

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

In the matter of)
)
)

**Evanston Northwestern Healthcare
Corporation,**)
a corporation, and)

ENH Medical Group, Inc.,)
a corporation.)
)
)
_____)

Docket No. 9315

PUBLIC VERSION

**COMPLAINT COUNSEL'S RULE 3.24 STATEMENT OF
MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE**

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October 27, 2004

Pursuant to Section 3.24 of the Commission's Rules of Practice, in connection with its Motion for Partial Summary Decision, Complaint Counsel submits its statement of material facts as to which there is no genuine issue.

Respondents

1. Evanston Northwestern Healthcare ("ENH") is a non-profit corporation organized, existing and doing business under, and by virtue of, the laws of Illinois, with its office and principal place of business located at 1301 Central Street, Evanston, Illinois 60201. First Amended Answer at ¶ 4 (Tab 1).

2. ENH Faculty Practice Associates ("Faculty Practice Associates") is a non-profit corporation organized, existing and doing business under, and by virtue of, the laws of Illinois, with its office and principal place of business located at 1301 Central Street, Evanston, Illinois 60201. First Amended Answer at ¶ 7 (Tab 1); CX 716 at 1 (Tab 16).

3. ENH is the sole member or owner of Faculty Practice Associates. First Amended Answer at ¶7 (Tab 1).

4. ENH Medical Group, Inc. ("ENH Medical Group") is a for-profit corporation organized, existing, and doing business under, and by virtue of, the laws of Illinois, with its office and principal place of business located at 1301 Central Street, Evanston, Illinois 60201. First Amended Answer at ¶ 8 (Tab 1).

5. Faculty Practice Associates is the sole shareholder of ENH Medical Group. First Amended Answer at ¶8 (Tab 1).

Jurisdiction

6. ENH Medical Group is, and at all relevant times has been, engaged in commerce

within the meaning of the Federal Trade Commission Act. Stipulation Regarding Interstate Commerce at ¶ 1 (Tab 2).

Health Care Industry

7. Most people in the United States, not covered by government programs, participate in health insurance plans, generally through their employer. Insurance companies develop health plans and market them to employers to meet the need for medical services.

8. In developing health plans, insurance companies contract with health providers, including doctors and hospitals, to insure people using the health plans have access to needed health care. The contract between the insurance company and the doctor sets forth the terms under which the doctor will furnish services to an enrolled beneficiary of the health insurance plan and the payment that the doctor will receive for providing those services.

9. Often, an insurance company's payment for services is on a "fee-for-service" basis. A fee-for-service arrangement is one in which the doctor charges separately for each service that is provided to an enrollee, no matter how often such service is provided. Gutmann Dep. Tr. at 60 (Tab 56); Hochberg Dep. Tr. at 67-68 (Tab 61); Katz Dep. Tr. 43-44 (Tab 63).

10. A common formula for determining fee for service payments is Medicare's Resource Based Relative Value System ("RBRVS"), a Medicare system that prospectively sets payment amounts for specific doctor services. First Amended Answer ¶ 41 (Tab 1); see 42 U.S.C. § 1395w-4. The fee-for-service prices agreed to between insurance companies and doctors are often specified as some percentage of the RBRVS fee, *e.g.*, "110% of RBRVS." First Amended Answer ¶ 41 (Tab 1).

11. Doctors and insurance companies negotiate whatever price is mutually acceptable

for doctors services. Mittleman Dep. Tr. at 46-47 (**Tab 57**).

12. Another type of contract used by insurance companies and doctors is based one based upon a capitated rate. A capitated rate is a fixed, predetermined payment per covered life that the insurance company pays to a physician group in exchange for the group's providing services to covered individuals for a specified period of time, regardless of the amount of services actually provided. 1996 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002), 1563 at 1592 fn 30.

13. Doctors have a variety of business models for the provision of services. In some instances, doctors work as employees of a corporation. *See e.g.*, First Amended Answer at ¶ 35. The corporation negotiates the contracts with the insurance companies for the provision of physician services, and pays a salary to the doctors it employs. *Id.*

14. Doctors may also establish their own businesses – usually as sole practitioners or partnerships or professional corporations with other doctors. *See e.g.*, Katz Dep. Tr. at 7-8 (**Tab 63**); Hochberg Dep. Tr. at 7-9 (**Tab 61**).

15. As separate business entities, doctors -- just like GM and Ford -- compete against each other, among other things, on the prices they will accept from insurance companies.

The ENH Doctors and Highland Park Doctors

16. In January 2000, Respondent Evanston Northwestern Healthcare Corporation (“ENH”), which then owned two hospitals (located in Evanston and Glenbrook), merged with Highland Park Hospital. First Amended Answer at ¶ 1 (**Tab 1**).

17. ENH Medical Group, a for-profit, independent practice association (or IPA), in

2000 represented approximately 860 doctors. CX 1383 at 4 (**Tab 26**).

18. Approximately 400 of the doctors who belonged to ENH Medical Group in 2000 (“ENH Doctors”) were employees of ENH Medical Group’s parent company, Faculty Practice Associates. CX 1383 at 2 (**Tab 26**).

19. In addition to the employed doctors, there were approximately 460 other doctors who belonged to ENH Medical Group (collectively, the “Independent Doctors”) in 2000. CX 1383 at 2, 4 (**Tab 26**). ENH Medical Group refers publicly to the independent doctors as affiliated doctors in contrast to its employed doctors. First Amended Answer ¶ 36 (**Tab 1**); Gutmann Dep. Tr. at 20-21 (**Tab 56**).

20. ENH Medical Group has no ownership interest in the practices of the Independent Doctors. Hochberg Dep. Tr. at 22 (**Tab 61**); Burstein Dep. Tr. at 8 (**Tab 60**). The Independent Doctors are self-employed independent businesses – solo practitioners or members of a group physician practice. Golbus IH Tr. at 32-33 (**Tab 70**); Chan IH Tr. at 26 (**Tab 72**); Gutmann Dep. Tr. at 20-21 (**Tab 56**).

21. Prior to the ENH merger, approximately 320 of the 460 Independent Doctors belonged to Highland Park Independent Practice Associates, Inc. (known as Highland Park IPA). CX 1332 at 4 (**Tab 23**).

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

23. The ENH Doctors and the Independent Doctors “absolutely” compete against each other, and the Independent Doctors compete among themselves. Levine IH Tr. at 35, 38 (**Tab**

71). Jodi Levine was Vice President of ENH Medical Group. *Id.* at 9.

24. The ENH Doctors and the Independent Doctors practice in close geographic proximity to each other. Levine IH Tr. at 32-33 (**Tab 71**).

25. There is no other hospital located inside the triangular region formed by Highland Park Hospital, Glenbrook Hospital, and Evanston Hospital. Foucre IH Tr. at 68 (**Tab 75**).

26. Before the price fixing agreement, when the ENH Doctors and the Independent Doctors from Highland Park were in competition, ENH Medical Group sought to expand its reach by acquiring three medical offices in towns in which the Independent Doctors from Highland Park primarily practiced. CX 105 (**Tab 6**); CX 490 (**Tab 14**). *See also* Neaman Dep. Tr. at 186-87 (**Tab 58**); Stearns Dep. at 97-98 (**Tab 59**); Newton Dep. at 123-25 (**Tab 68**); Golbus IH at 19-29 (**Tab 70**).

27. The ENH Doctors and the Independent Doctors provide comparable medical services, mostly in primary care medicine but also in specialties such as cardiology, gastroenterology, and infectious disease. CX 1142 (**Tab 19**); Gutmann Dep. Tr. at 28-29 (**Tab 56**); Katz Dep. Tr. at 18-20 (**Tab 63**); Hochberg Dep. Tr. at 51-52 (**Tab 61**); Burstein Dep. Tr. at 9 (**Tab 60**); Moller Dep. Tr. at 126-27 (**Tab 65**).

28. Patients are free to choose any of doctors in ENH Medical Group, including the ENH Doctors and the Independent Doctors (as well as among the Independent Doctors). Burstein Dep. Tr. at 9 (**Tab 60**); Hochberg Dep. Tr. at 51-52 (**Tab 61**); Katz Dep. Tr. at 18-20 (**Tab 63**); Nora Dep. Tr. at 10-11 (**Tab 66**); Cohen Dep. Tr. at 30 (**Tab 67**).

29. Prior to the hospital merger, through their separate independent practice associations, the Independent Doctors competed with the ENH Doctors (and among themselves) for

business with insurance companies.

30. In October 1998, the Highland Park IPA's annual report about the state of "competition" observed that [REDACTED] by acquiring nearby sites, the "consequences" of which was that the Highland Park IPA's [REDACTED] [REDACTED] CX 1347 at 7 (Tab 25).

31. In June 1997, Highland Park Healthcare's Board noted that among the factors contributing to the recent decline in managed care enrollment for the IPA between December 1996 and May 1997 was [REDACTED] [REDACTED] CX 1335 at 11 (Tab 24).

The Price-Fixing Agreement

32. In November of 1999, in anticipation of the completion of the hospital merger, the independent doctors of Highland Park Hospital, through their IPA, entered into an Integration Agreement with ENH Medical Group whereby they agreed [REDACTED] [REDACTED] [REDACTED] [REDACTED] CX 1090 at 1-2, 5-7 (Tab 17).

33. Joseph Golbus, President of ENH Medical Group and Faculty Practice Associates, agreed that after signing the Integration Agreement the independent doctors would [REDACTED] [REDACTED] for insurance company contracts. Golbus Dep. Tr. at 299 (July 8, 2004)(Tab 53).

34. The Independent Doctors signed a Participating Physician Service Agreement ("Participation Agreement") in order to become "affiliated" with ENH Medical Group. CX 1147 (Tab 20); CX 1156 (Tab 21); CX 1503 (Tab 33); CX 1504 (Tab 34); CX 1710 at 1(Tab 37).

The Participating Agreements signed by the Independent Doctors are substantially similar to CX 1503 and CX 1504, including with regard to Sections 2.9, 3.3, 5.8, and Exhibit C. Spriggs-Hutchinson Decl. at ¶ 3 (Tab 52).

35. Pursuant to the Participating Agreement, [REDACTED]

[REDACTED]

[REDACTED]

E.g., CX 1503 at 7 (Provision 2.9), 9 (Provision 3.3) and 22 (Exhibit C)(Tab 33).

36. The Participating Agreement [REDACTED]

[REDACTED] CX 1503 at 22 (Tab 33);

see also CX 1710 (Tab 37); Golbus Dep. Tr. at 33-34 (July 9, 2004)(Tab 54). Over [REDACTED] of the independent doctors who signed a Participating Agreement with ENH Medical Group chose to participate in the fee-for-service contracts negotiated by ENH Medical Group. Spriggs-Hutchinson Decl. at ¶ 5 (Tab 52).

37. Provision 5.8 of the Participation Agreement sets forth that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *E.g.*, CX 1503

at 12 (Provision 5.8)(Tab 33).

38. [REDACTED]

[REDACTED] *See e.g.*, Hochberg Dep. Tr. at 77-78 (Tab 61); Katz Dep. Tr. at 58 (Tab 63).

39. ENH Medical Group also asked the Independent Doctors from Highland Park Hospital to sign a standardized letter (addressed "To Whom it May Concern"). CX 1710 at 1 (Tab 37); CX 1714 (Tab 38); CX 1745 (Tab 40).

40. In the standardized letter, each doctor who signed the letter stated that he or she terminates any current contracts and would henceforth participate only in those managed care contracts held by ENH Medical Group. *E.g.*, CX 1710 at 2 (Tab 37); CX 1714 (Tab 38); CX 1745 (Tab 40).

41. [REDACTED]

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

42. Terry Chan, the chief managed care contract negotiator for the Independent Doctors from Highland Park Hospital, wrote that [REDACTED]

[REDACTED] CX 440 at 1 (Tab 11).

43. Dr. Burstein, the President of the Highland Park IPA, stated that [REDACTED]

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

44. Dr. Gutmann, one of the ENH Doctors who has served on several management committees for ENH Medical Group, including a managed care contracting committee, believes that one or two physicians negotiating with a health plan are [REDACTED]

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

45. In connection with negotiating with an insurance company, a June 2000 e-mail

from Terry Chan to ENH Medical Group management stated: [REDACTED]

[REDACTED]

CX 450 at 1 (Tab 12).

46. As Terry Chan noted in a memo to ENH Medical Group management, having doctors participate in individual contracts with an insurance company would [REDACTED]

[REDACTED] CX 440 at 1 (Tab 11).

The Fruits of the Price-Fixing Agreement

47. Through ENH Medical Group, the doctors exchanged contract information to see who had the better prices. CX 1481 at 2-4 (Tab 31); CX 1516 at 16 (Tab 35). Compare CX 2202 (Tab 43) and CX 1536 (Tab 36) (Independent Doctors at Highland Park demanded to be paid under existing contract negotiated by ENH Medical Group) with CX 260 (Tab 8) and CX 2201 (Tab 42) (ENH Doctors demanded to be paid under existing contract negotiated by Independent Doctors at Highland Park).

48. After the Independent Doctors from Highland Park Hospital became affiliates of ENH Medical Group, the group established targets of {140%} of RBRVS and minimum prices of {130%} of RBRVS in connection with fee-for-service health plans. CX 416 at 1 (Tab 9); Golbus IH Tr. at 152-53 (Tab 70); Levine IH Tr. at 198-200 (Tab 71).

49. After the Independent Doctors at Highland Park Hospital joined ENH Medical Group, the group renegotiated contracts with insurance companies. First Amended Answer at ¶ 43 (Tab 1); CX 1156 (Tab 21); Burstein Dep. Tr. at 54-55 (Tab 60).

50. ENH Medical Group negotiated with [REDACTED] in early 2000. CX 2208 (Tab 45). ENH Medical Group's negotiation with [REDACTED] in January 2000 increased

doctor revenues by about [REDACTED] per year. CX 27 at 6 (Tab 4); CX 28 (Tab 5); CX 416 (Tab 9).

51. At the conclusion of contract negotiations with [REDACTED], ENH Medical Group reported to its doctors on its success in obtaining [REDACTED] [REDACTED] CX 1385 at 1 (Tab 27).

52. In addition to the [REDACTED] contract, ENH Medical Group successfully renegotiated more contracts throughout the year 2000. CX 27 at 6 (Tab 4); CX 28 (Tab 5); CX 2206 (Tab 44); CX 2211 (Tab 46).

53. In 2000, the fee-for-service managed care contracts negotiated by ENH Medical Group contained price increases that ranged from [REDACTED] to [REDACTED] for contracts based on Medicare RBRVS and from [REDACTED] to [REDACTED] for contracts based on percentage of charges. CX 27 at 6 (Tab 4); CX 28 (Tab 5).

54. In 2000, ENH Medical Group negotiated an increase in the price for Private Health Care System's PPO from [REDACTED] of Medicare RBRVS to 140%. CX 28 (Tab 5); Golbus IH Tr. at 154-55 (Tab 70); First Amended Answer at ¶43a (Tab 1).

55. In 2000, ENH Medical Group negotiated an increase in the price for United's PPO from [REDACTED] of Medicare RBRVS to 140%, and an increase of [REDACTED] for United's HMO. CX 28 (Tab 5); First Amended Answer at ¶43b (Tab 1).

56. In 2000, ENH Medical Group negotiated a [REDACTED] increase in the price for Aetna's PPO. CX 27 at 6 (Tab 4); CX 28 (Tab 5).

57. In 2000, ENH Medical Group negotiated an increase in the price of CIGNA's PPO from 135% of Medicare RBRVS to 150%. For CIGNA's HMO, the contracts increased

from [REDACTED] of Medicare RBRVS to 135%. CX 28 (Tab 5); First Amended Answer at ¶43d (Tab 1).

58. ENH Medical Group negotiated price increases throughout the year 2000 that amounted to approximately [REDACTED] in increased annual revenues for the doctors. CX 17 at 1 (Tab 3).

59. In late 2003, ENH Medical Group sent a letter to at least one insurance company offering it the option of canceling its existing fee-for-service contracts. CX 2212 (Tab 47).

60. [REDACTED]

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

Lack of Integration Among the Doctors

61. Fee-for-service contracts do not create financial integration among doctors because they are “no risk” contracts. In a fee-for-service arrangement, it is the insurance companies (and the enrollees to the extent that deductibles and co-payments are required) who bear the risk that enrollees will require medical treatment. Coyle Dep. Tr. at 22-23 (Tab 64); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 340 n. 9 (1982).

62. In contrast, in an integrated risk-sharing arrangement (e.g. a capitated contract), the doctors as a group collectively receive a fixed total payment for all services the enrollees may require, regardless of the aggregate services the enrollees ultimately need. Such risk-sharing provides incentives to doctors in a network to cooperate in controlling costs and improving quality by managing the provision of services. *See* 1996 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002), 1563 at 1592.

63. ENH Medical Group refers to fee-for-service contracts as [REDACTED] contracts. CX 1113 at 2 (Tab 18); Golbus Dep. Tr. at 114 (July 8, 2004)(Tab 53); Mittleman Dep. Tr. at 172-73 (Tab 57).

64. The ENH Doctors and the Independent Doctors do not share costs, profits, losses or risk under the fee-for-service contracts, and the compensation that the Independent Doctors receive under ENH Medical Group's fee-for-service contracts does not depend on the performance of either an ENH Doctor or the other Independent Doctors. Golbus IH Tr. at 41-43 (Tab 70); *see also* CX 1503 at 4 (Tab 33).

65. A 2003 ENH Medical Group strategy document states that in the context of fee-for-fee contracting, [REDACTED] [REDACTED] CX 1113 at 2 (Tab 18).

66. ENH Medical Group has advised insurance companies that it [REDACTED] [REDACTED] [REDACTED] CX 455 at 1 (Tab 13).

67. As of June 2003, there were [REDACTED] fee-for-service contracts compared to [REDACTED] capitated contracts. Golbus IH Tr. at 38 (Tab 70). Fee-for-service contracts constitute over [REDACTED] of the revenues of ENH Medical Group. Golbus IH Tr. at 61 (Tab 70).

68. There has been no clinical integration in connection with the fee-for-service contracts negotiated by ENH Medical Group. Levine Dep. Tr. at 15, 225-26 (Tab 55).

69. In late 2002, management realized that ENH Medical Group had never broached the topic of clinical integration, and absent such clinical integration programs, its contracting practices could be viewed as illegal. CX 1457 (Tab 30); CX 1433 (Tab 28); CX 1113 (Tab 18);

Golbus Dep. Tr. at 115-16 (July 8, 2004)(**Tab 53**).

70. It was not until November of 2002 that ENH Medical Group's management first urged the development of an [REDACTED] including estimates of number of affiliates willing to clinically integrate." CX 1500 at 2 (**Tab 32**).

71. In December of 2002, an [REDACTED] was introduced to management, but the memo states that ENH Medical Group did [REDACTED]

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

72. It was not until March of 2003 that the Participating Agreement with the Independent Doctors nominally required participation in any clinical integration programs that ENH Medical Group might adopt and implement. *E.g.*, CX 1742 at 12 (Provision 2.13)(**Tab 39**).

73. Even after the clinical integration requirement was included in the Participating Agreement, some doctors were not aware that ENH Medical Group had any clinical integration program. L. Benson IH Tr. at 45-48 (**Tab 74**); M. Benson IH Tr. at 78-80 (**Tab 73**).

74. Efforts to develop and implement clinical integration plans ultimately failed, and in early 2004, ENH Medical Group abandoned the clinical integration efforts. Gutmann Dep. Tr. at 128-29 (**Tab 56**).

75. [REDACTED]

[REDACTED] Gutmann Dep. Tr. at 136 (**Tab 56**).

76. ENH Medical Group's [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] CX 1433 (Tab 28); CX 1456 (Tab 29); CX 1457 (Tab 30).

77. [REDACTED]

[REDACTED] Golbus IH Tr. at 193-96 (Tab 70).

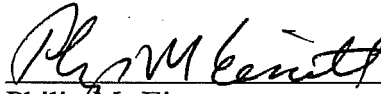
Respondents' Knowledge of the Investigation

78. On approximately [REDACTED] the Federal Trade Commission sent a letter to Evanston Northwestern Healthcare informing the hospital that the Commission was conducting an investigation into the merger of Evanston Northwestern Healthcare and Highland Park Hospital. CX 2213 (Tab 48).

79. On approximately [REDACTED] the Federal Trade Commission faxed an advance draft of the subpoena duces tecum and civil investigative demand to counsel representing ENH, in which the FTC asked for, among other things, [REDACTED]
[REDACTED] CX 2214 (Tab 49).

80. ENH Medical Group management personnel also had notice of the FTC's investigation into ENH at least as early as September 26, 2002, through an article in the Wall Street Journal. CX 139 (Tab 7).

Respectfully submitted,



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DATED: October 27, 2004.

CERTIFICATE OF SERVICE

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

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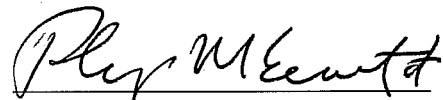
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