UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S MOTION TO STRIKE
RESPONDENTS' RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

Complaint Counsel move to strike Respondents' June 21, 2007, Response to our Notice of Supplemental Authority.

In their original brief, Respondents represented to the Commission that the Illinois Certificate of Need statute would expire on July 1, 2006. In our June 19, 2007, Notice of Supplemental Authority, we satisfied the obligation to notify the Commission that the State of Illinois had amended the statute three different times to extend the sunset date, most recently, to August 31, 2008.

Respondents agree that our Notice is correct. Respondents, though, twist the parties' shared obligation to advise the Commission of new legal authority into a unilateral opportunity to pack the record with ten new exhibits. This is precluded by the Order dated July 18, 2005, in which Judge McGuire closed the record, as mandated by Rule 3.44(c).[1] And, Respondents' submission simply emphasizes the need for the stringent enforcement of this Order: these questionable materials are now insulated from the crucible of cross-examination or rebuttal.

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[1] http://www.ftc.gov/os/adjpro/d9315/050718orderd9315.pdf.

Respondents' new Exhibit H highlights why Respondents' brief should be stricken. Exhibit H apparently constitutes a March, 2007 press release that touts purported plans to build a new hospital in Lindenhurst, Illinois, six miles from the Wisconsin border. Respondents label this "New Market Entry" and suggest that this exhibit "demonstrates the absence of anticompetitive effects" of the merger of Evanston and Highland Park. Response at 3. Respondents' presentation, however, would not survive the trial process: their own evidence demonstrates that the hospital will open, at the absolute earliest, in 2010, assuming that the certificate of need application is approved by the State. *See* Exhibit H at 3; *cf.* Horizontal Merger Guidelines § 3.2 ("The agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.") And, of course, Respondents presume that the pipe-dream construction of a hospital 25 miles north of Highland Park will somehow curb Respondents' continued exercise of market power.[2] By presenting this in their Response after the record is closed, Respondents can use this "evidence" as they see fit because they need not meet the demands of the litigation process.

Consideration of two other aspects of this litigation confirms that the Response should be stricken. First, Respondents made sure that the trial below was a religious observance of the Federal Rules of Evidence and the hearsay rule in particular. Thus, for example, when we introduced emails authored by Respondents' own executives that recounted certain conversations they had with third parties, Respondents demanded (and we agreed) that those emails could not

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[2] By way of comparison, Respondents apparently would argue that the possible construction of a hospital in Columbia, Maryland, would limit the exercise of market power by two merged hospitals in downtown Washington.

be admitted to prove the truth of the matters asserted by the third parties.[3] Yet now, Respondents have submitted materials to the Commission that are all hearsay – and in many instances double hearsay[4] – and that are inadmissible under the Federal Rules of Evidence.

Second, based on this motion, the Commission will be cognizant of the pervasive problems with the Response. Nevertheless, the Commission's final decision may be subject to appeal, 15 U.S.C. § 45(b), and if the Response is made part of the administrative record, an appellate court might be less aware of how the Respondents' Response runs roughshod over the Commission's Rules and the Federal Rules of Evidence.

The record is complete and the record is closed. And, Respondents' attempt to introduce new evidence is wholly unwarranted by our initiative to advise the Commission that a statute cited and relied on by Respondents is no longer good law. Therefore, Respondents' brief dated June 21, 2007, should be stricken from the record.

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[3] Pretrial Conference Tr. at 19-24 (February 8, 2005). And, when the parties jointly submitted exhibits for the record, Respondents insisted on preserving the applicability of Rule 805 of the Federal Rules of Evidence regarding hearsay within hearsay. *See* JX-1, Joint Stipulation Regarding Admissibility of Trial Exhibits, dated February 10, 2005.

[4] For example, Respondents' Exhibit 2 consists of an out-of-court statement – a magazine article – setting forth an out-of-court statement – quotations attributed to anonymous hospital officials.

Respectfully submitted,

Dated: June 25, 2007

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Complaint Counsel

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ORDER

Upon motion of Complaint Counsel, and after consideration of the memoranda in support and in opposition thereto, it is hereby

ORDERED, that Respondents' June 21, 2007, Response to Complaint Counsel's Notice of Supplemental Authority is stricken from the record.

Dated

For the Federal Trade Commission

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served by delivering copies to:

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Dated: June 25, 2007

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