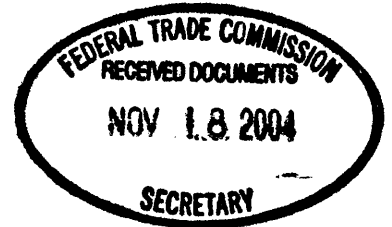


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the matter of)
)
)

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

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

Docket No. 9315

Public Record Version

RESPONDENT'S SEPARATE AND CONCISE STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE FOR TRIAL

Pursuant to Rule 3.24(a)(2) of the Commission's Rules of Practice, 16 C.F.R. § 3.24(a)(2), Respondent ENH Medical Group, Inc., (Medical Group) by counsel, hereby submits a separate and concise statement of those material facts as to which there exists a genuine issue for trial. Part I of this submission responds to each of the assertions as to which Complaint Counsel contends that there is no material dispute, and in doing so demonstrates that there are numerous material facts as to which there is a genuine issue for trial. Part II of this submission sets forth additional material facts demonstrating that there is a genuine issue for trial.

PART 1: RESPONSE TO COMPLAINT COUNSEL'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Respondent hereby responds to each of the statements in Complaint Counsel's Rule 3.24 Statement of Material Facts as to Which There is No Genuine Dispute. Complaint Counsel's statements are reprinted herein in italics. Respondent's replies follow.

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.

Response to No. 1: Not disputed.

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; CX 716 at 1.*

Response to No. 2: Not disputed.

3. *ENH is the sole member or owner of Faculty Practice Associates. First Amended Answer at ¶ 7.*

Response to No. 3: Not disputed.

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.*

Response to No. 4: Not disputed.

5. *Faculty Practice Associates is the sole shareholder of ENH Medical Group. First Amended Answer at ¶ 8.*

Response to No. 5: Not disputed.

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.*

Response to No. 6: Not disputed.

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.*

Response to No. 7: Not disputed.

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.*

Response to No. 8: Disputed as incomplete and therefore misleading. In addition to contracting with individual doctors and hospitals, payors have been contracting for several years with Independent Physician Associations (IPAs) in the Chicagoland area that negotiate on behalf of both employed and non-employed physicians. Ballengee Dep. Tr. at 162-166 (**Tab 1**); Holt-Darcy Dep. Tr. at 21-24 (**Tab 2**); Mendonsa Dep. Tr. at 132-35 (**Tab 3**); Cronos Dep. Tr. at 80-81 (**Tab 4**); Neary Dep. Tr. at 151-152 (**Tab 5**). Most major hospitals in the Chicagoland area have an IPA associated with them. ENH-FSM 29 (**Tab 6**); ENH-FSM 30 (**Tab 7**).

[REDACTED]

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; Hochberg Dep. Tr. at 67-68; Katz Dep. Tr. 43-44.*

Response to No. 9: Disputed as incomplete and therefore misleading. A doctor will only get paid under a fee-for-service arrangement for services that are covered by the payors. Services that are not covered, whether they are capitated or fee-for-service will not be reimbursed. Guttmann Dep. Tr. at 60 (**Tab 9**).

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; 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 at ¶ 41.*

Response to No. 10: Disputed in part as incomplete and therefore misleading.

RBRVS is a Medicare system that provides one basis for determining the rate at which a payor will reimburse a physician for physician services. It is used not only in negotiations between payors and individual doctors, but also in negotiations between payors and IPAs. Rates in physician contracts also may be an agreed percentage on RBRVS for a particular year (both the percentage and the particular year of the RBRVS were negotiated) or some modified version of RBRVS. Golbus Dep. Tr. (July 8, 2004) at 145-46 (Tab 10). Further, to be clear, the fee-for-service rates agreed to between payors and individual doctors or IPAs are not typically around 110% of RBRVS, but instead vary widely.

[REDACTED]

11. *Doctors and insurance companies negotiate whatever price is mutually acceptable for doctors services. Mittleman Dep. Tr. at 46-47.*

Response to No. 11: Disputed in part as incomplete and therefore misleading.

Payors negotiate with both individual doctors and IPAs to find a mutually acceptable *reimbursement rate* for physician services.

[REDACTED]

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.*

Response to No. 12: Not disputed.

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.*

Response to No. 13: Not disputed.

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; Hochberg Dep. Tr. at 7-9.*

Response to No. 14: Not disputed.

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.*

Response to No. 15: Disputed. There is no evidence in the record that supports this statement, and notably, Complaint Counsel does not cite such evidence.

[REDACTED]

Moreover, physicians practice in a wide array of specialties, and most do not compete against each other on any level. McChesney Rep. at Ex. 2. **(Tab 12)**. A podiatrist, for example, does not compete with a cardiologist. The Medical Group specialists practice in over 40 diverse specialties, ranging from podiatry to gynecology to cardiology. *Id.* At most, some doctors compete against other doctors in their same specialty for patients. Moller Dep. Tr. at 126-27 (competes against other gastroenterologists for patients) **(Tab 13)**; Ankin Dep. Tr. at 36 (competes against other doctors practicing pulmonary medicine for patients) **(Tab 14)**; Burstein Dep. Tr. at 106 (competes against other OB/GYNs for patients) **(Tab 15)**. However, not all doctors who compete in the same specialty agree that they are competitors. Rosenberg Dep. Tr. at 90-91 ("I don't think gastroenterologists think about competing against each other. We're colleagues who provide service. And patients go back and forth for whatever reason.") **(Tab 16)**. Further, the degree to which different physicians compete with one another depends on the relative proximity of the two physicians. The approximately 850 physicians in the

Medical Group practice over a five county area, spanning from McHenry County (Northwest of Chicago) to Cook County (which includes Chicago itself, as well as south of Chicago), spanning a radius of approximately 40 miles. Miller Aff. ¶ 5 (Tab 17); McChesney Rep. at Ex. 4a. (Tab 12). It is unlikely that a gastroenterologist in Gurnee, IL (near the Wisconsin border) would be competing with an Allergist/Immunologist in Flossmoor, IL (near Chicago Heights, near the Indiana border).

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.*

Response to No. 16: Not disputed.

17. *ENH Medical Group, a for-profit, independent practice association (or IPA), in 2000 represented approximately 860 doctors. CX 1383 at 4.*

Response to No. 17: Disputed in part. The physicians were not represented by the Medical Group, but rather participated in certain programs and contracts offered by the IPA, and were free to, and did, participate in certain programs and contracts with other IPAs.

[REDACTED]

[REDACTED]

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.*

Response to No. 18: Not disputed.

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. ENH Medical Group refers publicly to the independent doctors as affiliated doctors in contrast to its employed doctors. First Amended Answer ¶ 36; Gutmann Dep. Tr. at 20-21.*

Response to No. 19: Not disputed.

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

Response to No. 20: Not disputed.

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.*

Response to No. 21: Disputed as incomplete and therefore misleading. First, the document Complaint Counsel cites states that there were 350 physicians participating in the Highland Park Independent Practice Associates, Inc. (Highland Park IPA) before the merger with the Medical Group. Further, the physicians did not belong to the Highland Park IPA, but rather participated in the IPA.

[REDACTED]

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; CX 1503 at 7.*

Response to No. 22: Disputed in part as incomplete and therefore misleading. To be clear, the affiliated doctors who participated in the Medical Group before the merger were free to have staff privileges at other hospitals besides Evanston and Glenbrook. Miller Affidavit ¶ 5. (Tab 17). Even after the merger, the Medical Group never imposed any limitations on which hospital staffs a doctor could be a member, and never required a doctor to terminate his/her staff privileges at other hospitals. Katz Dep. Tr. at 12 (Tab 22); Rosenberg Dep. Tr. at 93 (Tab 16).

[REDACTED]

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

Response to No. 23: Disputed in part as incomplete, vague, misleading, and opinion.

This statement is overbroad. Ms. Levine stated only that the employed physicians competed against the affiliated physicians, but was not precise about which physicians competed against each other, or what they competed for. This statement, as composed by Complaint Counsel, suggests that all physicians, no matter what their specialty, compete against each other, which is simply not true. *See* Response to No. 15, *supra*;

[REDACTED]

Further, Ms. Levine is not a doctor, and cannot know which of the 850 doctors in the Medical Group, if any, compete with each other. While she has knowledge regarding physician contracting, she has no knowledge of physician competition. It is notable that Complaint

Counsel does not cite to a single physician witness's testimony to support its contentions that employed physicians and independent physicians compete against each other, and that independent physicians compete amongst themselves.

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

Response to No. 24: Disputed. The physicians in the Medical Group practice in five different counties, Lake, Cook, Kane, Dupage, McHenry. Miller Aff. ¶ 5 (Tab 17); McChesney Rep. at Ex. 4a. (Tab 12). It is unlikely that a gastroenterologist in Gurnee, IL (near the Wisconsin border) would be competing with an Allergist/Immunologist in Flossmoor, IL (near Chicago Heights, near the Indiana border).

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*

Response to No. 25: Disputed as misleading. The "triangular region" Complaint Counsel refers to is overly narrow and ignores the realities of the competitive landscape in the Chicagoland area. The "triangular region" is not, and never has been, where the main competitors of Highland Park, Glenbrook, and Evanston are located.

[REDACTED]

[REDACTED]

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; CX 490. See also Neaman Dep. Tr. at 186-87; Stearns Dep. at 97-98; Newton Dep. at 123-25; Golbus IH at 19-29.*

Response to No. 26: Disputed. There has never been any price-fixing agreement among the Medical Group physicians, nor were all of the Medical Group doctors in competition with the Highland Park doctors. *See* Response to No. 25, *supra*. Even if some employed physician competed with some affiliated physician, it is not correct to say or imply that all employed physicians competed with all affiliated physicians. *See also* Response to No. 15, *supra*.

[REDACTED]

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; Gutmann Dep. Tr. at 28-29; Katz Dep. Tr. at 18-20; Hochberg Dep. Tr. at 51-52; Burstein Dep. Tr. at 9; Moller Dep. Tr. at 126-27.*

Response to No. 27: Disputed.

[REDACTED]

[REDACTED]

The medical services provided by all members of the Medical Group are not “comparable.” The services of a cardiologist are not the same as the services of a pediatrician.

[REDACTED]

This includes doctors who practice in the same areas as, and provide comparable medical services, to the Medical Group physicians. *See e.g.*, Moller Dep. Tr. at 126-27 (**Tab 13**); Hochberg Dep. Tr. at 104-06 (**Tab 21**).

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; Hochberg Dep. Tr. at 51-52; Katz Dep. Tr. at 18-20; Nora Dep. Tr. at 10-11; Cohen Dep. Tr. at 30.*

Response to No. 28: Disputed. None of these cites supports Complaint Counsel's contention. Patients are free to choose any doctor they wish, subject to their health plan's rules, whether or not that doctor participates in the Medical Group. Moller Dep. Tr. at 126-28 (**Tab 13**).

[REDACTED]

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.*

Response to No. 29: Disputed. Notably, Complaint Counsel cites no support for this statement, because there is no factual backing in the record for this declaration. *See* Response to No. 15, *supra*.

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] CX 1347 at 7.*

Response to No. 30: Disputed as incomplete and therefore misleading. The Medical Group was only one of several IPAs in the Chicagoland area. Most hospitals in the Chicagoland area, including Lake Forest, Rush North Shore, Condell, Advocate, Northwest Community, and Waukegan, have IPAs associated with them. ENH-FSM 29 (Tab 6); ENH-FSM 30 (Tab 7); CX 1347 at 7 (Tab 28).

[REDACTED]

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] CX 1335 at 11.*

Response to No. 31:

[REDACTED]

[REDACTED]

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]

CX 1090 at 1-2, 5-7.

Response to No. 32: Disputed as vague and incomplete and therefore misleading.

[REDACTED]

[REDACTED]

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

Response to No. 33: Disputed. Complaint Counsel misrepresents Dr. Golbus's deposition testimony. Complaint Counsel is quoting Dr. Golbus's testimony about post-merger competition with the Highland Park IPA. Golbus Dep. Tr. (July 8, 2004) at 299

[REDACTED]

See Response to No. 15, supra.

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

Response to 34: Disputed as incomplete and therefore misleading. The Participation Agreements also all included an identical Section 3.2. CX 1503 at 9 (Tab 34); CX 1504 at 8 (Tab 35).

[REDACTED]

[REDACTED]

35. Pursuant to the Participating Agreement,

[REDACTED]

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

Response to No. 35: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

36. *The Participating Agreement*

[REDACTED] *CX 1503 at 22; see also CX 1710; Golbus Dep. Tr. at 33-34 (July 9, 2004). 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.*

Response to No. 36: Disputed as incomplete.

[REDACTED]

Finally, Complaint Counsel's determination of the number of affiliated physicians who participated in the Medical Group's fee-for-service contracts is based solely on the investigation of Ms. Spriggs-Hutchinson, an FTC investigator. Ms. Spriggs-Hutchinson's analysis is riddled with fundamental errors. She double-counts some

contracts, as she noted that there were 850 agreements for 640 doctors, and without any justification, she discards 181 contracts that do not include Attachment C.

37. *Provision 5.8 of the Participation Agreement sets forth that*

[REDACTED]

E.g., CX 1503 at 12 (Provision 5.8).

Response to No. 37: Disputed as incomplete and therefore misleading.

[REDACTED]

38. [REDACTED]

See e.g., Hochberg Dep. Tr. at 77-78; Katz Dep. Tr. at 58.

Response to No. 38: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

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; CX 1714; CX 1745.*

Response to No. 39: Disputed. Complaint Counsel has it backwards.

[REDACTED]

[REDACTED]

[REDACTED]

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; CX 1714; CX 1745.*

Response to No. 40: Disputed. Complaint Counsel's characterization of the letters is incorrect and misleading.

[REDACTED]

[REDACTED]

41. [REDACTED]

*Ballengee Dep. Tr. at 227-41(CX
1201-1243, 1245-1276, 1284-1319, and 1321-1328); CX 1749.*

Response to No. 41: Disputed.

[REDACTED]

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

[REDACTED]

CX 440 at 1.

Response to No. 42: Disputed as misleading and opinion. Complaint Counsel quotes Chan correctly, but this opinion is wrong.

[REDACTED]

43. *Dr. Burstein, the President of the Highland Park IPA, stated that*

[REDACTED]

Burstein Dep. Tr. at 48.

Response to No. 43: Disputed as misleading and opinion. Complaint Counsel quotes Burstein correctly, but his individual opinion has not been borne out by the experience of individual physicians.

[REDACTED]

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]

Gutmann Dep. Tr. at 156.

Response to No. 44: Disputed as misleading and opinion. Complaint Counsel quotes Guttmann correctly, but his opinion has not been borne out by the experience of individual physicians.

[REDACTED]

45. *In connection with negotiating with an insurance company, a June 2000 e-mail from Terry Chan to ENH Medical Group management stated:*

[REDACTED]

CX 450 at 1.

Response to No. 45: Disputed as misleading. The statement from Chan was only discussing one payor, CNN, and not all the insurance companies that the Medical Group dealt with.

[REDACTED]

[REDACTED]

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]

CX 440 at 1.

Response to No. 46: Disputed as misleading and opinion. This statement by Terry Chan, while quoted correctly, is inaccurate opinion.

[REDACTED]

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

Response to No. 47: Disputed. The physicians did not exchange contract information.

[REDACTED]

48. *After the Independent Doctors from Highland Park Hospital became affiliates of ENH Medical Group, the group established targets of [REDACTED] of RBRVS and minimum prices of [REDACTED] of RBRVS in connection with fee-for-service health plans. CX 416 at 1; Golbus IH Tr. at 152-53; Levine IH Tr. at 198-200.*

Response to 48: Disputed as incomplete and therefore misleading. The Contracting Committee of the Medical Group established these goals simply as a guideline, and not as strict

rules. Mittleman Dep. Tr. at 186 (Tab 11). These rates were consistent with what other comparable IPAs were receiving at the time. See McChesney Rep. at Ex. 3

[REDACTED]

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; CX 1156; Burstein Dep. Tr. at 54-55.*

Response to No. 49: Disputed as incomplete and therefore misleading. When Evanston Northwestern Healthcare (ENH) merged with Highland Park Hospital the intention was to create one integrated medical staff. Miller Aff. ¶ 6. (Tab 17). As part of integrating the medical staffs, it was decided that the Medical Group and Highland Park IPAs should become one integrated entity. *Id.* Thus, the IPAs needed to have a single set of contracts. Golbus Dep. Tr. (July 8, 2004) at 82 (Tab 10).

50. *ENH Medical Group negotiated with [REDACTED] in early 2000. CX 2208. ENH Medical Group's negotiation with [REDACTED] in January 2000 increased doctor revenues by about [REDACTED] per year. CX 27 at 6 ; CX 28 ; CX 416.*

Response to No. 50: Disputed as incomplete and therefore misleading. This statement regards an increase in revenue, and not profitability,

[REDACTED]

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

Response to No. 51: Disputed as incomplete and therefore misleading. The statement by Dr. Golbus is quoted correctly,

[REDACTED]

52. *In addition to the [REDACTED] contract, ENH Medical Group successfully renegotiated more contracts throughout the year 2000. CX 27 at 6 ; CX 28; CX 2206; CX 2211.*

[REDACTED]

[REDACTED]

Finally, the rates negotiated with payors brought the Medical Group in line with comparable IPAs in the Chicagoland area. McChesney Rep. at 35-37, Ex. 3 (Tab 12).

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

Response to No. 53: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

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; Golbus IH Tr. at 154-55; First Amended Answer at ¶43a.*

Response to No. 54: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

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; First Amended Answer at ¶43b.*

Response to No. 55: Disputed as incomplete and therefore misleading.

[REDACTED]

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

Response to No. 56: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

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; First Amended Answer at ¶43d.*

Response to No. 57: Disputed as incomplete and therefore misleading. The contract that the Medical Group signed with Cigna in 2000 was a three-year arrangement. CIG/IL 0071166-0071205 at 10 (Tab 62). Further, like Aetna, the contract had not been renegotiated since 1996. ENHL JH 002275-002301 (Tab 62). Thus, these increases were based on rates negotiated over four years prior. As discussed above, there are many reasons why the rates may have increased, and that the rates are equivalent to other comparable IPAs. Response to No. 51, *supra*.

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.*

Response to No. 58: Disputed as incomplete and therefore misleading. This statement regards an increase in revenue, and not profitability,

[REDACTED]

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.*

Response to No. 59: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

60. **[REDACTED]**

Katz Dep. Tr. at 59; Hochberg Dep. Tr. at 78.

Response to No. 60: Disputed.

[REDACTED]

[REDACTED]

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; Arizona v. Maricopa County Medical Society, 457 U.S. 332, 340 n. 9 (1982).*

Response to No. 61: Disputed as misleading. During his deposition, John Coyle never discussed the differences between fee-for-service and capitated contracts. Rather, he was asked only about his understanding of the term "non-risk." He never identified who took on the risk under a fee-for-service contract. J. Coyle Dep. Tr. at 22-23 (**Tab 82**).

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.*

Response to No. 62: Not disputed.

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

Response to No. 63: Not disputed.

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; see also CX 1503 at 4.*

Response to No. 64: Disputed as incomplete and misleading.

[REDACTED]

The affiliated physicians and the Medical Group share financial risk under their capitated plans. Golbus Dep. Tr. (July 8, 2004) at 135-37, 164. The Medical Group has over 70,000 capitated lives, which is the third largest number of capitated lives held by any IPA in the Chicagoland area. ENH-FSM 30 at 7 (Tab 7).

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

Response to No. 65: Disputed as incomplete and misleading.

[REDACTED]

Moreover, as more doctors enter the Medical Group for fee-for-service contracts, the more financially integrated it is for capitated contracts. Currently, the Medical Group has over 70,000 capitated lives, which is the third largest number of capitated lives held by any IPA in the Chicagoland area. ENH-FSM 30 at 7 (Tab 7).

66. *ENH Medical Group has advised insurance companies that it* [REDACTED]
CX 455 at 1.

Response to No. 66: Disputed.

[REDACTED]

[REDACTED]

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

Response to No. 67: Disputed as incomplete and therefore misleading. Despite the trend toward fee-for-service contracts in the Chicagoland area, the Medical Group still has over 70,000 capitated lives, which is the third largest number of capitated lives held by an IPA in that area. ENH-FSM 30 at 7 (**Tab 7**). As a result, the Medical Group still has some degree of financial integration.

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.*

Response to No. 68: Disputed. The Medical Group always had some form of clinical integration in connection with its fee-for-service contracts; it was just not always called clinical integration. Clinical integration was a new term used by the FTC in late 2002-early 2003 that did not have any meaning to the Medical Group members. Guttman Dep. Tr at 188 (**Tab 9**); Golbus Dep. Tr. (July 8, 2004) at 50 (**Tab 10**); Golbus Dep. Tr. (July 9, 2004) at 170-71 (**Tab 73**); Miller Dep. Tr. at 102 (**Tab 72**).

[REDACTED]

[REDACTED]

[REDACTED]

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; CX 1433; CX 1113; Golbus Dep. Tr. at 115-16 (July 8, 2004).*

Response to No. 69: Disputed. The Medical Group has always had clinical integration programs, although they were not called by that name. *See* Response to No. 68, *supra*. Complaint Counsel also mischaracterizes Dr. Golbus' testimony.

[REDACTED]

Jodi Levine is not an attorney, and she testified that she does not understand what the term clinical integration means. Levine Dep. Tr. at 13 (**Tab 18**).

[REDACTED]

[REDACTED]

Out of an abundance of caution, the Medical Group made efforts to formalize and expand what it was already doing. *See, e.g.,* Golbus Dep. Tr. (July 8, 2004) at 57-58 (Tab 10).

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.*

Response to No. 70: Disputed. The Medical Group has always had clinical integration programs, and the affiliates have always participated in the Medical Group's clinical integration efforts. *See* Response to Nos. 68 and 69, *supra*. In late 2002, out of an abundance of caution, the Medical Group made efforts to formalize and expand what it was already doing. *Id.*

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

[REDACTED]

CX 1457 at 1.

Response to No. 71: Disputed as misleading and opinion. This statement is merely the opinion of one employee, Jodi Levine, a non-attorney who admitted that she does not understand what the term "clinical integration" means. Levine Dep. Tr. at 13 (Tab 18). The Medical Group had always been clinically integrated, and by December 2002, many aspects of clinical integration were already in place. *See* Response to Nos. 68-69, *supra*. In late 2002, out of an abundance of caution, the Medical Group made efforts to formalize and expand what it was already doing. *Id.*

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).*

Response to No. 72: Disputed.

[REDACTED]

In late 2002, out of an abundance of caution, the Medical Group made efforts to formalize and expand what it was already doing. *See* Response to Nos. 68-69, *supra*.

[REDACTED]

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; M. Benson IH Tr. at 78-80.*

Response to No. 73: Disputed. The Medical Group has always been clinically integrated, and the affiliates have always participated in the Medical Group's clinical integration efforts. *See* Response to Nos. 68 and 69, *supra*; Miller Dep. Tr. at 132, 135-37, 140 (Tab 72). In late 2002, out of an abundance of caution, the Medical Group made efforts to formalize and expand what it was already doing. *See* Response to Nos. 68 and 69, *supra*. As a result of these efforts, all of the physicians were aware, or should have been aware, of its existence.

[REDACTED]

[REDACTED]

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.*

Response to No. 74: Disputed. The Medical Group always had clinical integration programs, and its clinical integration efforts are ongoing. *See* Response to Nos. 68 and 69, *supra*;

[REDACTED]

75.

[REDACTED]
Gutmann Dep. Tr. at 136.

Response to No. 75: Disputed. The Medical Group has always had clinical integration programs, many of which involved the use of clinical protocols.

[REDACTED]

Moreover, the affiliated physicians have always been involved in the efforts to improve clinical quality

[REDACTED]

[REDACTED]

76. *ENH Medical Group's*

[REDACTED]

CX 1433; CX 1456; CX 1457.

Response to No. 76: Disputed as incomplete and therefore misleading. The Medical Group has always had clinical integration programs, many of which involved the use of clinical protocols. *See* Response to No. 75, *supra*. Its expanded efforts at clinical integration in late 2002 and early 2003 involved the expansion of clinical protocols, and the use of the EPIC computer system. CX 1433 (Tab 75); Golbus Dep. Tr. (July 9, 2004) at 39-40, 170-71, 175-76 (Tab 73).

77.

[REDACTED]

Golbus IH Tr. at 193-96.

Response to No. 77: Disputed as incomplete and therefore misleading. All of the Medical Group physicians, both employed and affiliated, have access to their patients records through the web-based EPIC.

[REDACTED]

[REDACTED]

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.

Response to No. 78: Not disputed.

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] CX 2214.

Response to No. 79: Not disputed.

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.

Response to No. 80: Not disputed.

PART II: STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE FOR TRIAL

Background

81. Evanston Northwestern Healthcare ("ENH") is an integrated healthcare delivery system based in the northern suburbs of Chicago, Illinois. ENH provides in- and out-patient

hospital services, physician services, home health care, medical research and other healthcare related services. *See, e.g.*, ENH DL 004099 (**Tab 77**). As an integrated healthcare delivery system, ENH owns Faculty Practice Associates (FPA), which employs an array of physicians who practice at various ENH facilities. First Amended Answer at ¶ 7 (**Tab 78**). The FPA also owns ENH Medical Group Inc. (the Medical Group), an Independent Physician Association (“IPA”) whose members include the ENH-employed physicians, as well as a number of non-employed physicians with staff privileges at the ENH hospitals (“affiliated physicians”). *Id.* at ¶ 8. The Medical Group was formed in the early 1990s, when it appeared that health maintenance organizations (“HMOs”) would be the future of managed care contracting, for the purpose of securing and providing medical care to patients under capitated contracts. Miller Aff. ¶ 3 (**Tab 17**).

82. ENH merged with Highland Park Hospital effective January 1, 2000. Similarly, the Medical Group became legally integrated with the Highland Park Independent Practice Associates, Inc. (“Highland Park IPA”) on January 1, 2000. Golbus Dep. Tr. (July 8, 2004) at 92-93 (**Tab 10**). Dr. Golbus was not involved in the decision to merge the hospitals. *Id.* at 74-75. The Highland Park IPA was comprised solely of affiliated physicians, which totaled approximately 350 doctors by the time of the merger. CX 1332 at 4 (**Tab 79**).

83. Patients do not contract with physicians directly. Rather, patients obtain insurance, either directly or through their employers, from payors, or managed care companies (“MCOs”). Payors, in turn, negotiate with physicians, either individually or collectively with a practice group or IPA, over the rates the physicians will be reimbursed for providing medical services.

[REDACTED]

84.

[REDACTED]

85.

[REDACTED]

86. The Medical Group is one of several IPAs in the Chicagoland area, many of which are hospital-based and consist of both employed and affiliated physicians. ENH-FSM 29 (Tab 6); ENH-FSM 30 (Tab 7).

[REDACTED]

87.

[REDACTED]

[REDACTED]

The Medical Group Still has Capitated Contracts

88.

[REDACTED]

89. ENH Medical Group has over 70,000 capitated lives, which is the third most capitated lives in Chicago. ENH-FSM 30 at 7 (**Tab 7**). In 2000, the Medical Group received a meaningful part of its business from capitated contracts. Miller Aff. ¶ 3 (**Tab 17**). *See also* Miller Dep. Tr. at 48 (**Tab 72**).

90. Several IPAs in the Chicagoland area have stopped accepting capitated contracts, leaving the Medical Group as one of the only IPAs in the area that accepts capitated patients. Hochberg Dep. Tr. at 108-09 (**Tab 21**).

Payors Have Not Objected to the Medical Group Contracting on Behalf of Affiliated Physicians

91. The Medical Group has contracted for fee-for-service contracts on behalf of its employed and affiliated physicians. There is nothing extraordinary about this. Like the Medical Group, many IPAs in the Chicagoland area consist of both employed and affiliated physicians. ENH-FSM 30 (Tab 7).

[REDACTED]

92.

[REDACTED]

93.

[REDACTED]

94.

[REDACTED]

[REDACTED]

95.

[REDACTED]

The Medical Group is Non-Exclusive

96. Almost half of the affiliated physicians in the Medical Group belong to more than one IPA. McChesney Rep. at Ex. 8 (**Tab 12**).

97. After the merger between the Medical Group and the Highland Park IPA, none of the Highland Park doctors were coerced to join the Medical Group. Moller Dep. Tr. at 130 (**Tab 13**); Burstein Dep. Tr. at 101 (**Tab 15**); Solmor Dep. Tr. at 102 (**Tab 30**); Katz Tr. at 90 (**Tab 22**); Hochberg Dep. Tr. at 115 (**Tab 21**).

[REDACTED]

Chan Dep. Tr. at 42 (**Tab 48**); Solmor Dep. Tr. at 102 (**Tab 30**).

98. The Medical Group was never a payor's exclusive source for affiliated-physician contracting. Payors have always been free to contract with the Medical Group's affiliated physicians through other IPAs and/or individually.

[REDACTED]

99.

[REDACTED]

100.

[REDACTED]

101. The Medical Group does not monitor what other IPAs its doctors are affiliated with, or the individual contracts they may have with payors, nor do they know the rates the doctors have obtained through these other contracts. Mittleman Dep. Tr. at 29, 56-57, 100, 106 (Tab 11); Levine Dep. Tr. at 22 (Tab 18); Coyle Dep. Tr. at 38 (Tab 36).

Physicians Could Get Comparable or Better Rates Independently or With Other IPAs

102. Several doctors were able to negotiate better reimbursement rates outside of the Medical Group. In the years following the merger, some doctors who preferred to negotiate contracts on their own left the Medical Group.

[REDACTED]

103. Although they did not leave the Medical Group, some doctors also echoed the sentiment that they could negotiate better reimbursement rates individually with payors than through the Medical Group.

[REDACTED]

104. Additionally, several doctors testified that they were getting rates as good or better than the Medical Group's rates through contracts with payors through other IPA's.

[REDACTED]

Payors Were Not Always Equipped To Handle Multiple Affiliations

105. Although it was the Medical Group's policy to allow its affiliated physicians to have multiple IPA affiliations and/or individual contracts with payors,

[REDACTED]

Jans Dep. Tr. at 105 (**Tab 33**); Ballengee Dep. Tr. at 171 (**Tab 1**); Dorsey Dep. Tr. at 142-43 (**Tab 39**); Husa Dep. Tr. at 52 (**Tab 24**).

106.

[REDACTED]

107.

[REDACTED]

The multiple affiliation problem predated the merger, and was not unique to the Medical Group, but a global issue that affected other IPAs. Mittleman Dep. Tr. at 35-37, 122, 190 (**Tab 11**); Coyle Dep. Tr. at 35-36 (**Tab 36**).

108.

[REDACTED]

[REDACTED]

109.

[REDACTED]

110. The Medical Group staff was not concerned whether the physicians wanted to be paid the Medical Group contract rate or another rate. Levine Dep. Tr. at 245-46. Indeed, the Medical Group staff did not even know what rates the affiliated physicians were getting through their individual and/or other IPA contracts. Mittleman Dep. Tr. at 28-29, 56-57, 100, 106 (Tab 11); Levine Dep. Tr. at 22 (Tab 18); Coyle Dep. Tr. at 38 (Tab 36).

111.

[REDACTED]

112. About 2-3 months after the merger,

[REDACTED]

113. Within the next few months, the networking and provider relations staff at the Medical Group was also receiving calls from affiliated physicians on a weekly basis saying that they were not being reimbursed under the rate they were due under their contracts. Coyle Dep. Tr. at 36-37 (**Tab 36**); Levine Dep. Tr. at 161 (**Tab 18**).

[REDACTED]

114.

[REDACTED]

115.

[REDACTED]

[REDACTED]

116. The Medical Group sent the form “To Whom It May Concern” letter to all affiliated doctors to be returned to the Medical Group. *Id.* at 57, 68-69 (Tab 36).

[REDACTED]

117. Although all of the affiliated physicians received the “To Whom It May Concern” letter, not all of the letters were sent to the payors.

[REDACTED]

118. Moreover, there was no requirement that physicians sign the “To Whom It May Concern” letter. Levine Dep. Tr. at 165

[REDACTED]

No doctor was ever dropped from the Medical Group for failure to sign the “To Whom It May Concern” letter. Levine Dep. Tr. at 259 (Tab 18).

119. Other doctors signed and returned their “To Whom It May Concern” letters only after confirming through letters and conversations with the Medical Group networking specialists that the letters would in no way affect their ability to participate in other IPAs. *See e.g.*, FTC 000226 (Tab 44).

[REDACTED]

120.

[REDACTED]

[REDACTED]

121.

[REDACTED]

122. In the end, the “To Whom It May Concern” letters were a payor-dictated solution to resolve a payor system problem arising when a physician had multiple affiliations.

[REDACTED]

The Medical Group’s Ability to Contract On Behalf Of Its Affiliated Physicians Generates Numerous Efficiencies For Payors, Its Member Physicians, and Patients

123. An efficiency provided by the Medical Group’s contract negotiations on behalf of its affiliated physicians is lower transaction costs that result from single signature contracting. Levine Dep. Tr. at 20 (Tab 18).

[REDACTED]

124.

[REDACTED]

[REDACTED]

125.

[REDACTED]

126.

[REDACTED]

[REDACTED]

127. Doctors also recognized the benefits of single signature contracting. In explaining the benefits of being in the Medical Group,

[REDACTED]

128.

[REDACTED]

129.

[REDACTED]

[REDACTED]

130. The increased size of the Medical Group allowed it to offer a different and better product to payors, one with broader geographic coverage and more high end specialists.

[REDACTED]

131. Another efficiency for both payors and physicians is credentialing. Both employed and affiliated physicians must be credentialed with each individual payor for the payor's fee-for-service products. Coyle Dep Tr. at 17 (**Tab 36**); Miller Dep. Tr. at 10-11 (**Tab 72**).

132. Credentialing involves a vast amount of paperwork: gathering the required licensure and documentation from the physicians (including the physician's license, DEA number, hospital privilege verification, education verification, and malpractice information), providing the documentation to the payors, and following up with the payors and physicians to provide any further information the payors required. Coyle Dep Tr. at 8, 15-16, 47 (**Tab 36**); Mittleman Dep. Tr. at 111 (**Tab 11**); Guttman Dep. Tr. at 172-73 (**Tab 9**).

[REDACTED]

As a result, when the physicians had any questions about the credentialing forms, their administrative staff were able to call a

credentialing specialist at the Medical Group rather than having to contact the payors. Coyle
Dep. Tr. at 26 (Tab 36).

133.

[REDACTED]

134.

[REDACTED]

135. The doctors agree that delegating credentialing to the Medical Group is a huge time
saver. Katz Dep. Tr. at 92-93

[REDACTED]

[REDACTED]

136. Another efficiency that flows from the Medical Group's contracting on behalf of its employed and affiliated physicians is ease of patient referrals. Patients who are in strict HMOs must see doctors within the HMO network, or their expenses will not be covered. Miller Aff. ¶ 3 (Tab 17). Patients who are in PPOs similarly desire to be referred to doctors within their payor's network to obtain maximum insurance coverage. Miller Aff. ¶ 8 (Tab 17). By negotiating single signature contracts on behalf of all of its physicians, employed and affiliated, the Medical Group automatically assures that doctors within the Group are contracted with the same payors. As a result, physicians within the Medical Group can refer patients freely to one another without having to check in each instance whether that doctor is contracted with the patient's insurance coverage, and the Medical Group physicians can accept referrals from the Medical Group doctors without being concerned with whether their services will be covered. Miller. Aff. ¶ 8 (Tab 17). To facilitate patient referrals within the ENH network, the Medical Group provided all of its participating physicians with a physician directory so they would know what primary care physicians were in the Medical Group and what specialists primary care physicians could refer their patients to. Mittleman Dep. Tr. at 16 (Tab 11).

137. The Medical Group also facilitates physician referrals by providing a referral clearinghouse and by obtaining the necessary pre-approvals from managed care plans. Guttman Dep. Tr. at 178-79 (Tab 9); Hochberg Dep. Tr. at 83 (Tab 21); Katz Dep. Tr. at 65-66 (Tab 22).

138. A fourth efficiency the Medical Group delivers to both payors and physicians is assistance with the payor-physician relationship. The Medical Group has a dedicated staff of provider relation representatives that serve as liaisons between the physicians and the health plans. Mittleman Dep. Tr. at 7 (Tab 11). The provider relation specialists can intervene if, for example, a physician is not being reimbursed properly by a payor, if there are contractual issues that need to be clarified, if a physician is unsure of a payor policy or procedure, or if a physician has any other issues with a payor. Mittleman Dep. Tr. at 9 (Tab 11); Coyle Dep. Tr. at 8 (Tab 36).

139.

[REDACTED]

Consumers also benefit in that doctors can spend more time seeing patients and focusing on the practice of medicine. Guttmann Dep. Tr. at 177-78 (Tab 9).

140.

[REDACTED]

The Medical Group Has Always Had Clinical Integration

141. The Medical Group provides for its payors who have capitated contracts the use of clinical protocols by the Medical Group physicians and data collection on the use of those protocols.

[REDACTED]

The Medical Group not only disseminates information provided by the payors, such as data flow sheets and information about the protocols, to the physicians, but also employs a full-time staff to collect data for the payors on the use of these protocols. Guttman Dep. Tr. at 166-72 (**Tab 9**).

142. Clinical integration on the capitated side spills over and benefits patients covered under the Medical Group's fee-for-service plans. The clinical protocols and data gathering not only help the capitated patients, but all patients, as most doctors do not know what type of coverage a patient has at the time they treat the patient. Katz Dep. Tr. at 89-90 (**Tab 22**); Solmor Dep. Tr. at 101 (**Tab 30**); Hochberg Dep. Tr. at 124-25 (**Tab 21**).

[REDACTED]

143. The Medical Group always had some form of clinical integration in connection with its fee-for-service contracts; it was just not always called clinical integration.

[REDACTED]

Although the term was new, however, the Medical Group had always been involved in activities relating to clinical quality: “the terminology of clinical integration was a relatively new term using that as a term but the activities related to managing clinical quality, looking at pathways and stuff like that we had been doing -- for quite some time doing that through the care management committee was well as that group working in conjunction with the hospital staff.” Miller Dep. Tr. at 102 (Tab 72). *See also* Miller Dep. Tr. at 100-01 176-77 (Tab 72);

[REDACTED]

Moreover, the affiliated physicians have always been involved in the efforts to improve clinical quality.

[REDACTED]

144.

[REDACTED]

[REDACTED]

The IPA Has Stopped Contracting On Behalf Of Affiliates

145.

[REDACTED]

146.

[REDACTED]

[REDACTED]

147.

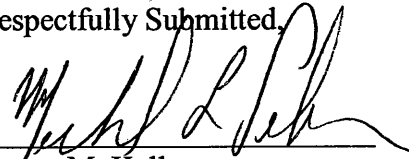
[REDACTED]

[REDACTED]

149. Regardless of what the payors chose to do, however, the Medical Group has ceased contracting on behalf of affiliated physicians for fee-for-service products. Golbus Dep. Tr. (July 8, 2004) at 169-70, 172-75 (**Tab 10**); Golbus Dep. Tr. (July 9, 2004) at 174 (**Tab 73**); Miller Dep. Tr. at 15, 18 (**Tab 72**).

Dated: November 18, 2004

Respectfully Submitted,



Duane M. Kelley
Tracy Allen
WINSTON & STRAWN LLP
35 West Wacker Dr.
Chicago, IL 60601-9703
(312) 558-5764
Fax: (312) 558-5700
Email: dkelley@winston.com

Michael L. Sibarium
Jay L. Levine
WINSTON & STRAWN LLP
1400 L Street, NW
Washington, DC 20005
(202) 371-5777
Fax: (202) 371-5950
Email: msibarium@winston.com

Counsel for Respondents

CERTIFICATE OF SERVICE

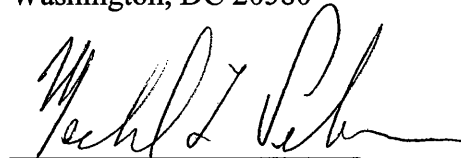
I hereby certify that on November 18, 2004, a copy of the foregoing *Respondent's Separate and Concise Statement of Material Facts as to Which There Exists a Genuine Issue for Trial* was served by hand delivery on:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW (H-106)
Washington, DC 20580

Thomas H. Brock, Esq.
Federal Trade Commission
600 Pennsylvania, Ave. NW (H-374)
Washington, DC 20580

Philip M. Eisenstat, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
Room NJ-5235
Washington, DC 20580

Chul Pak, Esq.
Assistant Director Mergers IV
Federal Trade Commission
600 Pennsylvania, Ave. NW (H-374)
Washington, DC 20580



Michael L. Sibarium, Esq.

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

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

**RESPONDENT'S ATTACHMENT TO THE SEPARATE AND CONCISE
STATEMENT OF MATERIAL FACTS AS TO WHICH THERE
EXISTS A GENUINE ISSUE FOR TRIAL
PURSUANT TO RULE 3.45(e)**

Pursuant to Rule 3.45(e) of the Commission's Rules, Respondent ENH Medical Group, Inc., by counsel, identifies the following redacted materials in Respondent's Separate and Concise Statement of Material Facts as to Which There Exists a Genuine Issue for Trial, dated November 15, 2004:

1. The redacted materials in ¶¶ 17, 21, 25, 28, 32, 33, 37, 40, 42-43, 46, 66, 68, 74, 77, 103-104, 113, 119, 127-129, 135-136, and 142 relate to the testimony of Dr. Jay Alexander, Teresa Chan, Dr. Norman Cohen, Dr. Laurie Hochberg, Dr. Richard Katz, Amy Rogers and Dr. Allan Solmor. The attorney for the doctors, Ms. Chan, and Ms. Rogers is George Lynch, Burke Warren MacKay & Serritella, 330 North Wabash Avenue, 22nd Floor, Chicago, Illinois 60611 who can be reached at (312) 840-7008.

2. The redacted materials in ¶ 25 relate to the testimony of Joseph Arango and documents produced by Blue Cross Blue Shield of Illinois. The attorney for Mr. Arango and

Blue Cross is James H. Mutchnik, Kirkland & Ellis LLP, 200 East Randolph Drive, Chicago, Illinois 60601 who can be reached at (312) 861-2350.

3. The redacted materials in ¶¶ 35, 39, 41, 46, 53, 69, 91, 94, 107, 114, and 144 relate to the testimony of Jane Ballengee and documents produced by Private HealthCare Systems. The attorney for Ms. Ballengee and PHCS is Jerome Hoffman, Holland & Knight, 315 South Calhoun Street, Tallahassee FL 32302, who can be reached at (850) 425-5654.

4. The redacted materials in ¶¶ 25, 32, 43, and 127 relate to the testimony of Dr. Harry Burstein. The attorney for Dr. Burstein is George Lynch, Burke Warren MacKay & Serritella, 330 North Wabash Avenue, 22nd Floor, Chicago, Illinois 60611 who can be reached at (312) 840-7008.

5. The redacted materials in ¶¶ 8, 11, 33, 37, 39, 52, 59-60, 69, 95, 124-125, 133-134, 144, and 147-148 relate to the testimony of Ronald J. Craven and documents produced by HFN, Inc. The attorney for Mr. Craven and HFN is Laura C. Liu, Hogan Marren, LTD, 205 North Michigan Avenue, Suite 4300, Chicago, Illinois 60601 who can be reached at (312) 916-1800.

6. The redacted materials in ¶¶ 25, 33, 39-41, 91, and 100 relate to the testimony of James Crones and Robert Curry and documents produced by the Chandler Group, Inc. The attorney for the Chandler Group, Inc. is Don Scherzer, 208 So. LaSalle Street, Suite 814, Chicago, IL 60604-1101 who can be reached at (216) 615-7418.

7. The redacted materials in ¶¶ 25 and 59 relate to the testimony of Jillian R. Foucre and documents produced by United Healthcare. The attorney for Ms. Foucre and United Healthcare is Helene D. Jaffe, Weil, Gotshal & Manges, 767 Fifth Avenue, New York, New York 10153-0119 who can be reached at (212) 310-8572.

8. The redacted materials in ¶¶ 8, 35, 52, 83, 88, 91-92, and 124 relate to the testimony of Lenore Holt-Darcy and documents produced by Unicare. The attorney for Ms. Holt-Darcy

and Unicare is Elizabeth G. Doolin, Chittendent, Murday & Novotny, LLC, 303 West Madison Street, Suite 1400, Chicago, Illinois 60606 who can be reached at (312) 281-3604.

9. The redacted materials in ¶¶ 25, 35, 39-41, 69, 94, 107-108, and 144 relate to the testimony of Sherry Husa and documents produced by Cigna. The attorney for Ms. Husa and Cigna is Karen M. Espaldon, Jones Day, 51 Louisiana Avenue, N.W. Washington, D.C. 20001-2113 who can be reached at (202) 879-3939.

10. The redacted materials in ¶¶ 39, 45, 83, 106, and 114 relate to the testimony of Brian Jans and documents produced by First Health. The attorney for Mr. Jans and First Health is Jennifer E. Schneid, 3200 Highland Avenue, Downers Grove, Illinois 60515 who can be reached at (630) 737-7426.

11. The redacted materials in ¶¶ 25, 39, 59-60, 69, 106, 124, 144, and 148 relate to the testimony of John Maxwell and documents produced by Humana. The attorney for Mr. Maxwell and Humana is William . Chittenden, III, Chittenden, Murday & Novotny LLC, 303 West Madison Street, Suite 1400, Chicago, Illinois 60606 who can be reached at (312) 281-3601.

12. The redacted materials in ¶¶ 35, 66, 91, and 92 relate to the testimony of Robert K. Mendonsa and documents produced by Aetna. The attorney for Mr. Mendonsa and Aetna is Steven C. Tolliver, 980 Jolly Road, Blue Bell, Pennsylvania 19422 who can be reached at (215) 775-3674.

13. The redacted materials in ¶¶ 8, 11, 39, 52, 69, 83, 91, 107, 114, 123-124, 133, 140, and 144 relate to the testimony of Patrick R. Neary and Kevin A. Dorsey and documents produced by GreatWest Healthcare. The attorney for Mr. Neary, Mr. Dorsey, and GreatWest Healthcare is Franklin S. Schwerin, Schwartz, Cooper, Greenberger & Krauss, 180 North LaSalle Street, Suite 2700, Chicago, Illinois 60601 who can be reached at (312) 845-5109.

14. The redacted materials in ¶¶ 17, 28, 32-33, 37, 40, and 77 relate to the testimony of Dr. Nancy Nora. The attorney for Dr. Nora is Gerald Haberkorn, Louis & Gellen, 200 West Adams Street, Suite 1900, Chicago, Illinois 60606 who can be reached at (312) 456-2701.

15. The redacted materials in ¶¶ 22-23, 32-33, 37, and 100 relate to the testimony of Dr. Fred Rosenberg. The attorney for Dr. Rosenberg is Thomas B. Shapira, Much, Shelist, 191 North Wacker Drive, Suite 1800, Chicago, Illinois 60606 who can be reached at (312) 521-2599.

16. The remaining redacted materials in the Respondent's Separate and Concise Statement of Material Facts as to Which There Exists a Genuine Issue for Trial include the testimony of Dr. Neal Moller, Dr. Michael Ankin, Dr. Leon Dragon, and employees and former employees of, or documents produced by Respondents, Evanston Northwestern Healthcare Corp. and ENH Medial Group, Inc, and its expert, Fred S. McChesney. The attorney for Respondents is Michael L. Sibarium, Winston & Strawn LLP, 1400 L Steet, N.W. Washington, D.C. 20005-3502, who can be reached at (202) 371-5702.

Response to No. 8: Disputed as incomplete and therefore misleading. In addition to contracting with individual doctors and hospitals, payors have been contracting for several years with Independent Physician Associations (IPAs) in the Chicagoland area that negotiate on behalf of both employed and non-employed physicians. Ballengee Dep. Tr. at 162-166 (Tab 1); Holt-Darcy Dep. Tr. at 21-24 (Tab 2); Mendonsa Dep. Tr. at 132-35 (Tab 3); Cronos Dep. Tr. at 80-81 (Tab 4); Neary Dep. Tr. at 151-152 (Tab 5). Most major hospitals in the Chicagoland area have an IPA associated with them. ENH-FSM 29 (Tab 6); ENH-FSM 30 (Tab 7).

[REDACTED]

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; Hochberg Dep. Tr. at 67-68; Katz Dep. Tr. 43-44.*

Response to No. 9: Disputed as incomplete and therefore misleading. A doctor will only get paid under a fee-for-service arrangement for services that are covered by the payors. Services that are not covered, whether they are capitated or fee-for-service will not be reimbursed. Guttman Dep. Tr. at 60 (Tab 9).

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; 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 at ¶ 41.*

Response to No. 10: Disputed in part as incomplete and therefore misleading.

RBRVS is a Medicare system that provides one basis for determining the rate at which a payor will reimburse a physician for physician services. It is used not only in negotiations between payors and individual doctors, but also in negotiations between payors and IPAs. Rates in physician contracts also may be an agreed percentage on RBRVS for a particular year (both the percentage and the particular year of the RBRVS were negotiated) or some modified version of RBRVS. Golbus Dep. Tr. (July 8, 2004) at 145-46 (Tab 10). Further, to be clear, the fee-for-service rates agreed to between payors and individual doctors or IPAs are not typically around 110% of RBRVS, but instead vary widely.

[REDACTED]

11. Doctors and insurance companies negotiate whatever price is mutually acceptable for doctors services. Mittleman Dep. Tr. at 46-47.

Response to No. 11: Disputed in part as incomplete and therefore misleading.

Payors negotiate with both individual doctors and IPAs to find a mutually acceptable reimbursement rate for physician services.

[REDACTED]

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.

Response to No. 12: Not disputed.

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.*

Response to No. 13: Not disputed.

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; Hochberg Dep. Tr. at 7-9.*

Response to No. 14: Not disputed.

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.*

Response to No. 15: Disputed. There is no evidence in the record that supports this statement, and notably, Complaint Counsel does not cite such evidence.

[REDACTED]

Moreover, physicians practice in a wide array of specialties, and most do not compete against each other on any level. McChesney Rep. at Ex. 2. **(Tab 12)**. A podiatrist, for example, does not compete with a cardiologist. The Medical Group specialists practice in over 40 diverse specialties, ranging from podiatry to gynecology to cardiology. *Id.* At most, some doctors compete against other doctors in their same specialty for patients. Moller Dep. Tr. at 126-27 (competes against other gastroenterologists for patients) **(Tab 13)**; Ankin Dep. Tr. at 36 (competes against other doctors practicing pulmonary medicine for patients) **(Tab 14)**; Burstein Dep. Tr. at 106 (competes against other OB/GYNs for patients) **(Tab 15)**. However, not all doctors who compete in the same specialty agree that they are competitors. Rosenberg Dep. Tr. at 90-91 ("I don't think gastroenterologists think about competing against each other. We're colleagues who provide service. And patients go back and forth for whatever reason.") **(Tab 16)**. Further, the degree to which different physicians compete with one another depends on the relative proximity of the two physicians. The approximately 850 physicians in the

Medical Group practice over a five county area, spanning from McHenry County (Northwest of Chicago) to Cook County (which includes Chicago itself, as well as south of Chicago), spanning a radius of approximately 40 miles. Miller Aff. ¶ 5 (Tab 17); McChesney Rep. at Ex. 4a. (Tab 12). It is unlikely that a gastroenterologist in Gurnee, IL (near the Wisconsin border) would be competing with an Allergist/Immunologist in Flossmoor, IL (near Chicago Heights, near the Indiana border).

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.*

Response to No. 16: Not disputed.

17. *ENH Medical Group, a for-profit, independent practice association (or IPA), in 2000 represented approximately 860 doctors. CX 1383 at 4.*

Response to No. 17: Disputed in part. The physicians were not represented by the Medical Group, but rather participated in certain programs and contracts offered by the IPA, and were free to, and did, participate in certain programs and contracts with other IPAs.

[REDACTED]

[REDACTED]

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.*

Response to No. 18: Not disputed.

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. ENH Medical Group refers publicly to the independent doctors as affiliated doctors in contrast to its employed doctors. First Amended Answer ¶ 36; Gutmann Dep. Tr. at 20-21.*

Response to No. 19: Not disputed.

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

Response to No. 20: Not disputed.

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.*

Response to No. 21: Disputed as incomplete and therefore misleading. First, the document Complaint Counsel cites states that there were 350 physicians participating in the Highland Park Independent Practice Associates, Inc. (Highland Park IPA) before the merger with the Medical Group. Further, the physicians did not belong to the Highland Park IPA, but rather participated in the IPA.

[REDACTED]

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; CX 1503 at 7.*

Response to No. 22: Disputed in part as incomplete and therefore misleading. To be clear, the affiliated doctors who participated in the Medical Group before the merger were free to have staff privileges at other hospitals besides Evanston and Glenbrook. Miller Affidavit ¶ 5. (Tab 17). Even after the merger, the Medical Group never imposed any limitations on which hospital staffs a doctor could be a member, and never required a doctor to terminate his/her staff privileges at other hospitals. Katz Dep. Tr. at 12 (Tab 22); Rosenberg Dep. Tr. at 93 (Tab 16).

[REDACTED]

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

Response to No. 23: Disputed in part as incomplete, vague, misleading, and opinion. This statement is overbroad. Ms. Levine stated only that the employed physicians competed against the affiliated physicians, but was not precise about which physicians competed against each other, or what they competed for. This statement, as composed by Complaint Counsel, suggests that all physicians, no matter what their specialty, compete against each other, which is simply not true. *See* Response to No. 15, *supra*;

[REDACTED]

Further, Ms. Levine is not a doctor, and cannot know which of the 850 doctors in the Medical Group, if any, compete with each other. While she has knowledge regarding physician contracting, she has no knowledge of physician competition. It is notable that Complaint

Counsel does not cite to a single physician witness's testimony to support its contentions that employed physicians and independent physicians compete against each other, and that independent physicians compete amongst themselves.

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

Response to No. 24: Disputed. The physicians in the Medical Group practice in five different counties, Lake, Cook, Kane, Dupage, McHenry. Miller Aff. ¶ 5 (Tab 17); McChesney Rep. at Ex. 4a. (Tab 12). It is unlikely that a gastroenterologist in Gurnee, IL (near the Wisconsin border) would be competing with an Allergist/Immunologist in Flossmoor, IL (near Chicago Heights, near the Indiana border).

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*

Response to No. 25: Disputed as misleading. The "triangular region" Complaint Counsel refers to is overly narrow and ignores the realities of the competitive landscape in the Chicagoland area. The "triangular region" is not, and never has been, where the main competitors of Highland Park, Glenbrook, and Evanston are located.

[REDACTED]

[REDACTED]

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; CX 490. See also Neaman Dep. Tr. at 186-87; Stearns Dep. at 97-98; Newton Dep. at 123-25; Golbus IH at 19-29.*

Response to No. 26: Disputed. There has never been any price-fixing agreement among the Medical Group physicians, nor were all of the Medical Group doctors in competition with the Highland Park doctors. *See* Response to No. 25, *supra*. Even if some employed physician competed with some affiliated physician, it is not correct to say or imply that all employed physicians competed with all affiliated physicians. *See also* Response to No. 15, *supra*.

[REDACTED]

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; Gutmann Dep. Tr. at 28-29; Katz Dep. Tr. at 18-20; Hochberg Dep. Tr. at 51-52; Burstein Dep. Tr. at 9; Moller Dep. Tr. at 126-27.*

Response to No. 27: Disputed.

[REDACTED]

[REDACTED]

The medical services provided by all members of the Medical Group are not “comparable.” The services of a cardiologist are not the same as the services of a pediatrician.

[REDACTED]

This includes doctors who practice in the same areas as, and provide comparable medical services, to the Medical Group physicians. *See e.g., Moller Dep. Tr. at 126-27 (Tab 13); Hochberg Dep. Tr. at 104-06 (Tab 21).*

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; Hochberg Dep. Tr. at 51-52; Katz Dep. Tr. at 18-20; Nora Dep. Tr. at 10-11; Cohen Dep. Tr. at 30.

Response to No. 28: Disputed. None of these cites supports Complaint Counsel's contention. Patients are free to choose any doctor they wish, subject to their health plan's rules, whether or not that doctor participates in the Medical Group. *Moller Dep. Tr. at 126-28 (Tab 13).*

[REDACTED]

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.

Response to No. 29: Disputed. Notably, Complaint Counsel cites no support for this statement, because there is no factual backing in the record for this declaration. See Response to No. 15, *supra*.

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] CX 1347 at 7.

Response to No. 30: Disputed as incomplete and therefore misleading. The Medical Group was only one of several IPAs in the Chicagoland area. Most hospitals in the Chicagoland area, including Lake Forest, Rush North Shore, Condell, Advocate, Northwest Community, and Waukegan, have IPAs associated with them. ENH-FSM 29 (Tab 6); ENH-FSM 30 (Tab 7); CX 1347 at 7 (Tab 28).

[REDACTED]

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] CX
1335 at 11.

Response to No. 31:

[REDACTED]

[REDACTED]

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]
CX 1090 at 1-2, 5-7.

Response to No. 32: Disputed as vague and incomplete and therefore misleading.

[REDACTED]

[REDACTED]

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

Response to No. 33: Disputed. Complaint Counsel misrepresents Dr. Golbus's deposition testimony. Complaint Counsel is quoting Dr. Golbus's testimony about post-merger competition with the Highland Park IPA. Golbus Dep. Tr. (July 8, 2004) at 299

[REDACTED]

See Response to No. 15, supra.

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

Response to 34: Disputed as incomplete and therefore misleading. The Participation Agreements also all included an identical Section 3.2. CX 1503 at 9 (**Tab 34**); CX 1504 at 8 (**Tab 35**).

[REDACTED]

[REDACTED]

35. *Pursuant to the Participating Agreement,*

[REDACTED]

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

Response to No. 35: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

36. *The Participating Agreement*

[REDACTED] CX 1503 at 22; see also CX 1710; Golbus Dep. Tr. at 33-34 (July 9, 2004). 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.

Response to No. 36: Disputed as incomplete.

[REDACTED]

Finally, Complaint Counsel's determination of the number of affiliated physicians who participated in the Medical Group's fee-for-service contracts is based solely on the investigation of Ms. Spriggs-Hutchinson, an FTC investigator. Ms. Spriggs-Hutchinson's analysis is riddled with fundamental errors. She double-counts some

contracts, as she noted that there were 850 agreements for 640 doctors, and without any justification, she discards 181 contracts that do not include Attachment C.

37. *Provision 5.8 of the Participation Agreement sets forth that*

[REDACTED]

E.g., CX 1503 at 12 (Provision 5.8).

Response to No. 37: Disputed as incomplete and therefore misleading.

[REDACTED]

38. **[REDACTED]**

See e.g., Hochberg Dep. Tr. at 77-78; Katz Dep. Tr. at 58.

Response to No. 38: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

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; CX 1714; CX 1745.*

Response to No. 39: Disputed. Complaint Counsel has it backwards.

[REDACTED]

[REDACTED]

[REDACTED]

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; CX 1714; CX 1745.*

Response to No. 40: Disputed. Complaint Counsel's characterization of the letters is incorrect and misleading.

[REDACTED]

[REDACTED]

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

Response to No. 41: Disputed.

[REDACTED]

42. *Terry Chan, the chief managed care contract negotiator for the Independent Doctors from Highland Park Hospital, wrote that*
[REDACTED] *CX 440 at 1.*

Response to No. 42: Disputed as misleading and opinion. Complaint Counsel quotes Chan correctly, but this opinion is wrong.

[REDACTED]

43. *Dr. Burstein, the President of the Highland Park IPA, stated that*

[REDACTED]

Burstein Dep. Tr. at 48.

Response to No. 43: Disputed as misleading and opinion. Complaint Counsel quotes Burstein correctly, but his individual opinion has not been borne out by the experience of individual physicians.

[REDACTED]

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] *Gutmann Dep. Tr. at 156.*

Response to No. 44: Disputed as misleading and opinion. Complaint Counsel quotes Guttmann correctly, but his opinion has not been borne out by the experience of individual physicians.

[REDACTED]

45. *In connection with negotiating with an insurance company, a June 2000 e-mail from Terry Chan to ENH Medical Group management stated:*
[REDACTED]
CX 450 at 1.

Response to No. 45: Disputed as misleading. The statement from Chan was only discussing one payor, CNN, and not all the insurance companies that the Medical Group dealt with.

[REDACTED]

[REDACTED]

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] *CX 440 at 1.*

Response to No. 46: Disputed as misleading and opinion. This statement by Terry Chan, while quoted correctly, is inaccurate opinion.

[REDACTED]

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

Response to No. 47: Disputed. The physicians did not exchange contract information.

[REDACTED]

48. *After the Independent Doctors from Highland Park Hospital became affiliates of ENH Medical Group, the group established targets of [REDACTED] of RBRVS and minimum prices of [REDACTED] of RBRVS in connection with fee-for-service health plans. CX 416 at 1; Golbus IH Tr. at 152-53; Levine IH Tr. at 198-200.*

Response to 48: Disputed as incomplete and therefore misleading. The Contracting Committee of the Medical Group established these goals simply as a guideline, and not as strict

rules. Mittleman Dep. Tr. at 186 (Tab 11). These rates were consistent with what other comparable IPAs were receiving at the time. See McChesney Rep. at Ex. 3

[REDACTED]

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; CX 1156; Burstein Dep. Tr. at 54-55.*

Response to No. 49: Disputed as incomplete and therefore misleading. When Evanston Northwestern Healthcare (ENH) merged with Highland Park Hospital the intention was to create one integrated medical staff. Miller Aff. ¶ 6. (Tab 17). As part of integrating the medical staffs, it was decided that the Medical Group and Highland Park IPAs should become one integrated entity. *Id.* Thus, the IPAs needed to have a single set of contracts. Golbus Dep. Tr. (July 8, 2004) at 82 (Tab 10).

50. *ENH Medical Group negotiated with [REDACTED] in early 2000. CX 2208. ENH Medical Group's negotiation with [REDACTED] in January 2000 increased doctor revenues by about [REDACTED] per year. CX 27 at 6 ; CX 28 ; CX 416.*

Response to No. 50: Disputed as incomplete and therefore misleading. This statement regards an increase in revenue, and not profitability,

[REDACTED]

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

Response to No. 51: Disputed as incomplete and therefore misleading. The statement by Dr. Golbus is quoted correctly,

[REDACTED]

52. *In addition to the [REDACTED] contract, ENH Medical Group successfully renegotiated more contracts throughout the year 2000. CX 27 at 6 ; CX 28; CX 2206; CX 2211.*

[REDACTED]

[REDACTED]

Finally, the rates negotiated with payors brought the Medical Group in line with comparable IPAs in the Chicagoland area. McChesney Rep. at 35-37, Ex. 3 (Tab 12).

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

Response to No. 53: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

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; Golbus IH Tr. at 154-55; First Amended Answer at ¶43a.*

Response to No. 54: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

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; First Amended Answer at ¶43b.*

Response to No. 55: Disputed as incomplete and therefore misleading.

[REDACTED]

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

Response to No. 56: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

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; First Amended Answer at ¶43d.*

Response to No. 57: Disputed as incomplete and therefore misleading. The contract that the Medical Group signed with Cigna in 2000 was a three-year arrangement. CIG/IL 0071166-0071205 at 10 (Tab 62). Further, like Aetna, the contract had not been renegotiated since 1996. ENHL JH 002275-002301 (Tab 62). Thus, these increases were based on rates negotiated over four years prior. As discussed above, there are many reasons why the rates may have increased, and that the rates are equivalent to other comparable IPAs. Response to No. 51, *supra*.

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.*

Response to No. 58: Disputed as incomplete and therefore misleading. This statement regards an increase in revenue, and not profitability,

[REDACTED]

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.*

Response to No. 59: Disputed as incomplete and therefore misleading.

[REDACTED]

[REDACTED]

60. **[REDACTED]**

Katz Dep. Tr. at 59; Hochberg Dep. Tr. at 78.

Response to No. 60: Disputed.

[REDACTED]

[REDACTED]

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; Arizona v. Maricopa County Medical Society, 457 U.S. 332, 340 n. 9 (1982).*

Response to No. 61: Disputed as misleading. During his deposition, John Coyle never discussed the differences between fee-for-service and capitated contracts. Rather, he was asked only about his understanding of the term "non-risk." He never identified who took on the risk under a fee-for-service contract. J. Coyle Dep. Tr. at 22-23 (Tab 82).

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.*

Response to No. 62: Not disputed.

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

Response to No. 63: Not disputed.

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; see also CX 1503 at 4.*

Response to No. 64: Disputed as incomplete and misleading.

[REDACTED]

The affiliated physicians and the Medical Group share financial risk under their capitated plans. Golbus Dep. Tr. (July 8, 2004) at 135-37, 164. The Medical Group has over 70,000 capitated lives, which is the third largest number of capitated lives held by any IPA in the Chicagoland area. ENH-FSM 30 at 7 (Tab 7).

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

Response to No. 65: Disputed as incomplete and misleading.

[REDACTED]

Moreover, as more doctors enter the Medical Group for fee-for-service contracts, the more financially integrated it is for capitated contracts. Currently, the Medical Group has over 70,000 capitated lives, which is the third largest number of capitated lives held by any IPA in the Chicagoland area. ENH-FSM 30 at 7 (Tab 7).

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

Response to No. 66: Disputed.

[REDACTED]

[REDACTED]

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

Response to No. 67: Disputed as incomplete and therefore misleading. Despite the trend toward fee-for-service contracts in the Chicagoland area, the Medical Group still has over 70,000 capitated lives, which is the third largest number of capitated lives held by an IPA in that area. ENH-FSM 30 at 7 (Tab 7). As a result, the Medical Group still has some degree of financial integration.

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.*

Response to No. 68: Disputed. The Medical Group always had some form of clinical integration in connection with its fee-for-service contracts; it was just not always called clinical integration. Clinical integration was a new term used by the FTC in late 2002-early 2003 that did not have any meaning to the Medical Group members. Guttman Dep. Tr at 188 (Tab 9); Golbus Dep. Tr. (July 8, 2004) at 50 (Tab 10); Golbus Dep. Tr. (July 9, 2004) at 170-71 (Tab 73); Miller Dep. Tr. at 102 (Tab 72).

[REDACTED]

[REDACTED]

[REDACTED]

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; CX 1433; CX 1113; Golbus Dep. Tr. at 115-16 (July 8, 2004).*

Response to No. 69: Disputed. The Medical Group has always had clinical integration programs, although they were not called by that name. *See* Response to No. 68, *supra*. Complaint Counsel also mischaracterizes Dr. Golbus' testimony.

[REDACTED]

Jodi Levine is not an attorney, and she testified that she does not understand what the term clinical integration means. Levine Dep. Tr. at 13 (Tab 18).

[REDACTED]

[REDACTED]

Out of an abundance of caution, the Medical Group made efforts to formalize and expand what it was already doing. *See, e.g., Golbus Dep. Tr. (July 8, 2004) at 57-58 (Tab 10).*

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.*

Response to No. 70: Disputed. The Medical Group has always had clinical integration programs, and the affiliates have always participated in the Medical Group's clinical integration efforts. *See Response to Nos. 68 and 69, supra.* In late 2002, out of an abundance of caution, the Medical Group made efforts to formalize and expand what it was already doing. *Id.*

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

[REDACTED]

CX 1457 at 1.

Response to No. 71: Disputed as misleading and opinion. This statement is merely the opinion of one employee, Jodi Levine, a non-attorney who admitted that she does not understand what the term "clinical integration" means. *Levine Dep. Tr. at 13 (Tab 18).* The Medical Group had always been clinically integrated, and by December 2002, many aspects of clinical integration were already in place. *See Response to Nos. 68-69, supra.* In late 2002, out of an abundance of caution, the Medical Group made efforts to formalize and expand what it was already doing. *Id.*

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).*

Response to No. 72: Disputed.

[REDACTED]

In late 2002, out of an abundance of caution, the Medical Group made efforts to formalize and expand what it was already doing. *See* Response to Nos. 68-69, *supra*.

[REDACTED]

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; M. Benson IH Tr. at 78-80.*

Response to No. 73: Disputed. The Medical Group has always been clinically integrated, and the affiliates have always participated in the Medical Group's clinical integration efforts. *See* Response to Nos. 68 and 69, *supra*; Miller Dep. Tr. at 132, 135-37, 140 (Tab 72). In late 2002, out of an abundance of caution, the Medical Group made efforts to formalize and expand what it was already doing. *See* Response to Nos. 68 and 69, *supra*. As a result of these efforts, all of the physicians were aware, or should have been aware, of its existence.

[REDACTED]

[REDACTED]

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.*

Response to No. 74: Disputed. The Medical Group always had clinical integration programs, and its clinical integration efforts are ongoing. *See* Response to Nos. 68 and 69, *supra*;

[REDACTED]

75.

[REDACTED]
Gutmann Dep. Tr. at 136.

Response to No. 75: Disputed. The Medical Group has always had clinical integration programs, many of which involved the use of clinical protocols.

[REDACTED]

Moreover, the affiliated physicians have always been involved in the efforts to improve clinical quality

[REDACTED]

[REDACTED]

76. *ENH Medical Group's*

[REDACTED]

CX 1433; CX 1456; CX 1457.

Response to No. 76: Disputed as incomplete and therefore misleading. The Medical Group has always had clinical integration programs, many of which involved the use of clinical protocols. *See* Response to No. 75, *supra*. Its expanded efforts at clinical integration in late 2002 and early 2003 involved the expansion of clinical protocols, and the use of the EPIC computer system. CX 1433 (**Tab 75**); Golbus Dep. Tr. (July 9, 2004) at 39-40, 170-71, 175-76 (**Tab 73**).

77.

[REDACTED]

Golbus IH Tr. at 193-96.

Response to No. 77: Disputed as incomplete and therefore misleading. All of the Medical Group physicians, both employed and affiliated, have access to their patients records through the web-based EPIC.

[REDACTED]

[REDACTED]

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.

Response to No. 78: Not disputed.

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] CX 2214.

Response to No. 79: Not disputed.

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.

Response to No. 80: Not disputed.

PART II: STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE FOR TRIAL

Background

81. Evanston Northwestern Healthcare ("ENH") is an integrated healthcare delivery system based in the northern suburbs of Chicago, Illinois. ENH provides in- and out-patient

hospital services, physician services, home health care, medical research and other healthcare related services. *See, e.g.*, ENH DL 004099 (Tab 77). As an integrated healthcare delivery system, ENH owns Faculty Practice Associates (FPA), which employs an array of physicians who practice at various ENH facilities. First Amended Answer at ¶ 7 (Tab 78). The FPA also owns ENH Medical Group Inc. (the Medical Group), an Independent Physician Association (“IPA”) whose members include the ENH-employed physicians, as well as a number of non-employed physicians with staff privileges at the ENH hospitals (“affiliated physicians”). *Id.* at ¶ 8. The Medical Group was formed in the early 1990s, when it appeared that health maintenance organizations (“HMOs”) would be the future of managed care contracting, for the purpose of securing and providing medical care to patients under capitated contracts. Miller Aff. ¶ 3 (Tab 17).

82. ENH merged with Highland Park Hospital effective January 1, 2000. Similarly, the Medical Group became legally integrated with the Highland Park Independent Practice Associates, Inc. (“Highland Park IPA”) on January 1, 2000. Golbus Dep. Tr. (July 8, 2004) at 92-93 (Tab 10). Dr. Golbus was not involved in the decision to merge the hospitals. *Id.* at 74-75. The Highland Park IPA was comprised solely of affiliated physicians, which totaled approximately 350 doctors by the time of the merger. CX 1332 at 4 (Tab 79).

83. Patients do not contract with physicians directly. Rather, patients obtain insurance, either directly or through their employers, from payors, or managed care companies (“MCOs”). Payors, in turn, negotiate with physicians, either individually or collectively with a practice group or IPA, over the rates the physicians will be reimbursed for providing medical services.

[REDACTED]

84.

[REDACTED]

85.

[REDACTED]

86. The Medical Group is one of several IPAs in the Chicagoland area, many of which are hospital-based and consist of both employed and affiliated physicians. ENH-FSM 29 (Tab 6); ENH-FSM 30 (Tab 7).

[REDACTED]

87.

[REDACTED]

[REDACTED]

The Medical Group Still has Capitated Contracts

88.

[REDACTED]

89. ENH Medical Group has over 70,000 capitated lives, which is the third most capitated lives in Chicago. ENH-FSM 30 at 7 (Tab 7). In 2000, the Medical Group received a meaningful part of its business from capitated contracts. Miller Aff. ¶ 3 (Tab 17). *See also* Miller Dep. Tr. at 48 (Tab 72).

90. Several IPAs in the Chicagoland area have stopped accepting capitated contracts, leaving the Medical Group as one of the only IPAs in the area that accepts capitated patients. Hochberg Dep. Tr. at 108-09 (Tab 21).

Payors Have Not Objected to the Medical Group Contracting on Behalf of Affiliated Physicians

91. The Medical Group has contracted for fee-for-service contracts on behalf of its employed and affiliated physicians. There is nothing extraordinary about this. Like the Medical Group, many IPAs in the Chicagoland area consist of both employed and affiliated physicians. ENH-FSM 30 (Tab 7).

[REDACTED]

92.

[REDACTED]

93.

[REDACTED]

94.

[REDACTED]

[REDACTED]

95.

[REDACTED]

The Medical Group is Non-Exclusive

96. Almost half of the affiliated physicians in the Medical Group belong to more than one IPA. McChesney Rep. at Ex. 8 (Tab 12).

97. After the merger between the Medical Group and the Highland Park IPA, none of the Highland Park doctors were coerced to join the Medical Group. Moller Dep. Tr. at 130 (Tab 13); Burstein Dep. Tr. at 101 (Tab 15); Solmor Dep. Tr. at 102 (Tab 30); Katz Tr. at 90 (Tab 22); Hochberg Dep. Tr. at 115 (Tab 21).

[REDACTED]

Chan Dep. Tr. at 42 (Tab 48); Solmor Dep. Tr. at 102 (Tab 30).

98. The Medical Group was never a payor's exclusive source for affiliated-physician contracting. Payors have always been free to contract with the Medical Group's affiliated physicians through other IPAs and/or individually.

[REDACTED]

99.

[REDACTED]

100.

[REDACTED]

101. The Medical Group does not monitor what other IPAs its doctors are affiliated with, or the individual contracts they may have with payors, nor do they know the rates the doctors have obtained through these other contracts. Mittleman Dep. Tr. at 29, 56-57, 100, 106 (Tab 11); Levine Dep. Tr. at 22 (Tab 18); Coyle Dep. Tr. at 38 (Tab 36).

Physicians Could Get Comparable or Better Rates Independently or With Other IPAs

102. Several doctors were able to negotiate better reimbursement rates outside of the Medical Group. In the years following the merger, some doctors who preferred to negotiate contracts on their own left the Medical Group.

[REDACTED]

103. Although they did not leave the Medical Group, some doctors also echoed the sentiment that they could negotiate better reimbursement rates individually with payors than through the Medical Group.

[REDACTED]

104. Additionally, several doctors testified that they were getting rates as good or better than the Medical Group's rates through contracts with payors through other IPA's.

[REDACTED]

Payors Were Not Always Equipped To Handle Multiple Affiliations

105. Although it was the Medical Group's policy to allow its affiliated physicians to have multiple IPA affiliations and/or individual contracts with payors,

[REDACTED]

Jans Dep. Tr. at 105 (Tab 33); Ballengee Dep. Tr. at 171 (Tab 1); Dorsey Dep. Tr. at 142-43 (Tab 39); Husa Dep. Tr. at 52 (Tab 24).

106.

[REDACTED]

107.

[REDACTED]

The multiple affiliation problem predated the merger, and was not unique to the Medical Group, but a global issue that affected other IPAs. Mittleman Dep. Tr. at 35-37, 122, 190 (Tab 11); Coyle Dep. Tr. at 35-36 (Tab 36).

108.

[REDACTED]

[REDACTED]

109.

[REDACTED]

110. The Medical Group staff was not concerned whether the physicians wanted to be paid the Medical Group contract rate or another rate. Levine Dep. Tr. at 245-46. Indeed, the Medical Group staff did not even know what rates the affiliated physicians were getting through their individual and/or other IPA contracts. Mittleman Dep. Tr. at 28-29, 56-57, 100, 106 (Tab 11); Levine Dep. Tr. at 22 (Tab 18); Coyle Dep. Tr. at 38 (Tab 36).

111.

[REDACTED]

112. About 2-3 months after the merger,

[REDACTED]

113. Within the next few months, the networking and provider relations staff at the Medical Group was also receiving calls from affiliated physicians on a weekly basis saying that they were not being reimbursed under the rate they were due under their contracts. Coyle Dep. Tr. at 36-37 (Tab 36); Levine Dep. Tr. at 161 (Tab 18).

[REDACTED]

114.

[REDACTED]

115.

[REDACTED]

[REDACTED]

116. The Medical Group sent the form “To Whom It May Concern” letter to all affiliated doctors to be returned to the Medical Group. *Id.* at 57, 68-69 (Tab 36).

[REDACTED]

117. Although all of the affiliated physicians received the “To Whom It May Concern” letter, not all of the letters were sent to the payors.

[REDACTED]

118. Moreover, there was no requirement that physicians sign the “To Whom It May Concern” letter. *Levine Dep. Tr.* at 165

[REDACTED]

No doctor was ever dropped from the Medical Group for failure to sign the "To Whom It May Concern" letter. Levine Dep. Tr. at 259 (Tab 18).

119. Other doctors signed and returned their "To Whom It May Concern" letters only after confirming through letters and conversations with the Medical Group networking specialists that the letters would in no way affect their ability to participate in other IPAs. See e.g., FTC 000226 (Tab 44).

[REDACTED]

120.

[REDACTED]

[REDACTED]

121.

[REDACTED]

122. In the end, the “To Whom It May Concern” letters were a payor-dictated solution to resolve a payor system problem arising when a physician had multiple affiliations.

[REDACTED]

The Medical Group’s Ability to Contract On Behalf Of Its Affiliated Physicians Generates Numerous Efficiencies For Payors, Its Member Physicians, and Patients

123. An efficiency provided by the Medical Group’s contract negotiations on behalf of its affiliated physicians is lower transaction costs that result from single signature contracting.

Levine Dep. Tr. at 20 (Tab 18).

[REDACTED]

124.

[REDACTED]

[REDACTED]

125.

[REDACTED]

126.

[REDACTED]

[REDACTED]

127. Doctors also recognized the benefits of single signature contracting. In explaining the benefits of being in the Medical Group,

[REDACTED]

128.

[REDACTED]

129.

[REDACTED]

[REDACTED]

130. The increased size of the Medical Group allowed it to offer a different and better product to payors, one with broader geographic coverage and more high end specialists.

[REDACTED]

131. Another efficiency for both payors and physicians is credentialing. Both employed and affiliated physicians must be credentialed with each individual payor for the payor's fee-for-service products. Coyle Dep Tr. at 17 (Tab 36); Miller Dep. Tr. at 10-11 (Tab 72).

132. Credentialing involves a vast amount of paperwork: gathering the required licensure and documentation from the physicians (including the physician's license, DEA number, hospital privilege verification, education verification, and malpractice information), providing the documentation to the payors, and following up with the payors and physicians to provide any further information the payors required. Coyle Dep Tr. at 8, 15-16, 47 (Tab 36); Mittleman Dep. Tr. at 111 (Tab 11); Guttman Dep. Tr. at 172-73 (Tab 9).

[REDACTED]

As a result, when the physicians had any questions about the credentialing forms, their administrative staff were able to call a

credentialing specialist at the Medical Group rather than having to contact the payors. Coyle
Dep. Tr. at 26 (Tab 36).

133.

[REDACTED]

134.

[REDACTED]

135. The doctors agree that delegating credentialing to the Medical Group is a huge time
saver. Katz Dep. Tr. at 92-93

[REDACTED]

[REDACTED]

136. Another efficiency that flows from the Medical Group's contracting on behalf of its employed and affiliated physicians is ease of patient referrals. Patients who are in strict HMOs must see doctors within the HMO network, or their expenses will not be covered. Miller Aff. ¶ 3 (Tab 17). Patients who are in PPOs similarly desire to be referred to doctors within their payor's network to obtain maximum insurance coverage. Miller Aff. ¶ 8 (Tab 17). By negotiating single signature contracts on behalf of all of its physicians, employed and affiliated, the Medical Group automatically assures that doctors within the Group are contracted with the same payors. As a result, physicians within the Medical Group can refer patients freely to one another without having to check in each instance whether that doctor is contracted with the patient's insurance coverage, and the Medical Group physicians can accept referrals from the Medical Group doctors without being concerned with whether their services will be covered. Miller. Aff. ¶ 8 (Tab 17). To facilitate patient referrals within the ENH network, the Medical Group provided all of its participating physicians with a physician directory so they would know what primary care physicians were in the Medical Group and what specialists primary care physicians could refer their patients to. Mittleman Dep. Tr. at 16 (Tab 11).

137. The Medical Group also facilitates physician referrals by providing a referral clearinghouse and by obtaining the necessary pre-approvals from managed care plans. Guttman Dep. Tr. at 178-79 (Tab 9); Hochberg Dep. Tr. at 83 (Tab 21); Katz Dep. Tr. at 65-66 (Tab 22).

138. A fourth efficiency the Medical Group delivers to both payors and physicians is assistance with the payor-physician relationship. The Medical Group has a dedicated staff of provider relation representatives that serve as liaisons between the physicians and the health plans. Mittleman Dep. Tr. at 7 (Tab 11). The provider relation specialists can intervene if, for example, a physician is not being reimbursed properly by a payor, if there are contractual issues that need to be clarified, if a physician is unsure of a payor policy or procedure, or if a physician has any other issues with a payor. Mittleman Dep. Tr. at 9 (Tab 11); Coyle Dep. Tr. at 8 (Tab 36).

139.

[REDACTED]

Consumers also benefit in that doctors can spend more time seeing patients and focusing on the practice of medicine. Guttman Dep. Tr. at 177-78 (Tab 9).

140.

[REDACTED]

The Medical Group Has Always Had Clinical Integration

141. The Medical Group provides for its payors who have capitated contracts the use of clinical protocols by the Medical Group physicians and data collection on the use of those protocols.

[REDACTED]

The Medical Group not only disseminates information provided by the payors, such as data flow sheets and information about the protocols, to the physicians, but also employs a full-time staff to collect data for the payors on the use of these protocols. Guttman Dep. Tr. at 166-72 (Tab 9).

142. Clinical integration on the capitated side spills over and benefits patients covered under the Medical Group's fee-for-service plans. The clinical protocols and data gathering not only help the capitated patients, but all patients, as most doctors do not know what type of coverage a patient has at the time they treat the patient. Katz Dep. Tr. at 89-90 (Tab 22); Solmor Dep. Tr. at 101 (Tab 30); Hochberg Dep. Tr. at 124-25 (Tab 21).

[REDACTED]

143. The Medical Group always had some form of clinical integration in connection with its fee-for-service contracts; it was just not always called clinical integration.

[REDACTED]

Although the term was new, however, the Medical Group had always been involved in activities relating to clinical quality: “the terminology of clinical integration was a relatively new term using that as a term but the activities related to managing clinical quality, looking at pathways and stuff like that we had been doing -- for quite some time doing that through the care management committee was well as that group working in conjunction with the hospital staff.” Miller Dep. Tr. at 102 (Tab 72). *See also* Miller Dep. Tr. at 100-01 176-77 (Tab 72);

[REDACTED]

Moreover, the affiliated physicians have always been involved in the efforts to improve clinical quality.

[REDACTED]

144.

[REDACTED]

[REDACTED]

The IPA Has Stopped Contracting On Behalf Of Affiliates

145.

[REDACTED]

146.

[REDACTED]

[REDACTED]

147.

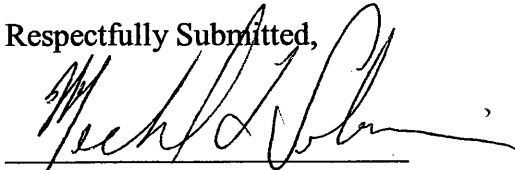
[REDACTED]

148.

[REDACTED]

149. Regardless of what the payors chose to do, however, the Medical Group has ceased contracting on behalf of affiliated physicians for fee-for-service products. Golbus Dep. Tr. (July 8, 2004) at 169-70, 172-75 (**Tab 10**); Golbus Dep. Tr. (July 9, 2004) at 174 (**Tab 73**); Miller Dep. Tr. at 15, 18 (**Tab 72**).

Respectfully Submitted,



Duane M. Kelley
Tracy Allen
WINSTON & STRAWN LLP
35 West Wacker Dr.
Chicago, IL 60601-9703
(312) 558-5764
Fax: (312) 558-5700
Email: dkelley@winston.com

Michael L. Sibarium
Jay L. Levine
WINSTON & STRAWN LLP
1400 L Street, NW
Washington, DC 20005
(202) 371-5777
Fax: (202) 371-5950
Email: msibarium@winston.com

Counsel for Respondents

Dated: November 18, 2004

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2004, a copy of the foregoing *Attachment to the Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision*

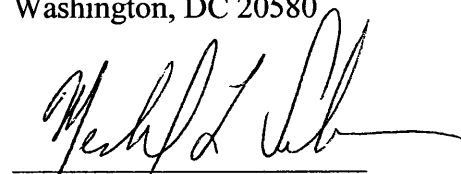
Pursuant to Rule 3.45(e) was served by hand delivery on:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW (H-106)
Washington, DC 20580

Thomas H. Brock, Esq.
Federal Trade Commission
600 Pennsylvania, Ave. NW (H-374)
Washington, DC 20580

Philip M. Eisenstat, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
Room NJ-5235
Washington, DC 20580

Chul Pak, Esq.
Assistant Director Mergers IV
Federal Trade Commission
600 Pennsylvania, Ave. NW (H-374)
Washington, DC 20580



Michael L. Sibarium, Esq.

