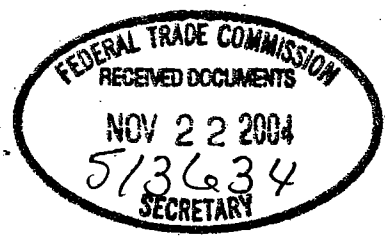
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of EVANSTON NORTHWESTERN HEALTHCARE CORPORATION, and ENH MEDICAL GROUP, INC., Respondents.	)	Docket No. 9315

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

I. PROCEDURAL BACKGROUND

On October 26, 2004, Complaint Counsel filed a Motion for Partial Summary Decision on Count III of the Complaint, a Memorandum in support thereof ("Motion"), and a Separate Statement of Material Facts as to Which There is No Genuine Issue ("Complaint Counsel's Statement of Facts"). On November 15, 2004, Respondents Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc. ("ENH" or "Respondents") filed their Opposition to Complaint Counsel's Motion for Partial Summary Decision on Count III of the Complaint, a Memorandum in support thereof ("Opposition"), and their Response to Complaint Counsel's Statement of Material Facts ("Respondents' Statement of Facts").

For the reasons set forth below, Complaint Counsel's motion for partial summary decision is **DENIED**.

II. POSITIONS OF THE PARTIES

In its motion for partial summary decision, with attached exhibits and sworn statements, Complaint Counsel asserts that the evidence will show that Respondent entered into a contract, combination, or conspiracy among separate entities to fix prices. Motion at 6-9, 15-17. Complaint Counsel contends that Respondents' price fixing conspiracy unreasonably restrained trade; collusive price fixing is *per se* illegal in the absence of a legitimate procompetitive

justification for the activity; there are limited legitimate justifications for otherwise illegal collusive conduct, none of which are present here; and Respondents did not share substantial financial risk and did not engage in clinical integration. Motion at 9-13, 17-22.

In its opposition to the motion for partial summary decision, with attached exhibits and sworn statements, Respondents assert that disputed issues of material facts preclude granting Complaint Counsel's motion for partial summary decision. Motion at 21-22. Respondents argue that there is no horizontal agreement between competitors to fix prices and thus their conduct is not inherently suspect; the activities of Respondents produce plausible and cognizable efficiencies, precluding the grant of summary decision; Complaint Counsel's purported pricing evidence does not demonstrate an anticompetitive effect; and equitable relief is not necessary to address the allegations in Count III. Opposition at 22-43.

III. SUMMARY DECISION STANDARD

Commission Rule of Practice 3.24(a)(2) provides that summary decision "shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." 16 C.F.R. § 3.24(a)(2). Commission Rule 3.24(a)(3) provides that once a motion for summary decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. § 3.24(a)(3). These provisions are virtually identical to the provisions governing summary judgment in the federal courts under Rule 56 of the Federal Rules of Civil Procedure; the Commission applies its summary decision rule consistent with case law construing Fed. R. Civ. P. 56. *In re Kroger Co.*, 98 F.T.C. 639, 726 (Sept. 25, 1981); *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (Mar. 9, 1972).

The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

Once the moving party has properly supported its motion for summary judgment, the nonmoving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The nonmoving party may not rest on mere allegations or denials of its pleading but must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 587 (quoting Fed. R. Civ. P. 56(e)). *See also Liberty*

Lobby, 477 U.S. at 256. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita,* 475 U.S. at 587. Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *State of New York v. Amfar Asphalt Corp.*, 1986 WL 27582, at *2 (E.D.N.Y. 1986); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 613, 618 (D.D.C. 1984).

IV. GENUINE ISSUES OF MATERIAL FACT EXIST

The determination of whether Respondents engaged in a contract, combination, or conspiracy and whether there was an unreasonable restraint of trade requires determination of disputed material facts. The disputed material facts raised by Complaint Counsel's motion and Respondents' opposition cannot be resolved without an evidentiary hearing.

A. Contract, Combination, or Conspiracy

"An antitrust plaintiff may prove the existence of a combination or conspiracy by providing either direct or circumstantial evidence sufficient to 'warrant a . . . finding that the conspirators have a unity of purpose or common design and understanding or a meeting of the minds in an unlawful arrangement.'" *ES Development, Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547, 554 (8th Cir. 1991) (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

Complaint Counsel asserts that evidence of a contract, combination, or conspiracy is found in the Participating Physician Agreement signed by the doctors and "To whom it may concern" letters signed by some of the physicians in 2000. Motion at 6-8. Respondents contend that the physicians did not agree to adhere to a set price; the "To whom it may concern" letters were prepared at the request of payors; and that the physicians are not horizontal competitors. Motion at 24-28. Both parties cite specific facts in support of their arguments. *See* Complaint Counsel's Statement of Facts; Respondents' Statement of Facts.

Among the factual questions raised by the pleadings and not resolved by Complaint Counsel's motion are whether Respondents agreed to fix prices; the impact of the "To whom it may concern" letters; and whether Respondents are horizontal competitors. For example, Complaint Counsel claims that Respondents' physicians "compete against each other." Complaint Counsel's Statement of Facts at 5-6. Respondents claim that this "is simply not true" and that physicians from different specialties are not in competition with each other. Respondents' Statement of Facts at 8-9. Viewing the evidence in the light most favorable to Respondents, the nonmoving party, there exist genuine issues of material fact regarding whether there was a contract, combination, or conspiracy.

B. Unreasonable Restraint of Trade

Complaint Counsel argues that under *PolyGram Holding*, if "conduct is 'inherently suspect,' the defendant 'can avoid summary condemnation only by advancing a legitimate justification for those practices.'" Motion at 18 (quoting *In re PolyGram Holding, Inc.*, 2003 FTC LEXIS 120, at *62 (July 24, 2003)). Complaint Counsel asserts that Respondents did not share substantial financial risk and did not engage in any clinical integration. Motion at 20-23. Therefore, Complaint Counsel argues that there is no legitimate justification for the practices. Motion at 19-20.

Respondents contend that a legitimate justification for the practices exists because there are increased efficiencies. Respondents argue that there are increased efficiencies because single signature contracting significantly reduces the cost of negotiations for both payors and physicians and induces physicians to join Respondents; the Respondents' contracting activities produced additional transaction cost savings for both payors and physicians from credentialing, ease of referrals, and assistance with payor-physician relationships; and the large size of Respondents generates additional efficiencies that benefit payors, physicians, and patients through a better network of physicians, provision of administrative services, and increased integrations. Opposition at 12-18.

Where a defendant asserts that the challenged conduct has procompetitive effects, courts evaluate whether the claimed efficiencies are plausible and whether the challenged conduct is reasonably necessary to achieve the legitimate objective identified by the defendant. *NCAA v. Bd. of Regents*, 468 U.S. 85, 114 (1984); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 353 (1982); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-21 (1979); *United States v. Brown Univ.*, 5 F.3d 658, 678-79 (3rd Cir. 1993). This determination requires a factual evaluation of the claimed efficiencies. For example, Complaint Counsel contends that Respondents are not financially integrated; affiliated doctors were not required to participate in clinical integration programs until 2003; and Respondents never implemented any clinical protocols. Complaint Counsel's Statement of Facts at 12-15. Respondents claim that Respondents share financial risk under capitated plans; have always been involved in Respondents' efforts to improve clinical quality; and Respondents have always had clinical integration programs, many of which involve the use of clinical protocols. Respondents' Statement of Facts at 35-36, 41-42.

Among the factual questions raised by the pleadings and not resolved by Complaint Counsel's motion are whether there are increased efficiencies that are plausible and reasonably necessary to achieve the legitimate objective identified by Respondents. Viewing the evidence in the light most favorable to Respondents, the nonmoving party, there exist genuine issues of material fact regarding whether there were anticompetitive effects.

V. CONCLUSION AND ORDER

As described above, the genuine issues of fact raised by the pleadings can only be properly determined through an evidentiary hearing. Such issues preclude granting partial summary decision, as a matter of law, at this stage of the proceeding. For the above-stated reasons, Complaint Counsel, the moving party, is not entitled to partial summary decision as a matter of law. Complaint Counsel's motion for partial summary decision is **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: November 22, 2004