market power through the Merger. Instead, these documents emphasize that the primary goals of the Merger were to improve the quality of care for the Evanston Hospital and HPH communities, to bolster the financial health of HPH and to generate much needed cost savings. (RFF ¶¶ 259-297).

Neither do the cited ENH documents somehow reveal that ENH used market power after the Merger. The documents, instead, confirm that, as a result of the Merger, ENH learned about its true value in the market as an academic hospital. (RFF ¶¶ 656-703, 726-737, 1002).

Respondent addresses below the documents at issue as they are used by Complaint Counsel in the following proposed findings of fact.

1. Evanston and Highland Park Sought Market Power Through the Merger

1347. **REDACTED** (CX 3 at 2; CX 1879 at 3-4; CX 1 at 3; CX 2 at 7; CX 4 at 1-2, 9; CX 1566 at 9; Neaman, Tr. 1138, *in camera*).

Response to Finding No. 1347:

This proposed finding is incorrect. (RFF-Reply ¶ 1346).

Highland Park Sought Market Power Through the Merger

1348. As early as the fall of 1998, Highland Park leadership "had been approached and approached again by [Evanston]" to discuss the possibility of a relationship between the two institutions. (CX 3 at 1).

Response to Finding No. 1348:

This proposed finding is misleading. First, Evanston Hospital did not approach HPH in the manner suggested by this proposed finding. Rather, the parties approached each other in an equal fashion, with HPH at times initiating the discussions. (Spaeth, Tr. 2206; RFF ¶ 275). Second, both parties approached each other primarily to improve the quality of care for the Evanston Hospital and HPH communities, to bolster the financial health of HPH and to generate much needed cost savings. (RFF ¶¶ 259-297).

1349. Transcript remarks from a fall 1998 meeting of Highland Park leadership lament that no hospital "is able to apply or assemble enough power to deal with managed care areas." (CX 3 at 2).

Response to Finding No. 1349:

This proposed finding is misleading. Complaint Counsel's selective quoting from the Fall 1998 meeting transcript misses the focus of the discussion recorded in that transcript. At that meeting, HPH Chairman Neele Stearns stated: "Our focus and this we have communicated to ENH through Ron [Spaeth] is – our initial concerns are: what benefit some sort of relationship would accrue to our community as a relationship of some sort of relationship to enhance programs so forth – what would be the implication." (CX 3 at 1). The need to improve HPH's quality was also confirmed by Mark (presumably Newton) at this same meeting. (CX 3 at 3-4).

In fact, enhancing quality was one of the means HPH's leadership sought to use to "apply or assemble enough power to deal" with MCOs. Improving the quality of care at HPH and at both Evanston and Glenbrook Hospitals would make the new ENH system more valuable to patients, employers and, ultimately, employees. (Spaeth, Tr. 2303; CX 3 at 2).

1350. Highland Park recognized the potential "power" that could be gained from an affiliation with Evanston. The affiliation "would enable [Highland Park] to exploit an area of the market in a meaningful way – Evanston has a large effect." (CX 3 at 1-2; Spaeth Tr. at 2207).

Response to Finding No. 1350:

This proposed finding is vague and misleading. (RFF-Reply ¶ 1349). Although Complaint Counsel asserts that HPH believed that the Merger would create "power," neither Complaint Counsel nor the cited materials describes this purported "power." The cited document demonstrates that the Merger was designed to give the new ENH more "power" in the sense that the Merger would make ENH more desirable to the market by enhancing quality at all three hospital campuses. (Spaeth, Tr. 2303; CX 3 at 1-2).

1351. In November 1998, Highland Park Hospital responded to Evanston's merger proposal. (CX 1879 at 1; CX 3 at 2). With respect to "competition and signals," Neele Stearns, Highland Park Hospital's board chairman, recognized that a merger would allow the two health care providers to "[s]top competing with each other." (CX 1879 at 3-4).

Response to Finding No. 1351:

This proposed finding is incorrect. HPH and Evanston Hospital were not close competitors and certainly were not each other's closest substitutes in the market. (RFF-Reply ¶¶ 47, 48, 57, 58, 61). Moreover, a natural reading of CX 1879 reveals that Stearns was not interested in ending competition for hospitals services but, instead, was more interested in ending competition between physicians and medical offices – an issue not addressed in the Complaint. (Spaeth, Tr. 2209, 2213-2214). This reading is confirmed by other documents cited by

Complaint Counsel and by the fact that HPH physicians had to refer large numbers of their patients to Evanston Hospital for tertiary services. (CX 1 at 3; CX 2 at 7; Spaeth, Tr. 2302-03). Once HPH became part of the ENH system, HPH physicians no longer had to refer their patients to other providers for the advanced services HPH lacked.

1352. Sometime between April 16, 1999 and January 1, 2000 (after a "Notice of Intent to Merge" had been established and before the merger), Highland Park board members and doctors met to discuss the possible merger. During this meeting, Ronald Spaeth, the president of Highland Park, stated: "*[T]here are ways to at least I think to push back on the managed care phenomenon and get the rates back where they ought to be if you are a big enough concerted enough entity which is important enough to the employers in the community.*" (CX 4 at 1-2; Spaeth, Tr. 2210-11 (emphasis added)).

Response to Finding No. 1352:

This proposed finding is misleading. At trial, Spaeth testified that he hoped to "push back" on the MCOs by using the Merger to present to the market a better and higher quality healthcare provider. (Spaeth, Tr. 2303; CX 4 at 1-2). Enhanced quality would make the merged entity "important enough to the employers in the community." (Spaeth, Tr. 2303; CX 4 at 1-2). A more thorough reading of Spaeth's comments in CX 4 confirms that his testimony accurately reflected his state of mind in 1999. (CX 4 at 2 ("As I look down the road 3-5-7 years from now I think that community hospitals whatever this one is are going to be a dime dozen in contracting opportunities. Something has to be distinctly different to assure yourself the volumes for your doctors and volumes that doctors can go get themselves....").

This proposed finding also is misleading to the extent it implies that Spaeth's desire to "get the [managed care] rates back to where they ought to be" is evidence of a desire to obtain market power. This vague comment conveys nothing of the sort. At most, it reflects the reality that, at the time, MCOs were viewed as difficult negotiators. (Neaman, Tr. 960-61).

Finally, Complaint Counsel contends that the referenced meeting occurred after a "Notice of Intent to Merge" had been established. However, CX 4 itself states that the Letter of Intent had yet to be "agree[d] upon." (CX 4 at 1).

1353. At that same meeting, another Highland Park representative echoed Mr. Spaeth's concerns regarding the "the relative negotiating power of the payers," which had become an "economic issue" for the hospital. (CX 4 at 9; Spaeth, Tr. 2211-12).

Response to Finding No. 1353:

This proposed finding is irrelevant. The referenced opinion concerning "relative negotiating power of the payors" does not accurately reflect the driving force for the Merger. (RFF ¶¶ 259-297).

1354. This same Highland Park representative went on to distinguish the unique market concentration opportunities associated with a Highland Park/Evanston merger. "What Evanston does is provide total concentration. . . If one of your key objectives is to get geographic leverage on the employers in this area getting Northwestern [Memorial] doesn't do much for you." (CX 4 at 9; Spaeth, Tr. 2211-12. *See also* CX 4 at 9 (The transcript entry also shows that the board member stated that a merger with Northwestern Memorial would not provide "critical mass in the same area.")).

Response to Finding No. 1354:

This proposed finding is irrelevant because this representative's opinion concerning "geographic leverage on the employers" or obtaining a "critical mass" was not one of HPH's or Evanston Hospital's "key objectives" concerning the Merger. In fact, outside of CX 3 and CX 4, no other document in this case uses similar terms. The vast majority of relevant documents, instead, confirm the testimony of the various ENH and HPH executives that both sides initially approached each other and eventually decided to merge to improve the quality of care for their communities. (RFF ¶¶ 259-297).

1355. According to Mr. Spaeth, "everybody" perceived that the merged hospitals would reap the "economic benefit of not being out there doing battle with one another in what will be a common battle ground." (CX 4 at 1).

Response to Finding No. 1355:

This proposed finding is incomplete, inaccurate and misleading. First, the entire sentence cited above actually reads: "Everybody progresses [sic] to see the *community benefit* that would be derived as well as the economic benefit of not being out there doing battle with one another in what will be a common battle ground." (CX 4 at 1 (emphasis added)). Complaint Counsel cannot ignore, downplay, or mischaracterize the real reason for the Merger – *i.e.*, to benefit the community by improving quality – through selective quotations.

From an economic perspective, HPH was understandably concerned that, absent the Merger, it likely would have been forced to spend all of its reserves on capital improvements in a risky attempt to transform itself into a high quality tertiary facility like Evanston Hospital. Spaeth makes this point clear in CX 4, stating "we are not looking at a rosie [sic] future economically on this site." (CX 4 at 1; RFF ¶¶ 2365-2370, 2376-2386).

1356. With the merger, Evanston and Highland Park would no longer have to "d[o] battle" with each other against health plans. At the post "Notice of Intent to Merge" meeting, Mr. Spaeth concluded that *"it would be real tough for any of the Fortune 40 companies in this area whose CEOs use either this place or that place to walk from Evanston, Highland Park, Glenbrook, and 1700 of their doctors."* (CX 4 at 1-2; Spaeth, Tr. 2210-11 (emphasis added)).

Response to Finding No. 1356:

This proposed finding is misleading for many of the same reasons spelled out above. Above all, CX 4 does not mention any competition between HPH and Evanston Hospital pertaining to MCO networks. Again, the references to limiting competition involve physician issues, and HPH leadership's desire to assure the survival of the hospital. (RFF-Reply ¶¶ 1351, 1355).

Complaint Counsel also fails to mention why it would be "real tough" for any of the Fortune 40 to "walk away." As Spaeth explained at trial, he felt that the quality enhancements

generated by the Merger would make the combined entity much more valuable to employees and, therefore, make it "real tough" for the employers to "walk away" from the hospitals. (Spaeth, Tr. 2303).

Evanston Sought Market Power Through the Merger

1357. At a January 4, 1999, meeting between Evanston and Highland Park board members and medical staff leaders, Evanston suggested "'do not compete with self' in covered zip codes (*e.g.*, 60-70% market share) such as Evanston, Glenview, Highland Park, and Deerfield." (CX 1 at 3).

Response to Finding No. 1357:

This proposed finding is incomplete and misleading. The text Complaint Counsel quotes above actually is a subheading of a point titled "Implement in coordinated fashion 'major medical office' expansion strategy throughout north/northwestern suburban combined service area. Particular emphasis on 'north' expansion." (CX 1 at 3 (emphasis in original)). As this subheading indicates, the referenced discussion, which involved the medical staff leaders, confirms that all references to ending competition between the two parties related only to physicians and not to hospital services. (CX 1 at 1; RFF-Reply ¶¶ 47, 48, 57, 58, 61, 1351, 1355). This point is further confirmed by the fact that neither Evanston Hospital nor HPH had a hospital campus in Deerfield.

1358. At that same January 4, 1999, meeting, Evanston representatives identified the opportunity to "strengthen negotiation capability with managed care companies through merged entities." (CX 1 at 3).

Response to Finding No. 1358:

This proposed finding is misleading because it implies that managed care negotiations were the focus of and driving force behind the Merger. Such a conclusion is not supported by CX 1. Point 5 is the only point referencing managed care and is placed well behind points 1 and 2, which refer to bringing advanced oncology and cardiac surgery to HPH through the Merger.

(CX 1 at 3). Once again, quality, not MCO negotiations, was the focus of the Merger negotiations and the ultimate reason Evanston Hospital and HPH decided to merge. (RFF ¶¶ 259-297).

1359. At an April 5, 1999, meeting of the medical staff executive committee at Highland Park, Mr. Neaman commented on the "geographic advantages" of a merger between Evanston and Highland Park. (Spaeth, Tr. 2213-14; CX 2 at 7).

Response to Finding No. 1359:

This proposed finding is misleading. Complaint Counsel does not even attempt to explain what Neaman meant by the vague term "geographic advantages." The use of this term did not relate to market power. The referenced meeting involved the HPH Medical Executive Committee and thus focused on important clinical and quality opportunities presented by the relatively close geography of the two hospitals. At trial, Neaman confirmed this plain reading of the document, explaining that because HPH is located in fast growing Lake County, the Merger provided Evanston Hospital the opportunity to capture some of that population growth and expand its volume of services. (RFF ¶ 288). As Neaman further explained at trial, physicians and staff need a high volume of patients to maintain their skills and keep their quality of care up to date. (RFF ¶ 289). Increasing volume of services also promotes efficiency because more scale means better costs per admission, better costs per case and better costs per procedures. (RFF ¶ 290).

Physicians testifying for Respondent further confirmed that such geographic proximity is crucial to supporting certain clinical services. For example, the State of Illinois required that at least one cardiothoracic surgeon reside within 30 minutes travel time of HPH before it would approve the cardiac surgery program ENH committed to implement at HPH as part of the Merger. (RFF ¶ 1597). Because Evanston Hospital is within 30 minutes travel time (27

minutes), this "geographic advantage" became a very important part of bringing cardiac surgery to HPH through the Merger. (RFF ¶¶ 388, 1593, 1596). Overall, the relatively close proximity of Evanston Hospital and HPH enabled physicians to rotate and specialists to move between the two campuses. (RFF ¶ 2471). Had HPH merged with a hospital further away than Evanston Hospital, HPH would not have been able to achieve the quality improvements resulting from the Merger. (RFF ¶ 2470). In short, there were numerous "geographic advantages" of the Merger, none of which related to MCO negotiations or market power.

1360. Like Highland Park, Evanston representatives also perceived the potential benefits of eliminating a competitor through the merger. The minutes of the April 5, 1999, meeting record another Evanston representative as saying that the merger "would be an opportunity to join forces and grow together rather than compete with each other." (CX 2 at 7).

Response to Finding No. 1360:

This proposed finding is inaccurate and misleading. HPH hardly posed a competitive threat to Evanston Hospital. Evanston Hospital representatives thus never had reason to believe that the Merger would eliminate a competitor. (RFF-Reply ¶¶ 47, 48, 57, 58, 61; Neaman, Tr. 1306).

The above-cited passage from CX 2 does not refer to hospital services but, rather, to physicians and medical offices. (RFF-Reply ¶¶ 47, 48, 57, 58, 61, 1351, 1355, 1357). The fact that the referenced statement was made at a meeting of the HPH Medical Executive Committee further confirms that it did not relate to hospital services. (CX 2 at 1; RFF-Reply ¶ 1357, 1588).

1361. **REDACTED** (CX 1566 at 9; Neaman, Tr. 1138, *in camera*).

Response to Finding No. 1361:

This proposed finding is incomplete and misleading. Complaint Counsel selectively quoted Neaman, leaving out a crucial portion of his statement. Neaman's statement, when viewed in context and not selectively quoted, reveals his state of mind at the time that the MCOs were aggressive negotiators: "The addition of Highland Park helps us to: Increase our leverage, *limited as it might be*, with the managed care players and help our negotiating posture." (CX 1566 at 9 (emphasis added)). Neaman's comment merely reiterates what Spaeth stated back in April 1999 in CX 4 – both sides hoped that the Merger would make the combined entity more valuable because of enhanced and increased clinical services. (RFF-Reply ¶ 1352; Neaman, Tr. 1375).

Once again, Complaint Counsel omits from this proposed finding all references to the ultimate goal of the Merger – namely, to improve the quality of care at HPH and across the entire ENH system. For example, at the referenced September 1999 meeting, Neaman stated that the addition of HPH would help to: (1) "Improve the system of care for our respective communities with the advent of capital infusion and medical expertise, particularly the expertise vested in our physician leadership"; and (2) "Create additional opportunities for our academic mission including clinical research trials, and teaching programs." (CX 1566 at 9).

1362. Mr. Neaman's November 18, 1999, speech to the board of directors emphasized the same potential to increase leverage and enhance the negotiating posture with managed care players through the merged entity. (*Compare* RX 2015 at ENHL MO 003485, *and* CX 1566 at 9).

Response to Finding No. 1362:

This proposed finding is incomplete and misleading. (RFF-Reply ¶ 1361).

2. ENH Employed the Market Power of the Combined Evanston and Highland Park After the Merger

1363. Numerous ENH documents illustrate that ENH employed the market power of the combined Evanston and Highland Park after the merger. (CX 5 at 5; CX 6 at 7; CX 2070 at 3; CX 12 at 2; CX 13 at 1; CX 16 at 1; CX 17 at 1-2).

Response to Finding No. 1363:

This proposed finding is inaccurate. The cited ENH documents do not illustrate that ENH used market power after the Merger. Instead, as explained below, these documents confirm that, as a result of the Merger, ENH learned about its true value in the market as an academic hospital. (RFF ¶¶ 656-703, 726-737, 1002).

1364. At a January 6, 2000, ENH board of directors executive committee meeting, Mr. Neaman asked Mr. Hillebrand "to comment on the recent renegotiation of managed care contracts, one of the tactics of system integration." (CX 5 at 5).

Response to Finding No. 1364:

Respondent has no specific response.

1365. In his January 6, 2000, update to the ENH executive committee, Mr. Hillebrand reported that "as a result of combining the medical staffs and Hospitals of the merger, [ENH] was able to renegotiate a managed care contract that resulted in an additional $3.5 million benefit." (CX 5 at 5).

Response to Finding No. 1365:

This proposed finding is misleading because it implies that the above-statement suggests an exercise of market power as a result of the Merger. The referenced statement merely confirms that, because of the Merger, Evanston Hospital learned about HPH's rates and, with Bain's assistance, used that knowledge to renegotiate a better contract with a MCO, in this case United. (RFF ¶¶ 684, 707, 883-893).

REDACTED

REDACTED

(RFF ¶ 884, *in camera*; RFF ¶¶ 885, 888).

It is also significant that Hillebrand's report on the United contract falls under the title "Status Report: Merger/Integration" because the "Merger integration" process involved a vast number of activities that included the analysis of HPH managed care rates and renegotiation with MCOs as part of the need to operate on a single contract for the combined post-Merger entity. (RFF ¶¶ 303-309, 656-673, 677-693, 701-703, 733). As explained by Hillebrand, ENH achieved the price increases noted in documents like CX 5 precisely because, in 1999-2000, ENH realized it was not being fairly compensated by many purchasers of care for its clinical services. (Hillebrand, Tr. 2026).

1366. Mr. Hillebrand further informed the ENH executive committee at the January 6, 2000, meeting that "other managed care contracts will be renegotiated over the next 100 days." (CX 5 at 5).

Response to Finding No. 1366:

Respondent has no specific response.

1367. One month later, at a February 3, 2000, ENH board meeting, Mr. Neaman highlighted accomplishments related to the system integration of Highland Park and Evanston. (CX 6 at 6).

Response to Finding No. 1367:

Respondent has no specific response.

1368. Mr. Hillebrand gave another update at the February 3, 2000, ENH board meeting. He "commented on the recent re-renegotiation of managed care contracts and the 'added value' as a result of combining the medical staffs and hospitals." (CX 6 at 7). Mr. Hillebrand again reported to the board (as he had the month before) that other managed care contracts were in the process of being renegotiated. (*Compare* CX 6 at 7 *and* CX 5 at 5).

Response to Finding No. 1368:

This proposed finding is misleading to the extent it implies that "added value" is a synonym for market power. The truth is that the term "added value" refers to the fact that the quality improvements resulting from the Merger were already having a positive impact on managed care contracting. (RFF ¶ 706). Homer Livingston, ENH's then-Chairman of the Board and head of the Oversight Committee on System Integration, emphasized this very point when he stated at the February 2000 meeting that: "To date the vast majority of [system integration] goals have been accomplished on the targeted timetables with significant 'value added.'" (CX 6 at 6). The report from HPH's Healthcare Services Committee likewise confirmed at this February 2000 meeting that "the [Merger] integration process is off to a good start." (CX 6 at 7).

1369. One month later, on March 14, 2000, Mr. Hillebrand drafted ENH's 2001-2003 Strategic Plan. In the Strategic Plan, Mr. Hillebrand stated that ENH's growth initiatives, including the merger with Highland Park, would be used to "provide leverage to [ENH's] market position as it negotiates with the purchasers of care." (CX 2070 at 3).

Response to Finding No. 1369:

This proposed finding is irrelevant and therefore misleading. It is irrelevant because the cited strategic plan was merely a draft that was later rejected by Neaman and never adopted as ENH's official strategic plan. (Hillebrand, Tr. 1813).

More importantly, Evanston Hospital and HPH hoped to generate leverage through system-wide enhancements, primarily improved services and cost savings. (RFF-Reply ¶ 1361). Even one of Complaint Counsel's lead witnesses, Mark Newton, recognized that hospitals had to be cost-effective and had to present a high quality product to the market in order to negotiate better rates with MCOs. (Newton, Tr. 408). Like Neaman and Newton, Hillebrand's strategic document expressed the hope that ENH would be able to capitalize on quality improvements and cost savings, not market power, to get better rates from MCOs.

1370. According to Mr. Hillebrand's March 2000 ENH Strategic Plan draft, ENH's "goal" in gaining leverage would be "to receive superior pricing" from purchasers of care. (CX 2070 at 3).

Response to Finding No. 1370:

This proposed finding is irrelevant. (RFF-Reply ¶ 1369). It is also inaccurate and misleading because Complaint Counsel selectively quotes from the referenced document. The full sentence from the draft reads: "Our goal will be to receive superior pricing for our services and to become indispensable to the purchaser of care as they sell their product in our marketplace." (CX 2070 at 3). Specifically, ENH hoped to become the patient's system of choice as a reflection of its quality and its physicians' abilities. (Hillebrand, Tr. 2022).

1371. At a June 16, 2000, meeting of the health care services committee at Highland Park, "Mr. Neaman reviewed the list of merger accomplishments," including the "important successes [that] have been accomplished in managed care contracting." (CX 12 at 2).

Response to Finding No. 1371:

This proposed finding is misleading because it fails to explain that Neaman's review of managed care contracting successes was part of his report on the Merger "Integration." (CX 12 at 2). This proposed finding highlights that discussions of managed care contract negotiations during ENH meetings were part of the greater discussions on Merger integration, specifically the process of discovering pre-Merger HPH's rates and integrating that knowledge into the post-Merger negotiations. (RFF-Reply ¶¶ 1365, 1367).

1372. At that same meeting, Mr. Neaman reported to the Highland Park health care services committee that "[t]here has been a $12 million improvement on the Hospital side and $8 million to physicians' practices to date. The total improvements as a result of the merger are $29.5 million." (CX 12 at 2).

Response to Finding No. 1372:

This proposed finding is misleading. (RFF-Reply ¶¶ 1365, 1367). Here, the $12 million and $8 million in improvements are a direct result of ENH using the knowledge of pre-Merger

HPH's rates to reach the appropriate level of reimbursement in the competitive marketplace. (RFF-Reply ¶¶ 1365, 1367).

Complaint Counsel's proposed finding is further misleading because it fails to acknowledge that a significant portion of the $29.5 million in total improvements is directly attributable to Merger-related cost savings. (CX 13 at 7 (stating that, as of July 1, 2000, the Merger achieved $10.6 million in cost savings)); RFF ¶¶ 2538-2541).

1373. The $29.5 million total revenue improvement reported by Mr. Neaman at the June 16, 2000, meeting "greatly exceed[ed] the Board approved $19 million goal over three years." (CX 12 at 2).

Response to Finding No. 1373:

This proposed finding is misleading. (RFF-Reply ¶ 1372). Specifically, this proposed finding fails to mention that $9 million of the Board's approved $19 million goal related to Merger-related cost savings. (CX 13 at 1).

Moreover, because the Board's $19 million goal was approved on October 7, 1999, well before the Merger integration process revealed on November 29, 1999 that HPH had superior contracts, it is not surprising that post-Merger actual revenue improvements exceeded $10 million. (RX 636 at ENH GW 5702, ENH GW 5709; RX 684 at BAIN 43). This is just further proof that Evanston Hospital had no idea that its contracts were under-market until it actually looked at HPH's contracts. (RFF ¶¶ 677-693).

1374. In a July 3, 2000, "Interdependence Day" memorandum to the ENH board, Mr. Neaman updated the board on the status of merger integration activities, including contract renegotiations with managed care plans. (Neaman, Tr. 1200; CX 13 at 1).

Response to Finding No. 1374:

This proposed finding shows that the contract negotiations were an important part of Merger integration activities, but it is still misleading because it fails to mention the many other Merger integration activities. (RFF-Reply ¶¶ 1365, 1367, 1372). CX 13 itself detailed the many

different Merger integration activities all designed to take the best aspects of each of the merging hospitals and thereby make the merged entity more efficient and better suited to provide a higher level of healthcare. (CX 13 at 3; RFF ¶¶ 303-309, 656-673, 677-693, 701-703, 733).

1375. While only one month earlier, Mr. Neaman had reported $12 million in revenue improvement from managed care renegotiations to the health care services committee at Highland Park, Mr. Neaman's July 3, 2000, "Interdependence Day" memorandum to the board reported that additional benefits from managed care renegotiations to that date totaled $16 million on an annualized basis. (CX 13 at 1; CX 12 at 2).

Response to Finding No. 1375:

This proposed finding is misleading. It fails to explain that the extra revenue reported in July 2000 was due to contract renegotiations with Blue Cross and Cigna, neither of which were represented by a witness at trial. (CX 13 at 1)

REDACTED

(CCFF ¶¶ 566-68, 576, 579, 665, *in camera*). Having affirmatively denied that ENH exercised its supposed market power over Blue Cross, Complaint Counsel cannot now use ENH's revenue enhancements on the 2000 Blue Cross contract as proof of market power.

Further, these revenue enhancements were just another part of the Merger integration process and, therefore, part of ENH discovering and applying the knowledge of HPH's rates. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374).

1376. In that July 2000 memorandum, Mr. Neaman reported the successes in the merger integration efforts were the result of Evanston's and Highland Park's "interdependence." Mr. Neaman stressed that "*neither Evanston nor Highland Park alone could achieve these results.*" (CX 13 at 1 (emphasis added)).

Response to Finding No. 1376:

This proposed finding is misleading because, again, it mistakenly implies that Neaman was referring to market power gained from the Merger. CX 13 is just another reflection of how Evanston Hospital learned about its value in the marketplace. (RFF-Reply ¶¶ 1365, 1367, 1372,

1374, 1375). Evanston Hospital alone could not have secured appropriate rates from MCOs without the Merger because Evanston Hospital would have never learned its true market value as an academic hospital. Moreover, Evanston Hospital and HPH alone could not have achieved many of the other benefits of Merger integration – such as expanding and enhancing services at HPH, generating significant cost savings, expanding Evanston Hospital's academic base to HPH and clinical rationalization. (CX 13 at 3; RFF ¶¶ 291-294).

Moreover, when the statement cited by Complaint Counsel is read within the context of the entire document, it is clear that the memo was an effort by Neaman to boost morale and emphasize team-building by thanking everyone who participated in the then ongoing Merger integration process. (CX 13 at 1).

1377. At a September 27, 2000, meeting of the ENH board's finance committee, Mr. Neaman emphasized the link between the merger and the managed care renegotiations. Mr. Neaman stressed that "the larger market share created by adding Highland Park Hospital has translated to better managed care contracts." (CX 16 at 1).

Response to Finding No. 1377:

This proposed finding is misleading because it fails to explain that HPH's added market share and, by definition, its added volume translated into a bigger base from which ENH could generate revenue on its MCO contracts. (Neaman, Tr. 1370-71; Hillebrand, Tr. 1709).

1378. Mr. Neaman's October 2, 2000, "Final Report – Merger Integration Activities" memorandum to the ENH board reported that "some $24 million of revenue enhancements have been achieved – mostly via managed care renegotiations." Mr. Neaman further reported that ENH's "net income from operations will go from a budgeted $4 million to in excess of $20 million for Fiscal Year 2000." (CX 17 at 1).

Response to Finding No. 1378:

This proposed finding is misleading, as detailed in Respondent's previous replies to similar proposed findings. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374-1376).

1379. In his October 2, 2000, "Final Report," Mr. Neaman repeated his "Interdependence Day" message to the board, concluding that "*[a]s stated previously, none of this could have been achieved by either Evanston or Highland Park alone.* The 'fighting unit' of our three hospitals and 1600 physicians was instrumental in achieving these ends." (*Compare* CX 17 at 2, *and* CX 13 at 1 (emphasis added)).

Response to Finding No. 1379:

This proposed finding is misleading. (RFF-Reply ¶¶ 1376). Moreover, reading CX 17 in context makes it clear that the memo was an effort by Neaman to thank everyone who participated in the Merger integration for their "leadership, support, and encouragement with our collective merger integration efforts." (CX 17 at 2). The accomplishments of the Merger that could not have been done "alone" included ten major goals – including, among others: (1) "full functional merger of Board, Management, Employees, and Medical Staff"; (2) full integration of all business functions; (3) "[r]edevelopment of HPH site," including the addition of new services and facilities, cost improvements; and (4) numerous other activities that were done as part of a team – rather than "alone." (CX 17 at 2, 4). None of the referenced accomplishments refer to market power.

3. ENH Achieved Substantial Post-Merger Price Increases Through the Merger

1380. The record shows that ENH exercised its market power, attained through the merger, to raise prices. At least five mechanisms were employed to raise prices, including: (1) moving health plans to one contract for all three ENH facilities, i.e., the Evanston or Highland Park pre-merger contract, whichever had the higher rates; (2) adding a premium to the higher of the Evanston or Highland Park contract rates; (3) moving health plans from a fixed price contract to a discount off charges contract or to a contract that contained more discount off charges provisions than the pre-merger contract; (4) adopting in 2000 the higher of the Evanston or Highland Park chargemaster list prices; and (5) increasing ENH's chargemaster list prices on numerous occasions following the merger. (*See, e.g.,* CX 30 at 1, 3; CX 23 at 2; CX 26 at 1; CX 25 at 9; CX 31 at 1. *See also* CCFF 822-842, 848-880, 813-821, 881-903, 918-927, 942-958).

Response to Finding No. 1380:

This proposed finding is inaccurate. The record reveals that ENH did not obtain or exercise market power through the Merger. Respondent addresses below the documents at issue as they are used by Complaint Counsel in the following proposed findings of fact.

ENH Moved Health Plans to One Contract for All Three ENH Facilities

1381. During the winter of 1999, ENH senior management decided that the merged entity would put the three ENH facilities on the same contract and charge the same rate for all three facilities. (Hillebrand, Tr. 1703; Newton, Tr. 363-65).

Response to Finding No. 1381:

This proposed finding is misleading because it implies that harmonizing the contracts and rates across all ENH facilities was improper. To the contrary, harmonizing contracts and rates was an important part of improving quality of care and promoting efficiencies across the ENH system. (RFF ¶¶ 303-309). Evanston Hospital and HPH determined that the merged entity "[m]ust have same managed care contracts, pricing, technical/professional fees, etc. so patients/physicians can go to any site." (RFF ¶ 309). This system required that any physician with clinical privileges at ENH have privileges at any ENH hospital or site. (RFF ¶ 306). Allowing all ENH physicians to have privileges at any ENH hospital or campus made ENH's twelve full-time clinical department chairmen responsible for quality of care regardless of where it was rendered in the ENH system. No other hospital system in Chicago has a similar system. (RFF ¶ 307). This arrangement also helped ENH achieve maximum cost savings because it required the consolidation of all corporate activities at the Evanston Hospital campus and elimination of all corporate functions at HPH – including human resources, purchasing, managed care contracting, the business office and information systems. (RFF ¶¶ 303-304).

Evanston Hospital and HPH had no reason to expect that consolidating all contracts, chargemasters and Medicare IDs would cause problems with any MCO because Evanston Hospital followed this same practice when it opened Glenbrook Hospital in 1977. From 1977 to the start of trial, no MCO complained about this practice. (RFF ¶ 308).

1382. **REDACTED** (Holt-Darcy, Tr. 1528, 1560-61, *in camera*; Foucre, Tr. 890; Ballengee, Tr. 176; Neary, Tr. 602; Neary, Tr. 756, *in camera*; Dorsey, Tr. 1447; CX 262 at 2, *in camera*).

Response to Finding No. 1382:

This proposed finding is inaccurate and misleading. ENH never demanded anything of the MCOs but, instead, freely and fairly negotiated its rates. ENH did secure better rates, but it did so only because it learned more about the demand for its services and, with the assistance of Bain, employed the negotiation tactics necessary to secure appropriate rates. (RFF ¶¶ 726-923).

This proposed finding is also misleading because ENH negotiated uniform contracts for all facilities to improve quality and generate efficiencies across the ENH system. (RFF-Reply ¶ 1381). Going into these negotiations, MCOs were well aware that Evanston Hospital had committed to bringing HPH's services up to Evanston Hospital's high level of quality. (RFF ¶ 268).

ENH Moved Health Plans to the Higher (in Terms of Rates) of the Evanston or Highland Park Contracts

1383. In a September 24, 1999, memorandum, Terry Chan of Highland Park compared ENH and HPH inpatient rates, and observed that "there could be great potentials [sic] in improving payment rates for both hospitals and physicians." (CX 30 at 3).

Response to Finding No. 1383:

This proposed finding is incomplete and misleading. When the entire document is examined, it is clear that Chan recognized that HPH likely had better rates than Evanston

Hospital and that if HPH's rates were applied to the merged entity, reimbursements obviously would be improved. (CX 30 at 3). This document thus confirms the learning about demand theory in that it reveals that Evanston Hospital's rates were under-market at the time of the Merger. (RFF-Reply ¶¶ 1363, 1365). Chan's pre-Merger reports and trial testimony both recognized that had Evanston Hospital's rates been applied to HPH, HPH would have received significantly smaller reimbursements. (RFF ¶¶ 656-666).

1384. Ms. Chan reported that ENH's "potentia[l]" rate improvements could be achieved if the merged entity renegotiated "rates that are more favorable than the current Highland Park or ENH rates, *(whichever is higher)*." (CX 30 at 3 (emphasis added)).

Response to Finding No. 1384:

This proposed finding is incomplete and misleading. (RFF-Reply ¶ 1383).

1385. During the post-merger contract renegotiations, ENH successfully moved health plans to the higher of the Evanston or Highland Park contracts, which resulted in at least $10 million in revenue enhancements for the merged entity. (Hillebrand, Tr. 1705; CX 23 at 2. *See* CCFF 833-842).

Response to Finding No. 1385:

This proposed finding is misleading. The referenced $10 million was the result of Evanston Hospital learning about the demand for its services, not market power. (RFF-Reply ¶ 1383; RFF ¶ 735-736, 888).

ENH Added a Premium in Addition to Adopting the Higher of the Evanston or Highland Park Contract Rates

1386. Moving health plans to the higher of the Evanston or Highland Park contract rates was only the "starting point" for ENH's health plan renegotiations after the merger. (Hillebrand, Tr. 1856, 1705).

Response to Finding No. 1386:

This proposed finding is misleading because it erroneously implies that ENH was always able to get rates more favorable than the higher of Evanston Hospital's and HPH's rates. As the

above-cited testimony confirms, however, the pre-Merger rates were merely the "starting point" and, in most cases, ENH was unable to secure anything more favorable. (RFF ¶¶ 735-736; Hillebrand, Tr. 1705). And if ENH were able to secure rates more favorable than those of either hospital, this increase was merely a consequence of an academic hospital system renegotiating old, expired and under-market contracts and appropriately receiving higher prices than a community hospital. (RFF-Reply ¶¶ 1363, 1365).

1387. Recognizing ENH's "additional negotiating power and leverage with the payors"– one of the "benefits of the merger" – during the winter of 1999, ENH senior management decided that "the combined entity would use the better of the Highland Park or Evanston [contract rate] *and then add a premium to that.*" (Newton, Tr. 364-65; Hillebrand, Tr. 1705; Chan, Tr. 709-10 (emphasis added)).

Response to Finding No. 1387:

This proposed finding is misleading and false. As an initial matter, the testimony of both Newton and Chan related to the reasons for the Merger should be disregarded. Newton was never more than a vice president of "business affairs" at HPH, left ENH soon after the Merger and is now Chief Executive Officer of Swedish Covenant Hospital, an admitted competitor to ENH. (Spaeth, Tr. 2282-83, Hillebrand, Tr. 2028-29, Newton, Tr. 279, 434; RFF-Reply ¶ 1465). Moreover, Newton did not have responsibility for financial matters, did not have primary responsibility for Merger strategy, was excluded from most Merger discussions, and was not primarily responsible for managed care contracting. (Spaeth, Tr. 2283-84, Newton, Tr. 436, 452-53, 512-13; Hillebrand 2028-29). Chan's involvement with Merger discussions was even more limited, consisting merely of attending a "couple of [Merger] integration meetings." (Chan, Tr. 659).

REDACTED

(Chan, Tr. 840, *in camera*).

Complaint Counsel's reliance on Hillebrand's testimony is misplaced. Hillebrand never testified that a "benefit" of the Merger would be "additional negotiating power and leverage with the payors." The testimony cited above from Hillebrand's merely confirms that, after the Merger, ENH asked for rates no worse than those of pre-Merger HPH (a community hospital) or those of Evanston Hospital's outdated contracts. In some cases, but certainly not in all cases, ENH was fortunate enough to achieve this goal. (RFF-Reply ¶¶ 1363, 1365, 1386; RFF ¶¶ 735-36).

1388. The merged entity successfully negotiated prices above the pre-merger rates of either Evanston or Highland Park for numerous payors. (Hillebrand, Tr. 1705. *See* CCFF 848-880).

Response to Finding No. 1388:

This proposed finding is false and misleading. (RFF-Reply ¶ 1387).

ENH Moved Health Plans from Fixed Rates to Discount Off Charges Arrangements

1389. **REDACTED**

(RX 663 at ENHL TC 016939, *in camera*).

Response to Finding No. 1389:

This proposed finding is misleading. As an initial matter, **REDACTED**

(RX 663 at ENHL TC 16939, *in camera*). **REDACTED** (RX 663 at ENHL TC 16939, *in camera*). In general, discount-off-charges contracts are more favorable from a hospital's perspective because such contracts are simple to administer and result in timely payments to hospitals. (RFF ¶ 81). **REDACTED**

(RFF ¶¶ 83-86, *in camera*; RFF ¶ 91).

REDACTED

(RFF ¶¶ 87-89, 847, *in camera*).

1390.

REDACTED

(Hillebrand, Tr. 1706; Chan, Tr. 795-96, *in camera*. *See* CCFF 813-821).

Response to Finding No. 1390:

This proposed finding is misleading. The cited Hillebrand testimony does not remotely support the allegation that the market trended toward per diem rates. (Hillebrand, Tr. 1706).

REDACTED

(Chan, Tr. 795-96, *in camera*). Moreover, it was not uncommon for hospitals, including pre-Merger HPH, to seek and successfully secure discount-off-charges rates during the general period at issue in which ENH renegotiated its rates. (RFF ¶ 83-84). And since 2000, Chicago area hospitals have negotiated even more aggressively for discount-off-charges on inpatient services. (RFF ¶ 86).

ENH Adopted the Higher of the Evanston or Highland Park Chargemaster Rates

1391. **{According to Ms. Chan's November 1999 memorandum, a discount off charges arrangement would be even more favorable to the merged entity if "Highland Park Hospital is adopting ENH's charge master which is expected to generate higher gross charges than gross charges generated by Highland Park Hospital's current charge master."}** (RX 663 at ENHL TC 016939, *in camera).*

Response to Finding No. 1391:

This proposed finding is misleading. Consolidating the merging hospitals' chargemasters was just one part of the overall plan to harmonize quality and promote efficiency, not an attempted, or actual, exercise of market power. (RFF-Reply ¶ 1381).

REDACTED

REDACTED (RFF ¶¶ 87-89, 847, *in camera*).

1392. During the post-merger contract renegotiations, ENH consolidated the Highland Park and Evanston chargemaster by selecting the higher of the Evanston or Highland Park rate for each gross charge listing, resulting in at least an additional $5 million in annualized economic value for Evanston. (Hillebrand, Tr. 1711, 1714-15; CX 17 at 5; CX 2240 at 11. *See* CCFF 881-903).

Response to Finding No. 1392:

This proposed finding is misleading to the extent it implies that this action had anything to do with exercising market power. The chargemaster consolidation project was simply another part of the overall Merger integration process and, therefore, part of the (successful) attempt to standardize care and promote cost efficiency across the entire ENH system. (RFF-Reply ¶ 1381).

ENH Increased Its Chargemaster Rates in the Years Following the Merger

1393. **REDACTED** (RX 1687 at ENH BW 027653, *in camera*). **REDACTED** (RX 1687 at ENHL BW 027653, *in camera*).

Response to Finding No. 1393:

This proposed finding is misleading to the extent it implies a connection between ENH's chargemaster increases and ENH's alleged exercise of market power. There is no such connection.

ENH's chargemaster, like those of other providers, is a fluid document, changing roughly 100 times every month as Medicare issues new codes for new services and changes the terminology for existing services, and as ENH initiates its own new clinical services. (RFF ¶¶ 927, 941). Therefore, price changes are to be expected. More importantly, the rate increases cited by Complaint Counsel came about as part of ENH's attempts to bring its prices to market

level and streamline and harmonize its chargemaster, tasks it failed to fully accomplish back in 2000. (RFF ¶¶ 932-964). Evanston Hospital would have made these very same price increases had the Merger not taken place. (RFF ¶¶ 935, 939, 947-948, 964). Accordingly, there is no connection between the chargemaster increases and ENH's 2000 contract renegotiations. (RFF ¶¶ 942-943, 963). **REDACTED**

(RFF ¶ 847, *in camera*).

1394. **REDACTED**
(*See* RX 1687 at ENHL BW 027653 **REDACTED** *in camera*).

Response to Finding No. 1394:

This proposed finding is misleading because these chargemaster increases had nothing to do with the Merger or market power. The increases were designed to bring ENH's prices up to competitive market levels. (RFF-Reply 1393).

ENH Attributed Its Successes in Raising Prices to Health Plans to the Merger Itself

1395. Despite Mr. Neaman and Mr. Hillebrand's claims that health plans' bargaining positions have actually *increased* since the merger, ENH was able to increase its prices post-merger to health plans and achieve at least $18 million in increased annual revenues. None of the initial post-merger price increases obtained by ENH from health plans were taken away in subsequent years, with the exception of a partial price decrease to Humana. (Hillebrand, Tr. 1709-10, 1725-26; Neaman, Tr. 960-61, 1269-71).

Response to Finding No. 1395:

This proposed finding is misleading and false. The $18 million in increased annual revenues merely reflects the fact that ENH brought its contracts up to market in the months immediately following the Merger. (RFF ¶¶ 656-703, 726-737, 1002).

Moreover, in addition to the Humana price decrease referred to in this proposed finding,

REDACTED

REDACTED

(RFF ¶¶ 917-921, *in camera*; RFF ¶¶ 922-923).

1396. A worksheet entitled "Economic Measures of Success: ENH/HPH Merger/FY 2000," dated August 31, 2000, shows that ENH's initial forecast of income from operations for fiscal year 2000 was just $4 million, but that the fiscal year 2000 actual income from operations was $24 million, which is $20 million more than projected. (CX 31 at 1; CX 2382 at 2).

Response to Finding No. 1396:

This proposed finding is misleading for two reasons. First, this proposed finding improperly implies that all $24 million in enhancements was the result of contract renegotiations. A significant portion of this figure is directly attributable to the addition of new services and growth in patient volume at ENH. (Neaman, Tr. 1370-71; Hillebrand, Tr. 1708-09). Second, the revenue enhancements that were a product of contract negotiations merely relate to bringing ENH's prices to market level based on the learning about demand theory. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374-1376, 1378).

1397. On October 2, 2000, Mr. Neaman issued a "Final Report" to ENH's board of directors on "Merger Integration Activities." (CX 17 at 1). In it, Mr. Neaman reports that "[S]ome $24 million of revenue enhancements have been achieved - mostly via managed care renegotiations." (CX 17 at 1).

Response to Finding No. 1397:

This proposed finding is misleading. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374-1376, 1378, 1395-1396).

1398. Mr. Neaman's October 2, 2000, memorandum to the board of directors included an attached "Sequential Listing of Accomplishments" of the merger. (CX 17 at 1, 5). Mr. Neaman reported that the re-negotiation of payor contracts had resulted in an annualized economic value of $18 million. (CX 17 at 5-8 ($3 million each for the United, PHCS, Aetna, Blue Cross/Blue Shield, and Cigna contracts, $2 million for the Humana contract, and $1 million from the renegotiation of other smaller PPO contracts combined)). (CX 17 at 5-8; Hillebrand, Tr. 1708-09. *See* CX 13 at 1 (In July 2000, Mr. Neaman reported an additional $16 million/year in total managed care re-negotiation benefits to the board);

See also CX 25 at 9, 11 (September 13, 2000 memo reporting the same "Merger Accomplishments" in the form of increased revenue through renegotiated contracts).

Response to Finding No. 1398:

This proposed finding is misleading. (RFF-Reply ¶¶ 1365, 1367, 1372, 1374-1376, 1378, 1395-1397). Moreover, this proposed finding refers to the $3 million enhancement from the Blue Cross renegotiation, yet Complaint Counsel has not asserted that this $3 million enhancement was the result of ENH's market power. (RFF-Reply ¶ 1375).

1399. **REDACTED** (Chan, Tr. 820, *in camera*; CX 1099, *in camera*).

Response to Finding No. 1399:

This proposed finding is misleading because it mischaracterizes the cited Chan testimony.

REDACTED

(Chan, Tr. 819-20, *in camera*; CX 1099, *in camera*).

REDACTED

(RFF ¶¶ 590-593; RFF ¶ 594, *in camera*).

1400. Mr. Spaeth also testified that at the time of the merger Highland Park would not have been successful in raising its rates because the hospital could not sustain a strategy where it kept losing contracts. (Spaeth, Tr. 2178-79). He did not see an opportunity to raise the rates before the merger. (Spaeth, Tr. 2172-73).

Response to Finding No. 1400:

This proposed finding is misleading. (RFF-Reply ¶ 1399).

B. Testimony of Present ENH Executives Regarding Merger Creating Market Power

1. Assessments in Contemporaneous Documents of the Anticompetitive Consequences of the Merger Are a Reliable and Accurate Reflection of Discussions

1401. Present and former ENH executives testified that the contemporaneous assessment of the consequences of the merger found in ENH documents is an accurate reflection of contemporaneous discussions in the pre- and post-merger period. (Neaman, Tr. 1192-95, 1196-97, 1200, 1203-05, 1207, 1209; Hillebrand, Tr. 1811-12; Spaeth, Tr. 2210-11; Newton, Tr. 369-70; Newton, Tr. 372-73). This testimony confirms that ENH's documents provide trustworthy and reliable evidence that ENH's post-merger price increases are the product of anticompetitive behavior and market power.

Response to Finding No. 1401:

This proposed finding is both misleading and false. ENH documents are, indeed, an accurate reflection of contemporaneous discussions in the pre- and post-Merger periods. But a full and fair reading of these documents – free of Complaint Counsel's selective quotations and manipulation of phrases – shows no anticompetitive behavior or market power. The documents, instead, confirm that the primary purpose of the Merger was to improve quality, and the reason for post-Merger price increases is explained by the learning about demand theory. (RFF-Reply ¶¶ 1346-1400).

1402. ENH's board meeting minutes were reviewed by key personnel, including Mr. Neaman, and accurately represented what occurred at the meetings. Attendees were free to speak candidly and honestly. (Neaman, Tr. 1192-95).

Response to Finding No. 1402:

This proposed finding is incomplete. It fails to explain that Board meeting minutes do not include detailed reports of discussions, such as those relating to the managed care renegotiation process. (Neaman, Tr. 1389).

1403. Consistent with the language of the merger documents, Mr. Neaman admitted that one of the goals of the merger with Highland Park was to get better prices and terms from health plans for ENH. (Neaman, Tr. 1036). In the late 1990's health plans were decreasing

rates for hospital services. (Neaman, Tr. 1037-38). ENH and Highland Park hoped that the merged entity could strengthen the negotiating position of the hospitals with health plans. (Neaman, Tr. 1039; CX 19).

Response to Finding No. 1403:

This proposed finding is inaccurate and misleading. Improving MCO contracts was not a primary goal of the Merger. (RFF ¶¶ 259-297). But to the extent that it was a goal, both Evanston Hospital and HPH hoped that the Merger would create a better, more cost effective and, therefore, more valuable product to present to the marketplace. (RFF-Reply ¶¶ 1361; Newton, Tr. 408).

Moreover, because the Balanced Budget Act had an especially significant negative impact on pre-Merger Evanston Hospital in the late 1990s, and because the hospital's investment income declined during this same period, the hospital's leadership became particularly concerned about finding new revenue sources for the future. (RFF ¶¶ 105, 110-112, 624, 627-630, 633-634, 643-645). The combined forces of these financial pressures forced Evanston Hospital to look to the only untapped source of revenue: the wealthy MCOs. (Hillebrand, Tr. 2013-14; RX 652 at BAIN 12). The pricing pressures showed no signs of letting up. Accordingly, Evanston Hospital planned to aggressively renegotiate its contracts – with or without the Merger. (RFF ¶ 705).

1404. Mark Newton, a former Highland Park and ENH executive, attended the January 6, 2000, board meeting at which Jeff Hillebrand reported on renegotiations with health plans. The minutes from that meeting (CX 5 at 5) accurately reflect the statements made by Mr. Hillebrand at that meeting. (Newton, Tr. 369-70).

Response to Finding No. 1404:

This proposed finding is incomplete and misleading. (RFF-Reply ¶¶ 1365; Hillebrand, Tr. 2026).

1405. Mark Newton also attended the February 2000 board meeting at which Jeff Hillebrand reported on renegotiations with health plans. The minutes from that meeting (CX 809)

accurately reflect the statements made by Mr. Hillebrand at that meeting. (Newton, Tr. 372-73).

Response to Finding No. 1405:

This proposed finding is misleading (RFF-Reply ¶1368 (addressing CX 6, an exact copy of CX 809)).

2. ENH Executives Testified That Pre-Merger There Were Significant Pricing Pressures and the Threat of Increased Competition from Highland Park

1406. Before the merger, ENH leadership believed that the government and health plans would increase pricing pressures on hospitals. (Neaman, Tr. 1042; CX 442 at 4).

Response to Finding No. 1406:

This proposed finding is vague, incomplete and not placed in any context. (RFF-Reply ¶ 1403).

1407. **REDACTED**

(Neaman, Tr. 1134-35, *in camera*; CX 1566 at 3-4).

REDACTED

(Neaman, Tr. 1138, *in camera*; CX 1566 at 9).

Response to Finding No. 1407:

This proposed finding confirms the significant financial pressures pre-Merger Evanston Hospital faced in the late 1990s and its pressing need to renegotiate managed care contracts during that time frame. (RFF-Reply ¶ 1403). Nonetheless, this proposed finding is misleading to the extent it equates "leverage" with market power. Evanston Hospital, its consultants (Bain) and HPH all viewed the Merger as an opportunity to present a better and higher-quality product to consumers. (RFF ¶¶ 259-297, 707). ENH planned to use this improved product as "leverage, *limited as it might be*," to seek better rates from MCOs. (RFF-Reply ¶ 1361).

1408. In December 1997, Mr. Neaman authored the ENH strategic plan, "Achieving our Strategic Goals: The Financial Roadmap for Our Future, 1998-2002." ENH management

also authored a 1996 to 2000 strategic plan. Mr. Neaman forwarded excerpts from these plans to Bain in February 1998. (Neaman, Tr. 1149-51; CX 2037).

Response to Finding No. 1408:

Respondent has no specific response.

1409. As he wrote in the December 1997 Financial Roadmap, Mr. Neaman believed that "[p]ricing pressures, as anticipated five years ago, have continued to grow." (Neaman, Tr. 1151; CX 2037 at 2). Thus, ENH management recognized from the early 1990s that declining managed care prices would continue to exert pressure on ENH's bottom line.

Response to Finding No. 1409:

This proposed finding is false and misleading. As an initial matter, CX 2037 does not state or hint what pricing pressures Evanston Hospital faced five years before December 1997. (CX 2037 at 2). CX 2037 only lists the new and significant pressures that appeared in late 1997, specifically the Balanced Budget Act and reimbursement reductions from Blue Cross and Humana. (CX 2037 at 2-3). CX 2037 also does not indicate that Evanston Hospital anticipated significant reductions from major payors, especially Medicare, five years before December 1997. In any event, Evanston Hospital was much better equipped before 1997 to deal with threats to the bottom line because its investment income provided a more than adequate capital cushion. (CX 2037 at 2; RFF ¶¶ 641-643). As this cushion started to disappear in December 1997, however, Evanston Hospital faced more financial pressures. (RFF ¶¶ 643-645).

1410. As early as the beginning of 1998, ENH experienced "significant reductions in reimbursement" from both Blue Cross and Humana. (CX 2037 at 2-3; Neaman, Tr. 1151-52).

Response to Finding No. 1410:

Respondent has no specific response.

1411. In December 1998, ENH viewed the pricing pressures as a "significant threat" to Evanston. (CX 2037 at 3; Neaman, Tr. 1152).

Response to Finding No. 1411:

Respondent has no specific response.

1412. In its 1996 to 2000 Strategic Plan, ENH sought to increase market share for each segment of its business, including inpatient services. (CX 2037 at 9; Neaman, Tr. 1153). Part of that growth strategy included the strategy of acquiring other hospitals. (Neaman, Tr. 1154; CX 2037 at 9).

Response to Finding No. 1412:

This proposed finding is incomplete and misleading. Evanston Hospital focused on growth to become the "best integrated healthcare delivery system." (CX 2037 at 8). Growing volume is vitally important for hospitals to maintain high quality healthcare and to be cost effective in delivering that care. (RFF ¶¶ 289-290). Because Evanston Hospital realized it could not rely on the shrinking inpatient market to grow its volume, it looked to other means of sustaining growth, such as broadening its portfolio of various services and enhancing its "brand name and product differentiation." (CX 2037 at 9). Acquiring a hospital was one of several means to expand Evanston Hospital's portfolio of services. (CX 2037 at 9).

1413. According to Mr. Hillebrand, Mark Neaman believes that the reason Evanston's prices pre-merger were lower than those at Highland Park was because Evanston had a much greater volume of business for commercial payers. Neaman believes that "since Highland Park was so much smaller than Evanston, the managed care companies weren't as particular about what they paid them." (Hillebrand, Tr. 1706-07).

Response to Finding No. 1413:

This proposed finding is false. Complaint Counsel has mischaracterized Hillebrand's testimony concerning Neaman's purported beliefs by changing the tense of some verbs and by selectively quoting from the transcript. A fair and more complete reading of Hillebrand's cited testimony reveals two things: (1) Hillebrand believed that Neaman "*thought* that [differences in volume] *might be*" the reason behind the price differences (emphasis added); and (2) Hillebrand, the man most involved and familiar with the 2000 negotiations and to whom Neaman deferred

on these issues, never believed that volume explained the difference between Evanston Hospital's and HPH's rates. (Hillebrand, Tr. 1706-07; Neaman, Tr. 956-57, 1220-21). Once Bain explained to Neaman the real reasons behind the difference in rates (*i.e.*, that Evanston Hospital was under-market), Neaman directed Hillebrand to use aggressive negotiation tactics, with Bain's counsel, to bring ENH up to market with the other Chicago academic hospital systems. (RFF ¶ 683; Neaman, Tr. 1343-45)

1414. Prior to the merger, United, which had recently purchased a number of other health plans, was attempting to exert market power on ENH. Mr. Hillebrand believes that in the 1990s ENH was at a disadvantage in negotiations with Blue Cross, Aetna, and United because of the substantial collective market share of these three payers. (Hillebrand, Tr. 1725).

Response to Finding No. 1414:

The proposed finding is misleading and is not supported by the cited evidence. Although United did purchase a number of other MCOs in the 1990s, Hillebrand could not testify as to United's state of mind in its negotiations with ENH. Nor could Hillebrand testify about United's actual market power. At most, the first sentence of this proposed finding stands for the proposition that Hillebrand viewed United as attempting to exert market power on ENH. But this view, as well as Hillebrand's "belie[f]" as reflected in the second sentence of this proposed finding, were not necessarily based on reality because they were formed before Bain taught Evanston Hospital/ENH how to negotiate aggressively with MCOs. In short, Evanston Hospital perceived itself to be disadvantaged in MCO negotiations before the Merger, at least in part, because it had not yet learned how to negotiate effectively. (RFF ¶ 710-725).

1415. At the time of the merger, Blue Cross, United, Aetna, and Humana collectively comprised 75% of the managed care market in Chicago. (Hillebrand, Tr. 1725).

Response to Finding No. 1415:

This proposed finding is inaccurate. Hillebrand testified that Blue Cross, United, Humana, and Cigna (not Aetna) comprised 75% of the Chicago managed care market at the time of Merger. (Hillebrand, Tr. 1725).

1416. One of the ways that Highland Park competed with other hospitals was to negotiate contracts with health plans. Mr. Spaeth of Highland Park testified that health plans were looking for hospitals that would take care of the patient volume for the lowest possible rate. (Spaeth, Tr. 2185-86).

Response to Finding No. 1416:

This proposed finding is misleading because Spaeth testified that HPH competed for managed care contracts only to the extent that these contracts helped to bring patients to the hospital. (Spaeth, Tr. 2185-86). In reality, the presence of any hospital, including Evanston Hospital, in a MCO's network did not make it more difficult for pre-merger HPH to obtain price increases from that MCO. (Spaeth, Tr. 2176). Moreover, while MCOs no doubt looked for the lowest possible rates with hospitals, they obviously were willing to pay different rates to hospitals of different reputations and capabilities. (RFF ¶ 103).

1417. Mr. Spaeth testified that, before the merger, Evanston and Highland Park were competitors of each other, and health plans might have gotten a better deal from one hospital over the other or contracted with only one hospital and not the other. (Spaeth, Tr. 2188-89).

Response to Finding No. 1417:

This proposed finding is inaccurate and misleading. There is no evidence that MCOs played Evanston Hospital and HPH off one another before the Merger. Complaint Counsel, therefore, has resorted to selective quotations from Spaeth's testimony amounting to pure conjecture. Spaeth, in fact, testified that Evanston Hospital and HPH were not viable substitutes for one another. (Spaeth, Tr. 2241, 2244, 2285). And with the exception of Humana's Staff

Model Product, HPH never felt it was excluded from managed care contracts because of Evanston Hospital's presence in the market. (Newton, Tr. 457). In fact, Evanston Hospital's presence, or the presence of any other hospital in a MCO's network, did not make it more difficult for pre-merger HPH to obtain price increases from that MCO. (Spaeth, Tr. 2176). Therefore, while it is true MCOs theoretically could have contracted with HPH but not Evanston Hospital, and vice versa, this fact played no meaningful role in either hospital's pre-Merger negotiations with MCOs. (RFF ¶¶ 974-983).

1418. During the period 1994 forward, Mr. Spaeth had heard that every major insurer in the Chicago area had threatened to or had actually left hospitals out of its network contracts. (Spaeth, Tr. 2193).

Response to Finding No. 1418:

This proposed finding should be afforded little to no weight because it is based solely on unreliable hearsay. (Spaeth, Tr. 2192-93).

1419. The price trend before the merger was down, and in Mr. Spaeth's view that has not changed. (Spaeth, Tr. 2201-02).

Response to Finding No. 1419:

This proposed finding is misleading because, after the Merger, Spaeth had no involvement with managed care contracting. (Spaeth, Tr. 2299).

1420. Before the merger, Highland Park would sometimes propose a rate to a health plan that the health plan would say was too high. Sometimes health plans would not contract with Highland Park. That included both small HMOs and at least one large health plan like Aetna or Humana. (Spaeth, Tr. 2170-71).

Response to Finding No. 1420:

This proposed finding is misleading. **REDACTED**

(Mendonsa, Tr. 559, *in camera*; Holt-Darcy, Tr. 1588-89, *in camera*).

REDACTED

(Holt-Darcy, Tr. 1587-88, *in camera*). Accordingly, it is hardly surprising that MCOs claimed HPH's rates were too high.

Moreover, Complaint Counsel fails to explain the reasons for which these MCOs, big and small, would not contract with HPH. Having already established that MCOs did not play HPH and Evanston Hospital off one another or exclude one to the other's detriment, Complaint Counsel is left with no relevant explanation for why MCOs "[s]ometimes would not contract with [HPH]." (RFF ¶¶ 974-983; Newton, Tr. 457; Spaeth, Tr. 2170-71, 2176; RFF-Reply ¶ 1417).

1421. Mr. Spaeth testified that, before the merger, health plans sometimes walked away from hospitals. Mr. Spaeth did not believe that Highland Park was an absolute necessity in any health plan contract. He testified that health plans walk when they have the opportunity to go down the street and contract with another hospital at a better rate. Consequently, Highland Park was afraid that it would lose patients if health plans did not contract with the hospital. (Spaeth, Tr. 2171-72).

Response to Finding No. 1421:

To the extent that this proposed finding should be afforded any weight given that it is based on pure speculation, it is misleading. While no hospital has ever been an "absolute necessity" to a network, MCOs in the Chicago area – both before and after the Merger – have desired to have as large a network as possible. (RFF ¶¶ 58-60, 76, 989-994). Therefore, only in the rarest circumstances would MCOs actually "walk[] away" from a hospital in the Chicago area. (Noether, Tr. 5981-82).

1422. Mr. Spaeth testified that when Highland Park turned down a contract, this would reduce Highland Park's patient volume, and that Highland Park would begin to reduce its bottom line. (Spaeth, Tr. 2172).

Response to Finding No. 1422:

This proposed finding is incomplete because accepting a managed care contract at a rate below the hospital's cost will also reduce its bottom line – perhaps even to a greater extent. Therefore, there can be a time when turning down a contract will in fact help a bottom line.

1423. Mr. Spaeth believed that at the time of the merger Highland Park would not have been successful in raising its rates. He did not see an opportunity to raise the rates before the merger. (Spaeth, Tr. 2172-73). The hospital could not sustain a strategy where it kept losing contracts, as such a strategy would have proved very difficult to stick to. (Spaeth, Tr. 2178-79).

Response to Finding No. 1423:

This proposed finding is misleading because HPH put its renegotiations on hold in anticipation of the Merger and also based on speculation. Moreover, given HPH's historically aggressive and successful contract negotiations, no one has never asserted that HPH was under-market. (RFF-Reply ¶ 1399).

Additionally, this proposed finding is irrelevant because it is based on the testimony of Spaeth, who freely admitted at trial that he did not have a clear recollection of pre-Merger HPH contracts, which were handled directly by Chan. (Spaeth, Tr. 2183).

1424. Before the merger, normally it was very difficult for Highland Park to get an increase from a health plan in its contract rates. (Spaeth, Tr. 2180-82).

Response to Finding No. 1424:

This proposed finding is misleading. (RFF-Reply ¶ 1423).

1425. Before the merger, Highland Park had some contracts with prices that rolled over and others that had "a stipulated end at which then it was agreed to that there would be renegotiation." When the contract was "evergreen" and rolled over, the parties sometimes did not seek an adjustment of the current contract rates, and it was understood that the rate would continue to the following year. Highland Park had staff negotiating with the payers and trying to maximize the reimbursement from them, but in the pre-merger period, "every time we tried to negotiate for a higher rate, it was very difficult to achieve." (Spaeth, Tr. 2182-85).

Response to Finding No. 1425:

This proposed finding is misleading. (RFF-Reply ¶¶ 1423).

1426. Mr. Spaeth viewed the merger of Highland Park and Evanston as providing a unified face to managed care. Evanston now has the final say for all three hospitals in matters of contracting. (Spaeth, Tr. 2188).

Response to Finding No. 1426:

This proposed finding is misleading to the extent it implies that ENH exercised market power after the Merger. By definition, the Merger unified all contracting functions into a single office, but this was never the ultimate goal of the Merger. (RFF ¶¶ 259-297; RFF-Reply ¶¶ 1346-1350, 1352-1356, 1358-1359). Rather, unified contracting was just one part of the Merger integration effort to standardize clinical and business practices across the entire ENH system. (RFF ¶¶ 303-309).

3. Merger-Related Negotiations Headed by Jeff Hillebrand Were Successful for ENH

1427. Mr. Hillebrand agreed that "$36 million in economic value on an annualized basis" achieved by October 2, 2000, by ENH could not "have been achieved by Evanston and Highland Park alone." This $36 million included $24 million derived mostly from managed care renegotiations. (Hillebrand, Tr. 1817-18; CX 17 at 2).

Response to Finding No. 1427:

This proposed finding is incomplete and misleading. (RFF-Reply ¶ 1379). It is further misleading because it fails to explain that $12 million of the $36 million in economic value was the product of Merger-related cost savings. (H. Jones, Tr. 4131; RFF ¶ 2539). Moreover, a meaningful portion of the remaining $24 million was directly attributable to the addition of new services and growth in patient volume at ENH, not just simply price increases. (Neaman, Tr. 1370-71; Hillebrand, Tr. 1709).

1428. On an "annualized basis," Mr. Hillebrand testified that the ENH post-merger price increases from the health plan contract re-negotiation alone yielded $18 million in

increased revenues. None of the initial post-merger price increases ENH obtained from health plans were taken away in subsequent years, with the exception of a partial price decrease with Humana. (Hillebrand, Tr. 1709-10).

Response to Finding No. 1428:

This proposed finding is misleading and false. (RFF-Reply ¶ 1395).

1429. The 2000 negotiations led to a termination of the hospital contract between ENH and One Health on August 31, 2000. A number of months later, ENH and One Health came to terms on a new hospital contract. Other than One Health's termination period, ENH lost no other health plan customers. (Hillebrand, Tr. 1707-08).

Response to Finding No. 1429:

This proposed finding is vague. The fact that ENH lost no health plan customers other than One Health and, in turn, One Health lost no identifiable employer customers, confirms the that ENH's rates and negotiation tactics were not anticompetitive. (RFF-Reply ¶ 1135). That ENH did not lose any other contracts is consistent with the reality that ENH's 2000 rates were reasonable and proper for a hospital system of ENH's reputation and capability. (RFF-Reply ¶ 1176).

1430. In the process of setting its prices for the 2000 negotiations with health plans, and the 2002 increases to its chargemaster, ENH did not factor in whether patients or the health plans would switch to other hospitals in response to the increases. In his 26 years of experience, Mr. Hillebrand has never seen steerage by health plans work effectively in the Chicago area. (Hillebrand, Tr. 1765).

Response to Finding No. 1430:

This proposed finding is misleading to the extent it implies that the rate and price changes resulted from the exercise of market power. (RFF-Reply ¶¶ 261, 1391-93). Moreover, the lack of steerage only helps to show that MCOs do not play one hospital, including pre-Merger Evanston Hospital and HPH, off one another when negotiating contracts. (RFF ¶¶ 989-994; RFF-Reply ¶ 1421).

1431. In the process of setting its prices for the 2000 negotiations with health plans, and the 2002 increases to its chargemaster, ENH did not consider what actions other hospitals would take in response. (Hillebrand, Tr. 1764-65).

Response to Finding No. 1431:

This proposed finding is not supported by the cited portion of Hillebrand's testimony. In any event, this proposed finding is vague. It is unclear whether any other hospital was aware of the 2000 ENH contract renegotiations or, for that matter, the 2002 chargemaster increases. This proposed finding is also misleading because negotiated rates are confidential. Other hospitals do not know ENH's rates, and ENH does not know other hospitals' rates. (Newton, Tr. 373-74; Neaman, Tr. 1344; Ballengee, Tr. 193-94). Accordingly, this proposed finding makes no sense.

1432. When setting its prices in 2000, ENH was not concerned with and did not factor in whether Lutheran General, Rush North Shore, St. Francis, Lake Forest or any other hospital raised or lowered their prices in response. (Hillebrand, Tr. 1753-55).

Response to Finding No. 1432:

This proposed finding is misleading. (RFF-Reply ¶ 1431).

1433. Mr. Hillebrand did not write and does not recall seeing any analysis of the possibility that ENH's 2000 price increases would lead to ENH losing health plans to other hospitals. (Hillebrand, Tr. 1757-58).

Response to Finding No. 1433:

This proposed finding is misleading because it fails to mention that Neaman was concerned that ENH's 2000 negotiation plan risked losing contracts with MCOs and that Neaman expressed these concerns to Bain and ENH's own negotiators. (Neaman, Tr. 1348). In response to these concerns, Bain prepared a plan to deal with the possible loss of MCO contracts. (Neaman, Tr. 1349; RFF ¶ 725).

1434. Mr. Hillebrand does not recall anyone at ENH recommending against the 2000 ENH price increases on the ground that they would lead to ENH losing health plans to other hospitals. (Hillebrand, Tr. 1758).

Response to Finding No. 1434:

This proposed finding is misleading. (RFF-Reply ¶ 1433). Moreover, no one at ENH recommended against the 2000 negotiation plan because financial pressures bearing down on ENH made the possibility of securing extra revenue worth the risk of losing managed care contracts. (Neaman, Tr. 1343-44, 1346-47). And any concerns that ENH would lose contracts were no doubt mitigated by the fact that the MCOs would understand that ENH needed a one-time catch-up because its contracts were outdated and its rates under-market. (RFF ¶¶ 322, 707, 719, 732, 796; RFF ¶¶ 681, 687, 754, 864).

1435. Mr. Hillebrand believes that employers with insurance access to the three ENH hospitals would balk at the idea of a health plan telling the employer's enrollees that they have to go to another hospital system, instead of ENH. (Hillebrand, Tr. 1764).

Response to Finding No. 1435:

This proposed finding, which constitutes pure speculation, is misleading to the extent it purports to constitute proof of improper conduct. As a general matter, employers do not like to limit their employees' health care options. (Hillebrand, Tr. 1761-63; Noether, Tr. 5936-37; RFF ¶¶ 56, 58-60). Therefore, any employer would "balk" at the idea of any MCO telling the employer's enrollees they could no longer go to any hospital, not only ENH. (Hillebrand, Tr. 1761-64).

This proposed finding is irrelevant because it does not define the term "balk." Hillebrand did not speculate as to what specific conduct the employer would take under these circumstances.

1436. According to ENH, Evanston and Highland Park could not have achieved the increased revenues from the post-merger health plan negotiations if they had been independent hospitals. (Hillebrand, Tr. 1816-17; CX 13 at 1).

Response to Finding No. 1436:

This finding is misleading. (RFF-Reply ¶ 1374-1376, 1379)

1437. With the exception of capitation contracts, health plans in Chicago have not successfully engaged in steering their enrollees from one hospital to another in exchange for better rates. Mr. Hillebrand testified that it would be difficult for health plans to steer patients away from ENH. (Hillebrand, Tr. 1760-63).

Response to Finding No. 1437:

This finding is incomplete and misleading because Hillebrand also testified that it would be difficult for MCOs to steer their patients *to* ENH in exchange for better rates, again because steerage does not work in Chicago. Indeed, this proposed finding belies Complaint Counsel's "bargaining theory," which turns on the notion that MCOs will play one hospital off another hospital through steerage of patients. (RFF ¶¶ 989-994; RFF-Reply ¶ 1421, 1430).

1438. **REDACTED**

(Hillebrand, Tr. 1927, *in camera*; CX 20).

Response to Finding No. 1438:

Respondent has no specific response.

1439. **REDACTED**

(Hillebrand, Tr. 1923-24, *in camera*; CX 57 at 1, *in camera*).

Response to Finding No. 1439:

This proposed finding is inaccurate, misleading and false.

REDACTED

REDACTED (Hillebrand, Tr. 1923-24, *in camera*; CX 57 at 1, *in camera*; Hillebrand, Tr. 1878). United's proposal was demeaning and did not recognize the services and level of care ENH delivered to its patients. (Hillebrand, Tr. 1878). Hillebrand had never before, and has never since, been presented with a demand of that type. (Hillebrand, Tr. 1878-79).

This proposed finding is further misleading by suggesting that ENH resisted all attempts by United to change the terms of the new contract. In reality, ENH agreed to a non-standard managed care contract **REDACTED** (Foucre, Tr. 1106, *in camera*).

REDACTED

(Hillebrand, Tr. 1890, 2028; RFF ¶¶ 918-921, *in camera*). In the end, United negotiated a new contract very much to its liking. (RFF ¶ 922).

4. ENH's Executives Affirmed Respondent's Documents' Assertions About Price Increases Related to Post-Merger Re-Negotiations with Health Plans

1440. Mr. Neaman admitted that one of the goals of the merger with Highland Park was to get better prices and terms from health plans for ENH. (Neaman, Tr. 1036). In the late 1990s health plans were decreasing rates for hospital services. (Neaman, Tr. 1037-38). ENH and Highland Park hoped that the merged entity could strengthen the negotiating position of the hospitals with health plans. (Neaman, Tr. 1039; CX 19).

Response to Finding No. 1440:

This proposed finding is inaccurate and misleading. (RFF-Reply ¶ 1403).

1441. Mr. Neaman affirmed that, according to the January 2000 board meeting minutes, Mr. Hillebrand reported that ENH was able to gain an additional $3.5 million benefit from a managed care contract renegotiation "as a result of combining the medical staffs and Hospitals of the merger." (CX 5 at 5). This was the United renegotiation. (Neaman, Tr. 1196-97).

Response to Finding No. 1441:

This proposed finding is misleading. (RFF-Reply ¶¶ 1365; Hillebrand, Tr. 2026).

1442. Mr. Hillebrand confirmed that a March 14, 2000, draft Evanston Northwestern Healthcare, 2001-2003 Strategic Plan, which he wrote, states that ENH's growth initiatives, including the merger with Highland Park, would be used to provide leverage to ENH's market position as it negotiates with managed care and to receive superior pricing. (CX 2070 at 3, Hillebrand, Tr. 1811-12).

Response to Finding No. 1442:

This proposed finding is misleading. (RFF-Reply ¶ 1369).

1443. Mr. Neaman testified that in his July 3, 2000, "Interdependence Day" memorandum to the ENH board, he reported to the board on the status of merger integration activities. Mr. Neaman reported that the successes in the merger integration efforts were the result of Evanston's and Highland Park's "interdependence." Mr. Neaman noted, "Neither Evanston nor Highland Park alone could achieve these results." (Neaman, Tr. 1201-02; CX 13 at 1).

Response to Finding No. 1443:

This proposed finding is misleading. (RFF-Reply ¶ 1376).

1444. Mr. Neaman testified that at the September 27, 2000, finance committee meeting of the board, he noted that the "larger market share created by adding Highland Park Hospital has translated to better managed care contracts." (CX 16 at 1; Neaman, Tr. 1202-03).

Response to Finding No. 1444:

This proposed finding is misleading. (RFF-Reply 1377).

1445. Mr. Neaman testified that in an October 2, 2000, memorandum, he provided the board with his final report on the merger integration activities for the Highland Park merger. (CX 17; Neaman, Tr. 1203).

Response to Finding No. 1445:

Respondent has no specific response.

1446. Mr. Neaman testified that in his October 2, 2000, memorandum he reported that all of ENH's managed care contracts "have been successfully renegotiated." To that date, ENH had achieved, since the merger, $24 million in "revenue enhancements," the majority of which came from contract renegotiations. This $24 million figure was a "big number" relative to prior years. (CX 17 at 1; Neaman, Tr. 1203-04).

Response to Finding No. 1446:

This proposed finding is misleading. (RFF-Reply ¶¶ 1330, 1365, 1367, 1372, 1374-1376, 1378, 1395-1396, 1398, 1427).

1447. Mr. Neaman acknowledged that in his October 2, 2000, report he reiterated that "none of [the revenue enhancements and cost improvements] could have been achieved by either Evanston or Highland Park alone." (CX 17 at 2; Neaman, Tr. 1205-06).

Response to Finding No. 1447:

This proposed finding is misleading. (RFF-Reply ¶¶ 1337, 1378-1379).

1448. Mr. Neaman admitted that he was the primary drafter of the 2001-2003 Corporate Strategy presentation made to the board in approximately late 2000 or early 2001. (CX 68; Neaman, Tr. at 1206-07).

Response to Finding No. 1448:

Respondent has no specific response.

1449. Mr. Neaman admitted that one of ENH's strategic goals was to "protect the 'core.'" In the zip codes immediately surrounding its facilities, ENH wanted to increase its market share from 55 to 60% market share in the zip codes immediately surrounding its facilities. (CX 68 at 11; Neaman, Tr. 1208-09).

Response to Finding No. 1449:

This proposed finding is misleading, vague and irrelevant. This proposed finding does not explain the phrase "protect the 'core.'" The facts do show, however, that Evanston Hospital and ENH have always sought to increase market share by improving quality and promoting its brand name. (Hillebrand, Tr. 2022; RFF ¶¶ 233-236).

The facts further show that the "core" has never been Evanston Hospital's or ENH's market share focus. (RFF-Reply ¶¶ 49, 57). This is confirmed by the strategic document Complaint Counsel cites above. Indeed, this document also expressed ENH's hope to succeed in the areas to the northwest, south, and north and also at the regional level in services such as

oncology and cardiology. (CX 68 at 11). ENH cannot survive on the "core" alone and, therefore, must look to its broader service area and beyond. (RFF-Reply ¶¶ 49, 57).

1450. Mr. Neaman acknowledged that another of ENH's strategic goals was "market place leadership," partly through "leverage with payors." (CX 68 at 13; Neaman, Tr. 1209).

Response to Finding No. 1450:

This proposed finding is misleading to the extent it equates the term "leverage" with market power. These terms are not synonyms. As Complaint Counsel concedes, "leverage with payors" was only one way to help achieve marketplace leadership. The other ways included "physician recruitment/retention" and "consumers" – which Neaman explained was shorthand for making ENH well regarded by its consumer, the patient. (CX 68 at 13; Neaman, Tr. 1371). Without the respect of its consumers, ENH would not be able to "leverage" its reputation and service offerings with the MCOs. (RFF-Reply ¶¶ 1361, 1369, 1407; Newton, Tr. 408).

5. ENH Executive After-the-Fact "Explanations" of Leverage Are Factually Implausible

1451. ENH executives do not deny that they made various key statements concerning leverage. However, several of them claim that the statements in the documents concerning "leverage" do not reflect admissions of market power or are not connected to the merger with Highland Park. Such assertions are not credible and are contradicted by certain record admissions in light of numerous documents and supporting testimony. (Neaman, Tr. 1036- 39; Hillebrand, Tr. 1790, 1801-02, 1811-12; Spaeth, Tr. 2188; 2211-14; CX 2 at 7; CX 86 at 2; CX 69 at 1; CX 19 at 1; CX 4 at 1, 2, 9; CX 394 at 3; CX 2070 at 3).

Response to Finding No. 1451:

This proposed finding is false because the above-cited statements are not admissions of market power. Respondent addresses below the documents at issue as they are used by Complaint Counsel in the following proposed findings of fact.

1452.

REDACTED

(CX 1566 at 9; Neaman, Tr. 1138, *in camera*); *see also,* RX 2015 at 3487 ("leverage with managed care")).

Response to Finding No. 1452:

This proposed finding is misleading. (RFF-Reply ¶¶ 1361, 1407).

1453. Mr. Neaman admitted that one of the goals of the merger with Highland Park was to get better prices and terms from health plans for ENH. (Neaman, Tr. 1036). In the late 1990s health plans were decreasing rates for hospital services. (Neaman, Tr. 1037). ENH and Highland Park hoped that the merged entity could strengthen the negotiating position of the hospitals with health plans. (Neaman, Tr. 1039; CX 19 at 1).

Response to Finding No. 1453:

This proposed finding is misleading and inaccurate. (RFF-Reply ¶ 1403).

1454. Mr. Hillebrand admitted that the phrase "increase market leverage," includes the potential to get higher prices from health plans and to increase bargaining power. (Hillebrand, Tr. 1790-91, 1801-02, 1811-12; CX 394 at 3; CX 2070 at 3).

Response to Finding No. 1454:

This proposed finding is misleading because · **REDACTED**

(Baker, Tr. 4702, 4644, 4649-50, 4653, *in camera*; Haas-Wilson, Tr. 2677 *in camera*; Noether, Tr. 5904).

This proposed finding is also misleading because Hillebrand never testified that "increased market leverage" was the product of increased market share or the geography of ENH's three hospitals. Instead, as shown by one of Complaint Counsel's documents cited above, "market influence" was thought to be the product of high quality service, cost savings, and a strong brand name. (CX 394 at 13). These were the same qualities Evanston Hospital and HPH hoped to promote with their Merger. (RFF-Reply ¶¶ 1361; Newton, Tr. 408).

1455. Mr. Spaeth viewed the merger of Highland Park and Evanston as providing a unified face to managed care. Evanston now has the final say for all three hospitals in matters of contracting. (Spaeth, Tr. 2188).

Response to Finding No. 1455:

This proposed finding is misleading. (RFF-Reply ¶ 1426).

1456. Mr. Spaeth admitted that on April 5, 1999, at a meeting of the medical staff executive committee at Highland Park, Mr. Neaman of Evanston made a presentation related to the hospital merger. Mr. Spaeth understood that in the presentation Mr. Neaman "refers to the geographic advantages of two institutions" through the merger. (Spaeth, Tr. 2213-14; CX 2 at 7). The minutes also state that "[t]his would be an opportunity to join forces and grow together rather than compete with each other." (CX 2 at 7).

Response to Finding No. 1456:

This proposed finding is misleading and false to the extent it implies that Neaman made the latter comment on competition. Rather, the minutes do not attribute that comment to any particular person, but a natural reading suggests it was made by a physician. (RFF-Reply ¶¶ 1359-1360, 1607).

1457. Mr. Spaeth further admitted to making statements about gaining leverage over large employers after the merger. He testified that sometime after April 16, 1999, when a letter of intent was signed by Highland Park and Evanston regarding the merger, Mr. Spaeth told his board members that "it would be real tough for any of the Fortune 40 companies in this area whose CEOs either use this place or that place to walk from Evanston, Highland Park, Glenbrook and 1700 of their doctors." (CX 4 at 2; Spaeth, Tr. 2210-11). When Mr. Spaeth referred to "this place," he was referring to the three hospitals. (Spaeth, Tr. 2211).

Response to Finding No. 1457:

This proposed finding is misleading and inaccurate. (RFF-Reply ¶ 1352).

1458. Mr. Spaeth admitted that at the same meeting where he made his comment about gaining leverage over large employers, Mr. Patience, a board member of Highland Park Hospital, expressed the view that the economic issue being dealt with was the relative negotiating power of the health plans versus the hospitals and that, if one of the objectives was to get geographic leverage on the employers in the area, Northwestern Memorial would not help much. (CX 4 at 9; Spaeth, Tr. 2211-12).

Response to Finding No. 1458:

This proposed finding is irrelevant and, therefore, misleading. (RFF-Reply ¶¶ 1353-54).

1459. The leadership of both Evanston and Highland Park wanted to make ENH "indispensable" to the market. (CX 19 at 1).

Response to Finding No. 1459:

This proposed finding is misleading because there is no relationship between being "indispensable" and market power. In the period prior to the Merger, both Evanston Hospital and HPH documents explained that being "indispensable" was a function of quality, brand and cost efficiency. (CX 394 at 13; RX 367 at ENH DR 4205; RFF ¶ 1001). Hillebrand similarly testified that achieving "indispensability" would be the result of having the best outcomes, the best service, the best physicians and the highest brand. (Hillebrand, Tr. 2021).

1460. In a May 2000 planning document, ENH recognized that achieving "a leadership position (#1 or #2) and significant market share (>30%)" even in small market areas, "increases contracting leverage with health plans and employers." (CX 86 at 2-3).

Response to Finding No. 1460:

This proposed finding is misleading. Specifically, this proposed finding cites to a document, CX 86, which confirms that use of the term "leverage" is not related to market power. Instead, like the term "indispensability," the term "leverage" is a function of ENH's positive reputation. The entire sentence cited by Complaint Counsel reads: "Being #1 or #2 in a market increases contracting leverage with health plans and employers and *supports consumer preference*." (CX 86 at 3 (emphasis added)). This document thus confirms that a large market share is the result of "consumer preference," and any "leverage" derived from that large share is not the result of market power but, instead, the result of quality improvements resulting from the Merger. (RFF-Reply ¶¶ 1454, 1459).

1461. In a document with a time period January 1, 2000 – December 31, 2000, titled "Effective Communications During a Hospital Merger," ENH stated that the boards of Evanston and Highland Park Hospital decided to merge to obtain, among other things, "increased leverage in the managed care marketplace." (CX 69 at 1).

Response to Finding No. 1461:

This proposed finding is misleading. (RFF-Reply ¶¶ 1361-1362).

C. Testimony of Former ENH Executives Regarding Merger Creating Market Power

1462. Two former executives of ENH testified that ENH officials were aware that the merger created leverage and market power with health plans. Those two executives are Mark Newton and Terry Chan, and each held management positions with the merging hospitals. (Newton, Tr. 279, 295, 363-64; Chan, Tr. 652-62).

Response to Finding No. 1462:

This proposed finding is irrelevant and, therefore, misleading. (RFF-Reply ¶ 1387).

Additionally, the cited testimony does not support the assertion that "ENH officials were aware that the merger created leverage and market power with health plans." These cites merely list Newton and Chan's qualifications, qualifications that are not adequate enough to make either person an appropriate source to speak credibly on behalf of ENH. Moreover, Newton's testimony should be afforded little weight because he was biased – he is the CEO of a major competitor to ENH, Swedish Covenant Hospital. (RFF-Reply ¶ 1465).

1463. **REDACTED** (Newton, Tr. 351-53, 54, 59-60, 61-62; Chan, Tr. 839, *in camera*; Chan, Tr. 709-10); **REDACTED** (Newton, Tr. 363-64, 365, 66-67; Chan, Tr. 705-06; Chan, Tr. 839-41, *in camera*); **REDACTED** (Newton, Tr. 369-70; Chan, Tr. 696-97; 703).

Response to Finding No. 1463:

This proposed finding is irrelevant and, therefore, misleading. (RFF-Reply ¶¶ 1387, 1462, 1465). Moreover, Newton and Chan's "understanding" is not relevant because it is merely an expression of their personal opinion. For example, Newton testified that "in [his] mind" one of the alleged "benefits" of the Merger was "additional negotiating power and leverage" and he

was not was "personally" concerned that ENH's 2000 negotiations would lose contracts because he "felt" MCOs needed ENH. Newton did not purport to speak on behalf of ENH. (Newton, Tr. 365, 367; Newton, Tr. 354, 359, 361, 363 ("in your own mind," "in your view," and "Perhaps, in my opinion" used to qualify Newton's testimony)). Likewise, Chan testified that she "believed" ENH management knew ENH had more "power" after the Merger and it was "just [her] intuition" that the Merger gave ENH that "power." (Chan, Tr. 709-10).

1464. **REDACTED**

(CX 129 at 1, *in camera*). **REDACTED**

(Holt-Darcy Tr. at 1559-60 *in camera*.). ENH indicated to PHCS that ENH was an "entity controlling all of these communities." (Ballengee, Tr. 176-77 ("they indicated that they already had the market share for these communities.")).

Response to Finding No. 1464:

This proposed finding is misleading because

REDACTED

(Holt-Darcy, Tr. 1579, *in camera*; CX 129 at 1).

REDACTED

(RFF ¶¶ 869-875, *in camera*).

Moreover, Ballengee's "recollection" of conversations from five years ago should be afforded no weight. As discussed in RFF-Reply ¶ 1080, this Court should view with suspicion all testimony by MCO representatives that is not reflected in contemporaneous documents since they have a plain interest in this litigation. (RFF-Reply ¶ 1080). In fact, at trial, Hillebrand testified that he never told Ballengee that ENH had a 60% market share, the claim on which Complaint Counsel partially bases the allegation that ENH was an "entity controlling all of these

communities." (Hillebrand, Tr. 1894). Ballengee's characterizations of ENH comments (to the extent they have any independent relevance – which they do not) are clearly self-serving, uncorroborated and subject to dispute. Therefore, such testimony should be disregarded.

REDACTED

(Mendonsa, Tr. 559, *in camera*; Holt-Darcy, Tr. 1588, *in camera*).

1. Background of the Two Former ENH Executives

1465. During the period 1988 to April 2000, Mark Newton was employed at Highland Park and post-merger at ENH. (Newton, Tr. 279, 295). Mr. Newton's first position at Highland Park Hospital was vice president of planning and marketing. He subsequently took over the duties of senior vice president of business development. (Newton, Tr. 279). Mr. Newton also was involved in meetings on post-merger contract renegotiations between ENH and health plans. Specifically, he participated in several meetings with Bain and senior management of the former Highland Park. (Newton, Tr. 295). Mark Newton was involved in contract renegotiation strategy discussions in the winter of 2000. At least three meetings occurred during this time period. (Newton, Tr. 363-64).

Response to Finding No. 1465:

This proposed finding fails to establish that Newton had the proper experience, responsibilities and foundation to credibly support his testimony about the purposes and effects of the Merger. Specifically, Newton was never more than a vice president of "business affairs" at HPH, he left ENH soon after the Merger and he is now Chief Executive Officer of Swedish Covenant Hospital, an admitted competitor to ENH. (Spaeth, Tr. 2282-83, Hillebrand, Tr. 2028-29, Newton, Tr. 279, 434). Moreover, Newton did not have primary responsibility for Merger strategy, he was excluded from most Merger discussions, he was not primarily responsible for managed care contracting and he never worked for an MCO. (Spaeth, Tr. 2283-84, Newton, Tr. 436, 452-53, 512-13). Newton's credibility is further undermined by his exaggerated and

fanciful testimony, including calling pre-Merger HPH one of the "finest community hospitals in the country," even though the hospital suffered from numerous financial and quality problems. (Newton, Tr. 301; CCFF ¶ 42; RFF-Reply ¶ 42).

REDACTED

(Newton, Tr. 320, 384, 427, 436; Newton, Tr. 512-13, *in camera*). And Newton frequently offered his lay opinion on such subjects as market concentration, market power, and the effect of the Merger on MCO negotiations, all areas properly reserved for experts. (Newton, Tr. 352-55, 361-62). In short, Newton's testimony should be disregarded in its entirety or at the very least treated with extreme caution.

1466. From January 1, 2000, to September 1, 2000, Teresa Chan worked for ENH as assistant vice-president for finance. In this role, Ms. Chan was a member of the managed care contracting team that conducted post-merger negotiations with commercial payers. (Chan, Tr. 651-52). Ms. Chan's involvement during the 2000 post-merger negotiations included contacting health plans, drafting proposals, and analyzing the impact of every contract proposal and negotiation. (Chan, Tr. 663).

Response to Finding No. 1466:

This proposed finding fails to establish that Chan had the proper experience, responsibilities and foundation to credibly support her testimony about the purposes and effects of the Merger. (RFF-Reply ¶¶ 1387, 1462).

2. Former ENH Executives Also Testified That Highland Park and Evanston Faced Pricing Pressures Before the Merger

1467. Pre-merger, Highland Park management was "routinely concerned" about being excluded from a health plan's network. (Newton, Tr. 303).

Response to Finding No. 1467:

This proposed finding is false and misleading. (RFF-Reply ¶¶ 1463, 1465). Newton's "concerns" apparently did not reflect reality because, as he testified at trial, pre-Merger HPH had contracts with virtually all MCOs, with perhaps one or two exceptions. (Newton, Tr. 457).

Moreover, Newton testified that he never felt excluded from MCO contracts because of Evanston Hospital, other than Humana's staff model product. (Newton, Tr. 457; Spaeth, Tr. 2170-71). Spaeth, Newton's superior, confirmed that Evanston Hospital's presence, or the presence of any other hospital in a MCO's network, did not make it more difficult for pre-Merger HPH to gain price increases from that MCO. (Spaeth, Tr. 2176).

1468. MCOs would continually inform Highland Park during negotiations that "other hospitals will fill that bill." (Newton, Tr. 303).

Response to Finding No. 1468:

This proposed finding is vague, unintelligible, misleading and based on unsupported and unreliable hearsay. (RFF-Reply ¶ 1467).

1469. Highland Park management's "fundamental business tenet" was that Highland Park needed to be included in all products for all payors. Exclusion would "diminish [Highland Park's] ability to be successful in the market, would diminish [Highland Park's] ability for patients to come to [Highland Park]." (Newton, Tr. 303-04).

Response to Finding No. 1469:

This proposed finding is misleading. (RFF-Reply ¶ 1465). Pre-Merger HPH was rarely excluded from MCO networks and the presence or absence of other hospitals, including Evanston Hospital, did not make it more difficult for pre-Merger HPH to gain price increases from those MCOs. (Newton, Tr. 457; Spaeth, Tr. 2170-71, 2176).

1470. In order to avoid exclusion, Highland Park management had to be "constrained" in its pricing negotiations. (Newton, Tr. 304).

Response to Finding No. 1470:

This proposed finding is vague and misleading. (RFF-Reply ¶¶ 1465, 1469). This proposed finding is meaningless without a definition of the term "constrained." Moreover, pre-Merger HPH employed especially aggressive tactics, such as commencing negotiations by asking

for discount-off-charges rates and frequently threatening MCOs with termination. (RFF ¶¶ 590-593).

1471. Highland Park management believed that one benefit of growing via merger was that such a strategy "builds negotiating strength with payers." (CX 1869). "[B]y being part of a larger entity, a larger contracting entity, [the merged entity] would collectively have strength with payors." (Newton, Tr. 349).

Response to Finding No. 1471:

This proposed finding is inaccurate, incomplete and misleading. Newton's testimony merely reflects his own opinion. (RFF-Reply ¶¶ 1387, 1463, 1465).

1472. In the mid to late 1990s, Highland Park generally received single digit price increases from health plans. These price increases were less than what Highland Park had requested in negotiations. (Newton, Tr. 356-57).

Response to Finding No. 1472:

This proposed finding is misleading because it ignores the reality of negotiations with MCOs. Since there is a fair amount of bluffing and posturing by both sides, hospitals often do not receive the rate increases they first request. (RFF ¶ 182).

1473. In the mid to late 1990s, Highland Park could not obtain higher price increases because health plans could substitute other hospitals for Highland Park in their networks. These substitute hospitals included Evanston, Rush North Shore, and Lutheran General, among others. (Newton, Tr. 358).

Response to Finding No. 1473:

This proposed finding is false. This proposed finding is based entirely on pure speculation by Newton, who never worked for a MCO and who never had primary responsibility for MCO contracting at HPH. (Newton, Tr. 358; RFF-Reply ¶¶ 1387, 1463, 1465). Indeed, such speculation directly conflicts with testimony from the MCOs themselves and other fact and expert witnesses who testified that: (1) Evanston Hospital and HPH were not each other's closest substitutes because of their very different sizes and services; and (2) MCOs did not play

Evanston Hospital and HPH off one another in pre-Merger negotiations. (RFF ¶¶ 538-587). Newton himself testified that he never felt excluded from managed care contracts because of Evanston Hospital, other than Humana's Staff model product. (Newton, Tr. 457; Spaeth, Tr. 2170-71). Spaeth further confirmed that Evanston Hospital's presence, or the presence of any other hospital in a MCO's network, did not make it more difficult for pre-merger HPH to gain price increases from that MCO. (Spaeth, Tr. 2176).

1474. Prior to the merger, health plans indicated to Ms. Chan that Evanston was a nearby option if they were unsatisfied during rate negotiations with Highland Park Hospital. Before the merger, Evanston was a competitor of Highland Park Hospital. (Chan, Tr. 745).

Response to Finding No. 1474:

This proposed finding is false and based on unreliable evidence. The evidence clearly demonstrated that MCOs did not view Evanston Hospital and HPH as each other's closest substitutes and did not play one off of the other in pre-Merger negotiations. (RFF-Reply ¶¶ 47, 57-58, 1417, 1473). In fact, Chan herself testified that Lake Forest Hospital, not Evanston Hospital, was HPH's closest competitor. (Chan, Tr. 730). Moreover, this proposed finding is based on purported out-of-court statements by third parties who were not subject to cross-examination and, therefore, these statements should be afforded little or no weight.

1475. Before the merger, Highland Park perceived health plans to have greater leverage than Highland Park Hospital. (CX 1908 at 4).

Response to Finding No. 1475:

Respondent has no specific response.

1476. In the late 1990s there was a trend of health plans to "convert any discount off charge contract to per diems." (Chan, Tr. 671).

Response to Finding No. 1476:

This proposed finding is inaccurate and misleading. Chan did not testify that there was a trend from discount-off-charges to per diems. She only testified that MCOs were "trying" to convert to per diems, and did not further testify as to whether MCOs were successful in these attempts as to HPH. This proposed finding also is inaccurate and misleading because Chan did not to testify as to any late 1990s "trend" pertaining to MCO negotiations with hospitals other than HPH because she was not privy to those confidential negotiations. (Chan, Tr. 671).

This proposed finding is further misleading because discount-off-charges continue to be a very common reimbursement methodology. Generally, discount-off-charges are the standard methodology for outpatient services. (RFF-Reply ¶ 799).

REDACTED

(RFF ¶¶ 82-85, *in camera*). Since 2000, Chicago area hospitals have pressed more aggressively for discount-off-charges provisions for inpatient services. (RFF ¶ 86).

REDACTED

(RFF ¶¶ 87-89, *in camera*).

1477. Ms. Chan believes that the higher a hospital increased its rates, the less likely a health plan was to desire that hospital to remain in its network. (Chan, Tr. 699-700).

Response to Finding No. 1477:

This proposed finding concerning Chan's belief should be given no weight. Chan did not work for a MCO and, therefore, this belief is based on pure speculation. (Chan, Tr. 647-48, 650-54).

1478. **REDACTED**
(Chan, Tr. 823-24, *in camera*).

Response to Finding No. 1478:

This proposed finding is incomplete and misleading because it fails to explain that a "higher effective discount" does not necessarily mean a reduction in overall reimbursements.

REDACTED

(Chan, Tr. 783, 790, *in camera*).

REDACTED

(Chan, Tr. 791, *in camera*). Therefore, an overall higher "effective discount" could simply be an indication of HPH raising its prices and not an indication of reduced overall reimbursements.

1479. **REDACTED** (Chan, Tr. 782-83, *in camera*; CX 1095 at 6, *in camera*).

Response to Finding No. 1479:

This proposed finding is incomplete (RFF-Reply ¶ 1478).

1480.

REDACTED

(Chan, Tr. 785-87, *in camera*; CX 1095 at 6, *in camera*).

Response to Finding No. 1480:

REDACTED

(Chan, Tr. 785, *in camera*; CX 1095 at 6, *in camera*).

REDACTED (Chan, Tr. 785-86, *in camera*; *see also* RFF ¶ 93).

REDACTED

(Chan, Tr. 785-86, *in camera*; RFF ¶ 92).

REDACTED

(CX 5068 at 27, *in camera*; Chan, Tr. 785-786, *in camera*; RX 278 at ENH JL 5335, 5338; RFF ¶ 94).

REDACTED

(Chan, Tr. 786, *in camera*).

REDACTED

(Chan, Tr. 787-88, *in camera*).

Finally, this proposed finding is facially overbroad in that it purports to address contract rates and negotiations involving hospitals other than HPH, where Chan worked before the

Merger. Chan did not testify as to other hospital negotiations with MCOs because she had no foundation to so testify. (RFF-Reply ¶ 1477).

1481. **REDACTED** (Chan, Tr. 791-92, *in camera*; CX 439 at 8).

Response to Finding No. 1481:

This proposed finding is incomplete. **REDACTED** (Chan, Tr. 792, *in camera*).

1482. **REDACTED** (Chan, Tr. 794, *in camera*; CX 439 at 8).

Response to Finding No. 1482:

This proposed finding is incomplete and, therefore, misleading because a higher "effective discount" does not necessarily mean a reduction in overall reimbursements. (RFF-Reply ¶ 1478).

REDACTED (Chan, Tr. 794, *in camera*; CX 439 at 8).

1483. **REDACTED** (Chan, Tr. 795-96, *in camera*).

Response to Finding No. 1483:

This proposed finding is misleading. First, Chan could not, and did not, testify as to general MCO trends because she did not have an adequate foundation to so testify and because she was not qualified to testify as a managed care expert. (RFF-Reply ¶ 1477, 1480).

REDACTED

REDACTED (Chan, Tr. 650-51, 796, *in camera*).

1484. **REDACTED** (Chan, Tr. 820, *in camera*; CX 1099 at 1-67, *in camera*).

Response to Finding No. 1484:

This proposed finding is misleading because it mischaracterizes Chan's testimony. (RFF-Reply ¶ 1399).

1485. Before the merger, Highland Park felt that a merger or acquisition with another hospital could increase Highland Park's "negotiating strength" with health plans. (CX 1869 at 7 (LHS Strategic Planning Retreat, 9/2/98)).

Response to Finding No. 1485:

The proposed finding is misleading because the cited Strategic Planning Retreat document was authored by Newton. (RFF-Reply ¶¶ 1387, 1463, 1465). Newton was tasked with assisting the development of Merger strategy and options, but he was not primarily responsible for their development or implementation. (Spaeth, Tr. 2283). Spaeth and HPH Chairman Neele Stearns had that responsibility and both confirmed that building "negotiating strength" with MCOs was not a make-or-break reason for the Merger. (Spaeth, Tr. 2187, 2283; CX 6305 at 13-14 (Stearns, Dep.)).

3. Former ENH Executives Admitted That Market Power and Leverage over Health Plans Were Attributable to the Merger

1486. At the time of the merger, the merging parties' executives believed that the proposed Evanston merger would increase the merged entity's negotiating leverage with the health plans. (Newton, Tr. 359-60). The merging parties' executives believed that the merged entity's negotiating leverage would increase despite the existence of non-ENH facilities relatively nearby. Employers with employees in the merged entity's communities would find it "very difficult" to notify their employees that the ENH facilities were not in the network. (Newton, Tr. 362).

Response to Finding No. 1486:

This proposed finding is false and misleading. This proposed finding is supported solely by the testimony of Newton, who was not a credible witness. First, Newton has an obvious interest in this litigation as the CEO of a major competitor to ENH. And second, Newton's testimony speaks only for Newton, not HPH management or employers. Such testimony should be given no weight because it is pure speculation. Finally, this proposed finding and the cited testimony is overly vague and thus meaningless. (RFF-Reply ¶¶ 1387, 1462-1463, 1465).

1487. From Highland Park's perspective, Evanston presented the best combination to generate negotiating strength. Evanston's two hospitals and Highland Park "form a triangle . . . within this market of these really affluent communities . . . These organizations together would have a significant market penetration in these very affluent, attractive communities." (Newton, Tr. 351-52). Highland Park believed this would lead to increased prices from health plans. (Newton, Tr. 359-60).

Response to Finding No. 1487:

This proposed finding is false and misleading. This proposed finding is supported solely by the testimony of Newton, who was not a credible witness. Newton's testimony, especially the testimony concerning the purported relevance of the "triangle," is supported by no contemporaneous documents, and no witness testified that this term was ever used before the Complaint in this action was filed. To be sure, the concept of this "triangle" was made up by Complaint Counsel for purposes of this litigation, and Newton clearly was prepared by Complaint Counsel to use this term at trial. Such testimony, therefore, should be given no weight. (RFF-Reply ¶¶ 1387, 1462-1463, 1465).

1488. The combination of Highland Park and Evanston would have more bargaining strength as compared to combinations of Highland Park and other institutions. The factors pushing in this direction include proximity of institutions, cultural relationships existing in the community, and placement of medical staffs, among others. (Newton, Tr. 354).

Response to Finding No. 1488:

This proposed finding is false and misleading. This proposed finding is supported solely by the testimony of Newton, who was not a credible witness. Newton's testimony reflects improper lay opinion; he was not qualified as an expert witness. Newton had no foundation to testify about "bargaining strength," and his testimony concerning hypothetical combinations of HPH and other institutions amounts to pure speculation. He also had no foundation to testify about "cultural relationships" and the "placement of medical staffs." Such testimony, therefore, should be given no weight. (RFF-Reply ¶¶ 1387, 1462-1463).

1489. According to Mr. Newton, "essentially, what we were looking for here is how concentrated could this market be for us." (Newton, Tr. 353-54).

Response to Finding No. 1489:

This proposed finding is vague and misleading. This proposed finding is supported solely by the testimony of Newton, who was not a credible witness. Newton's testimony is vague because he does not explain who he is referring to as "we," nor does he define what he means by "concentrated." Moreover, Newton does not have the proper foundation or credentials to testify on behalf of HPH. Such testimony, therefore, should be given very little, if any, weight. (RFF-Reply ¶¶ 1387, 1462-1463, 1465).

1490. The geographic placement of ENH's three hospitals, which are concentrated in the North Shore's extremely affluent communities, gave ENH immense influence and power with the health plans. (Newton, Tr. 361-62). The merger between Evanston and Highland Park gave ENH "more power than it had before the merger." (Chan, Tr. 705-06).

Response to Finding No. 1490:

This proposed finding is false and misleading. The first sentence of this proposed finding is supported solely by the testimony of Newton, who was not a credible witness. Newton's testimony reflects improper lay opinion; he was not qualified as an expert witness. In particular,

Newton had no foundation to testify about how the Merger purportedly "gave ENH immense influence and power with health plans." He never worked for a MCO and he was not primarily responsible for HPH's managed care negotiations. Such testimony, therefore, should be given no weight. (RFF-Reply ¶¶ 1387, 1462-1463, 1465).

Moreover, this proposed finding mischaracterizes Chan's testimony. She testified that Evanston Hospital had a "lock" on the North Shore before the Merger because it was a very "desirable" hospital. (Chan, Tr. 705). She further testified that HPH "could not replace" Evanston Hospital, and that Evanston Hospital's true competitors were hospitals like Northwestern Memorial and Advocate Lutheran General. (Chan, Tr. 706; RFF-Reply ¶ 1491).

1491. Terry Chan testified that ENH insisted on certain rates after the merger, because it increased its negotiation power through the merger, and had more leverage. (Chan, Tr. 710). She believes that ENH had "more leverage" to insist on certain rates from health plans because of the merger. (Chan, Tr. 709-10).

Response to Finding No. 1491:

This proposed finding is false and misleading. (RFF-Reply ¶ 1387, 1462-1463). Again, Chan testified, and Complaint Counsel acknowledges in this proposed finding, that she was purely speculating and thus testified only as to her personal "belie[fs]" concerning the effect of the Merger. She clarified that it was "just [her] intuition" that the Merger gave ENH more "leverage." (Chan, Tr. 709-10). She did not hear anyone say anything along these lines during her meetings with ENH's negotiating team. (Chan, Tr. 710). Nor did she make any such statements to MCOs. (Chan, Tr. 709). Finally, she testified that whatever "power" or "leverage" the Merger generated was minimal. (RFF-Reply ¶ 1490).

1492. **REDACTED**
(CX 1607 at 5, *in camera*).

REDACTED
(Chan, Tr. 839-40, *in camera*).

Response to Finding No. 1492:

This proposed finding is misleading.

REDACTED

(Chan, Tr. 839, *in camera*). Bain likely calculated ENH's rough share of its "core," a sub-market that is too small to sustain ENH's business and, therefore, is of little relevance to the hospital. (RFF-Reply ¶¶ 49, 57).

REDACTED

(RX 1331 at ENHE DL 11883, *in camera*; RFF-Reply ¶ 65, *in camera*).

1493. **REDACTED**

(Chan, Tr. 839, *in camera*).

REDACTED

(Chan, Tr. 840-41, *in camera*; CX 1607 at 5, *in camera*)

Response to Finding No. 1493:

This proposed finding is incomplete and misleading.

REDACTED

(Chan, Tr. 840, *in camera*). This proposed finding is further misleading because it incorrectly presupposes that the "core" market at issue has any relevance to this litigation. (RFF-Reply ¶¶ 49, 57, 1492).

1494. Ms. Chan did not hear any health plans say during negotiations that they would not pay the ENH post-merger increase, or that they would move patients to St. Francis or Rush North Shore hospitals. (Chan, Tr. 703).

Response to Finding No. 1494:

This proposed finding is irrelevant because it is based on testimony that was not offered for the truth of the matter asserted. (Chan, Tr. 703). This proposed finding is also misleading. The MCOs were more willing to accept many of ENH's proposals because they acknowledged that ENH was under-market and required a catch-up. (Mendonsa, Tr. 533-34, 564, *in camera;* Holt-Darcy, Tr. 1579, *in camera*; CX 129 at 1; RFF ¶ 884). Moreover, because MCOs rarely employ selective contracting in Chicago, they were not likely to have threatened ENH with promises to move patients to competing hospitals. (RFF-Reply ¶¶ 9, 195-283).

1495.

REDACTED

(CX 129 at 1, *in camera*).

REDACTED

Holt-Darcy, Tr.1559-60, *in camera*).

Response to Finding No. 1495:

This proposed finding is incomplete, inaccurate and misleading. (RFF-Reply ¶ 1464).

1496. ENH indicated to PHCS that ENH was an "entity controlling all of these communities." (Ballengee, Tr. 176-77 ("they indicated that they already had the market share for these communities.")).

Response to Finding No. 1496:

This proposed finding is incomplete, inaccurate and misleading. (RFF-Reply ¶ 1464).

4. Former ENH Executives Admitted That a Merger Plan Was to Use Power Attributable to the Merger to Increase Prices

1497.

REDACTED

(Chan, Tr. 834, *in camera*; Hillebrand, Tr. 1868).

Response to Finding No. 1497:

This proposed finding is misleading because it fails to explain fully why Evanston Hospital/ENH decided to concentrate first on United negotiations. After the due diligence revealed that HPH had much better rates in its United contract than did Evanston Hospital, and Bain determined that Evanston Hospital was losing money on its United contract, the parties determined that they should ask United for a one-time corrective catch-up and then use that negotiation as the benchmark for future MCO negotiations. (RFF ¶¶ 707-708, 884-885).

Evanston Hospital/ENH also concentrated first on United renegotiations because the then-existing United contract suffered from claims issues that made reimbursement a "mess." (Hillebrand, Tr. 1870-71). Evanston Hospital was commonly paid under the wrong contract terms, by the wrong system, and for the wrong product. (Hillebrand, Tr. 1871).

1498. The pricing strategy was based on the "additional negotiating power and leverage with the payors" due to the ENH-Highland Park merger. (Newton, Tr. 365).

Response to Finding No. 1498:

This proposed finding is false and misleading. This proposed finding is supported solely by the testimony of Newton, who was not a credible witness. Newton's testimony reflects improper lay opinion; he was not qualified as an expert witness. Newton had no foundation to testify about "additional negotiating power and leverage with the payors" allegedly resulting from the Merger. Such testimony, therefore, should be given no weight. (RFF-Reply ¶¶ 1387, 1462-1463, 1465).

Finally, Newton's testimony is irrelevant because it merely reflects what he purportedly thought "in [his] mind" and, therefore, does not purport to represent the contemporaneous "pricing strategy" of ENH. (Newton, Tr. 365).