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

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

JOINT MOTION TO MODIFY SCHEDULING ORDER

Pursuant to the Federal Trade Commission's Rules of Practice ("Rules"), 16 C.F.R. §§ 3.21(c)(2) and 3.51(a), as well as the Scheduling Order dated March 24, 2004 ("Scheduling Order"), Complaint Counsel and Respondents[1] (collectively, the "Parties") hereby move to modify the Scheduling Order by extending the remaining deadlines and hearing date by approximately ninety (90) days. Attached is a proposed Amended Scheduling Order that, if entered by the Court, would set a new hearing date of January 10, 2004.[2]

This motion should be granted because this is the first time the Commission has challenged a hospital merger in years, and it is one of very few consummated merger challenges. Accordingly, the Court and the Commission need a full factual record and comprehensive expert testimony to decide this case.

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[1] Respondents are Evanston Northwestern Healthcare Corporation ("ENH") and ENH Medical Group, Inc. ("ENH Medical Group").

[2] The hearing date in this action initially was going to be scheduled for September 14, 2004, but that date was continued until September 29, 2004, in light of the Jewish holidays of Rosh Hashanah and Yom Kippur.

INTRODUCTION

The parties have engaged in diligent efforts to meet the existing discovery deadlines in the Scheduling Order. Since March 25, 2004, the Parties have exchanged tens of thousands of documents, and a countless number of additional documents are expected to be produced from third parties pursuant to more than 40 subpoenas issued in this litigation. Because the Parties have received only some of the subpoenaed documents pertinent to the claims and defenses in this matter, they will benefit from additional time to take and defend what will likely be at least 50 fact witness depositions before the July 12, 2004, fact discovery deadline. Also, the Parties' respective experts will benefit from additional time to adequately prepare their reports. Complaint Counsel and Respondents, therefore, jointly request an extension of the remaining deadlines in this case and hearing, as set out in the proposed Amended Scheduling Order.

BACKGROUND

The Parties have exchanged more than 280 boxes of documents since the inception of this litigation, but this represents only a subset of the documents deemed by the Parties to be potentially relevant to this litigation. Complaint Counsel and Respondents are diligently working with third parties to expedite the production of additional materials responsive to 36 outstanding subpoenas. Six of these third parties, however, either have sought additional time to respond to the subpoenas or are contesting the discovery.

The Parties also have noticed a total of 53 depositions to be taken by the July 12, 2004, fact discovery deadline. And it is safe to assume that a number of additional witnesses have yet to be noticed for deposition.

Finally, the Parties intend to rely heavily on expert testimony. On May 14, 2004, Complaint Counsel filed an expert witness list that identifies five expert witnesses who may be called to testify in Complaint Counsel's case in chief. Complaint Counsel also reserved the right in its pleading "to name additional witnesses as rebuttal witnesses." On May 21, 2004 Respondents filed an expert witness list identifying five expert witnesses who may be called in their defense. The current schedule requires Complaint Counsel to provide their expert reports in about 1 ½ months, on July 16, 2004; Respondents to provide their expert reports on July 27, 2004; and Complaint Counsel to provide rebuttal reports one week later, on August 3, 2004. Under the current Scheduling Order, the ten experts identified by the Parties, plus any rebuttal experts, would have to be deposed within a few weeks of trial.

ARGUMENT

This Court should exercise its discretion to extend the remaining deadlines under the Scheduling Order. Such an extension would be consistent with the Court's general practice in complex administrative proceedings.

I. This Court Has Discretion To Extend Scheduling Order Deadlines Upon A Showing Of "Good Cause."

Rule 3.21(c)(2) authorizes the Court to grant a motion to extend any deadline or time specified in the Scheduling Order upon a showing of "good cause." Although the Rules do not define "good cause," discovery extensions are routinely granted in complex FTC administrative proceedings, including challenges like the one at issue here to a consummated merger, when the parties need additional time to conduct discovery and resolve issues pertaining to third party subpoenas.[3]

[3] Rule 3.51 states that the Court's initial decision must ordinarily be filed no later than one year after the issuance of the administrative complaint (here, February 10, 2005). This Rule further provides that "the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a

On March 8, 2004, this Court found good cause in a post-consummation case to grant the respondent's requested four week extension. The Court held that respondent needed adequate time to review and analyze hundreds of boxes of documents produced by the parties and third parties as well as the transcripts of more than 40 depositions. Aspen Tech., Inc., Docket No. 9310, Mar. 8, 2004 Order (Ex. 1). Similarly, on June 14, 2002, Judge Timony, in another case challenging a consummated merger, granted an extension of discovery of sixty days after finding that adequate discovery could not be completed under the current deadlines. In re Chicago Bridge & Iron Co., Docket No. 9300, June 18, 2002 Order (Ex. 2); see also MSC Software Corp., Docket No. 9299, Mar. 5, 2002 Order at 2 (granting "extension of two months for the close of discovery and an extension of six to eight weeks for most other dates remaining in the Scheduling Order, including the commencement of the hearing") (Ex. 3); In re Intel Corp., 1998 FTC LEXIS 146 (F.T.C. 1998) (extending deadlines because, among other reasons, "resolution of all disputes concerning third-party document subpoenas is required for the parties to conduct meaningful third-party and expert depositions") (Ex. 4); In re Intel Corp., 1999 FTC LEXIS 216 (F.T.C. 1999) (granting further extension because both parties "require additional time to prepare their cases") (Ex. 5).

II. The Parties Have Demonstrated "Good Cause" To Extend The Scheduling Order Deadlines.

Despite their extraordinary efforts to meet the Scheduling Order deadlines, the Parties have demonstrated "good cause" to warrant the jointly requested extension of these deadlines. The need for an extension is particularly compelling in the instant case because some

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period of up to sixty (60) days" and "[s]uch extension, upon its expiration, may be continued for additional consecutive periods of up to sixty (60) days[.]" Trial in this case should be completed in advance of the one-year anniversary of the complaint even under the proposed amended scheduling order. This Court, however, would likely have to invoke Rule 3.51 to extend the one-year deadline to ensure that the Court has adequate time to consider the trial testimony and exhibits in preparing the initial decision.

of the 53 noticed depositions already have been taken and many others have been scheduled to meet the July 12, 2004, fact discovery deadline even though a significant number of relevant materials have yet to be produced by third parties. As in the cases cited above where extensions were granted, an extension here would afford the Parties more time to cull the enormous amount of electronic and paper discovery already produced and collect, organize and analyze those documents that have yet to be produced.

The time presently afforded to the Parties to complete these tasks will have effects that ripple throughout these proceedings. Not only are the Parties currently required to take more than 50 fact witness depositions by the July 12, 2004, fact discovery deadline without being afforded a prior opportunity to review and analyze adequately all pertinent materials, but the Parties' experts can benefit from more time to evaluate *all* pertinent data to prepare their reports by the July and August, 2004, deadlines.

Finally, a revised timeline may allow for a better expert deposition schedule. The current schedule requires all expert reports to be submitted by August 3, 2004. Under this schedule, the Parties will have barely more than 1 ½ months – from August 3, 2004 to the eve of trial, September 29, 2004 – to analyze a total of *at least* 10 expert reports, review the countless documents relied on by these experts, and depose the designated experts. More time to depose the experts would enable the parties to better prepare for a complex and lengthy trial.

CONCLUSION

Given the practical reality of this complex proceeding, both the Court and the parties would benefit from more time to review and analyze *all* pertinent materials (including those that have yet to be produced by third parties) *before* the depositions of key fact witnesses.

The requested 90-day extension will assist Complaint Counsel and Respondents in presenting their cases.

For the foregoing reasons, the Parties request that this Court grant their Joint Motion to Modify Scheduling Order.

Respectfully Submitted,

_____
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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2004, a copy of the foregoing Joint Motion to Modify Scheduling Order was served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW (H-106)
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(two courtesy copies delivered by messenger only)

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_____
Charles B. Klein

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ORDER

Upon consideration of the Joint Motion to Modify Scheduling Order and Complaint Counsel's response thereto, and the Court being fully informed, it is this _____ day of _____, 2004 hereby

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

ORDERED, that the following deadlines set in the Court's Scheduling Order dated March 24, 2004, are hereby modified as in the attached Amended Scheduling Order

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

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AMENDED SCHEDULING ORDER

July 23, 2004	-	Deadline for issuing document requests, requests for admission, interrogatories and subpoenas *duces tecum*, except for: 1) discovery for purposes of authenticity and admissibility of exhibits; or 2) discovery regarding new fact witnesses identified on Complaint Counsel or Respondent Counsel's revised witness lists.
August 6, 2004	-	Complaint Counsel provides revised witness lists, including preliminary rebuttal fact witnesses, with description of proposed testimony (excluding experts).
August 13, 2004	-	Respondent's Counsel provides revised witness lists, including preliminary rebuttal fact witnesses, with description of proposed testimony (excluding experts).
September 12, 2004	-	Close of discovery, other than discovery permitted under Rule 3.24(a)(4), expert depositions, and discovery for purposes of authenticity and admissibility of exhibits.
September 21, 2004	-	Complaint Counsel provides expert witness reports.
October 13, 2004	-	Deadline for filing motions for summary decision.
October 19, 2004	-	Respondents' Counsel provides expert witness reports.
November 2, 2004	-	Complaint Counsel to identify all rebuttal expert(s) and provide rebuttal expert report(s) to the extent that those rebuttal reports do not address econometric analyses proffered by Respondents'

experts. Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).

November 3, 2004 - Deadline for filing responses to motions for summary decision.

November 3, 2004 - Complaint Counsel provides to Respondents' Counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the testimony of each witness.

Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.

November 10, 2004 - Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the testimony of each witness.

Respondents' Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.

November 15, 2004 - Parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).

November 16, 2004 - Complaint Counsel to provide rebuttal expert report(s) to the extent that those reports address econometric analyses proffered by Respondents' experts. Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).

November 18, 2004 - Deadline for filing motion *in limine* and motion to strike.

November 30, 2004	-	Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
December 3, 2004	-	Deadline for filing responses to motions *in limine* and motions to strike.
December 10, 2004	-	Deadline for filing responses to motions *in camera* treatment of proposed trial exhibits.
December 13, 2004	-	Exchange proposed stipulations of law, facts, and authenticity.
December 17, 2004	-	Parties file pretrial briefs.
December 22, 2004	-	File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be filed as agreed by the parties.
January 4, 2005	-	Final prehearing conference. The parties are to meet and confer prior to the conference regarding trial logistics; proposed stipulations of law, facts, and authenticity; and admissibility of any designated deposition testimony. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded at this conference, to the extent practicable.
January 10, 2005	-	Commencement of Hearing, to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

ADDITIONAL PROVISIONS

1. Pursuant to Rule 3.21(c)(2), extensions or modifications to these deadlines will be made only upon a showing of good cause.

2. Service of all papers filed with the Commission shall be made on opposing counsel and two courtesy copies to the Administrative Law Judge by 5:00 p.m. on the designated date. Unless requested, the parties shall not serve courtesy copies on the ALJ of any papers (including discovery requests and responses) that are not required to be filed with the Office of the Secretary. *See* Commission Rules 3.31(b), 3.35, 3.37

3. Service on the parties shall be by electronic mail (formatted in WordPerfect or Word) and shall be followed promptly by delivery of an original by hand or by U.S. mail, first class postage prepaid, to the following addresses:

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4. All pleadings that cite to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

5. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off, that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 5 days of impasse if the parties are negotiating in good faith and are not able to resolve their dispute.

6. The parties are limited to a total 50 document requests, 50 interrogatories, and 50 requests for admissions, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit on the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Additional discovery may be permitted only for good cause upon application to and approval by the Administrative Law Judge. Unless otherwise agreed to by the parties, responses and objections to document requests, interrogatories, and requests for admissions shall be due within 20 days of service.

7. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intentions to record the deposition by videotape at least five days in advance of the deposition.

8. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum.* Counsel scheduling depositions shall immediately notify all other counsel that a deposition has been scheduled.

Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within five business days of receiving the documents.

9. The preliminary, revised, and final witness lists shall represent counsel's good faith designation of all potential witnesses. Additional witnesses may be added after the submission of the final witness lists only under the following circumstances:

(a) by agreement of counsel with notice to the Administrative Law Judge;

(b) by order of the Administrative Law Judge upon showing of good cause; or

(c) if needed, to authenticate or provide evidentiary foundation for documents in dispute, with notice to the opposing party and the Administrative Law Judge.

A party seeking to add witnesses after submission of the final witness lists shall promptly notify the other parties of its intention to do so, to facilitate completion of discovery within the dates of the scheduling order. Opposing counsel shall have a reasonable amount of time to subpoena documents for and depose any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the hearing. Such discovery shall not be subject to the return/response otherwise ordered scheduling or notice provisions of paragraph 5 or the minimum period for subpoena/discovery requests of this paragraph unless by the Administrative Law Judge.

A party may depose any witness identified on the final witness list of the opposing party who was not identified on the preliminary witness list.

10. The final exhibit list shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after submission of the final lists only: (a) by order of the Administrative Law Judge upon a showing of good cause; (b) by agreement of counsel with notice to the Administrative Law Judge; or (c) where necessary for purposes of impeachment.

11. At the time an expert is first listed as a witness by a party, the party will provide to the other party:

(a) materials fully describing or identifying the background and qualifications of the expert, and all prior cases in which the expert has testified or been deposed.

(b) transcripts of such testimony in the possession, custody, or control of the listing party or the expert, subject to any confidentiality orders entered in prior litigation.

(c) This paragraph shall not require the production of materials in litigation to which the expert was a party.

At the time an expert report is produced, the listing party will provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case. Unless otherwise agreed by the parties, drafts of expert reports need not be produced.

Each expert report shall include the subject matter on which the expert is expected to testify and the substance of the facts and opinion to which the expert is expected to testify and a summary of the grounds of each opinion.

It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition from November 8, 2004, through December

22, 2004. Unless otherwise agreed by the parties or ordered by the Administrative Law expert witness shall be deposed only once and each expert deposition shall be limited to seven hours.

12. Applications for the issuance of subpoenas commanding a person to attend and give testimony at the adjudicative hearing must comply with 16 C.F.R. § 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel.

13. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has person knowledge of the matter. Fed.R. Evid. 602

14. Witnesses not properly designated as expert witnesses shall not be allowed to provide opinions beyond what is allowed in Fed. R. Evid. 702. Fed. R. Evid. 701.

15. Properly admitted deposition testimony is part of the record and may not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court.

16. Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.,* 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22,2000) and 2000 FTC LEXIS 138 (Sept. 19,2000) and must be supported by a declaration or affidavit by a person qualified to explain the nature of the documents.

17. The procedure for marking of exhibits referred to in the adjudicative proceeding shall be as follows: both parties shall number their exhibits with a single series of consecutive numbers. Complaint Counsel's exhibits shall bear the designation CX and Respondent's exhibits shall bear the designation RX. (For example, the first exhibit shall be marked CX-l for Complaint Counsel.) When an exhibit consists of more than one piece of paper, each page of the exhibit must bears a consecutive bates number or some other consecutive page number.

All exhibit numbers must be accounted for, even if a particular number is not actually used at trial. If a party selects certain, but not all, documents that it previously designated as deposition exhibits, the party must indicate that certain numbers were not used in the numbering process for designating trial exhibits. For example, if Complaint Counsel decided to not introduce at trial documents previously marked at deposition as exhibits CX-2, CX-4, and CX-6, Complaint Counsel's list of exhibits would begin CX-I, CX-3, and CX-5. This method of numbering exhibits for trial is acceptable, as long as the party also prepares a list of its exhibits indicating that CX-2, CX-4, and CX-6 were never designated as trial exhibits. Using this example, in preparing the set of original exhibits to give to the court reporter, Complaint Counsel must indicate that CX-2, CX-4, and CX6 were never designated as trial exhibits by inserting in their place a piece of paper or tab indicating that such exhibit numbers were not used.

18. The parties shall provide one another, and the Administrative Law Judge, no later than seventy-two hours in advance, a schedule that identifies by day the party's best estimate of the witnesses to be called to testify during the upcoming week of the hearing. The parties further

shall provide one another with copies of any demonstrative exhibits twenty-four hours before they are used with a witness.

19. At the final pre-hearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. Counsel will also be required to give *the originals* of exhibits to the court reporter, which the court reporter will keep.

ORDERED:

_____
Administrative Law Judge

Date: May _____, 2004

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