UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
Office of Administrative Law Judges

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

COMPLAINT COUNSEL'S MOTION FOR RECONSIDERATION OF MOTION TO COMPEL DISCOVERY

Pursuant to the Federal Trade Commission's Rules of Practice ("FTC Rules"), 16 C.F.R. §§ 3.22, Complaint Counsel respectfully move for reconsideration of the Court's Order, dated November 30, 2004, denying Complaint Counsel's Motion to Compel Discovery and For Extension of Time to File Econometric Rebuttal Report ("Motion to Compel"). That Order rested on the Court's conclusion that the existence of the discovery dispute was obvious by November 11, 2004, and that Complaint Counsel had not explained why they waited until November 26, 2004, to file the motion to compel. Complaint Counsel respectfully suggest that the Court did not fully consider the very active negotiations regarding this dispute until only 48 hours before Complaint Counsel filed the motion.

For the purposes of this reconsideration motion, Complaint Counsel merely request that the Court order Respondents to produce the withheld materials, which are essential for Complaint Counsel to evaluate the reports of Respondents' experts and to prepare for depositions and trial. Requiring Respondents to produce these materials will have absolutely no effect on

the existing schedule. Thus, while Complaint Counsel may ask the Court for leave for its experts to file amended reports, that request (and any potential impact it might have on the overall schedule for this case) can be separately assessed at an appropriate time.

RECONSIDERATION OF THE COURT'S NOVEMBER 30, 2004, ORDER IS WARRANTED

The Court's November 30 Order is based on the mistaken premise that Complaint Counsel should (or could) have brought this matter to the Court as early as November 11, 2004. Here, however, pursuant to Paragraph 5 of the original Scheduling Order and the FTC Rules, Complaint Counsel may not file a motion to compel production of discovery until the parties reached a *final* impasse. Thus, Complaint Counsel would have been premature in asking the Court to intervene anytime before November 24, 2004.

While Respondents refused to produce the disputed processed data files on November 11, Respondents expressly outlined a different approach through which Complaint Counsel purportedly could replicate the disputed files.[1] If Respondents had been correct, their proposal would have rendered the parties' disagreement moot. It was only after Complaint Counsel cooperated with Respondents – but found that it was impossible to replicate the files using Respondents' alternative approach – that the issue had truly come to a head. *See* Declaration of Michelle Kambara ("Kambara Decl."), Ex. A at ¶¶ 7-10. At that point, Complaint Counsel demanded that Respondents produce these essential files, including transmitting a letter, dated

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[1] *See* Ex. B (E-mail from Charles Klein to Thomas Brock, dated November 11, 2004). In pursuing this approach, Complaint Counsel requested and Respondents later provided additional files used by Dr. Baker in generating his results. *See* Ex. C (E-mail from Charles Klein to Thomas Brock, dated November 19, 2004). This exchange demonstrates that filing a motion to compel would have been premature at that time.

November 22, 2004,[2] and two days later, Respondents refused.[3]

In short, Complaint Counsel filed their November 26 Motion to Compel promptly, *only 48 hours after (i) they exhausted Respondents' alterative approaches for generating the disputed processed data files, and (ii) they made one last request to Respondents to produce the processed data files directly.* Under these circumstances, Complaint Counsel's motion to compel was timely.

Totally apart from its concerns about equity for the parties, it is in the Court's own operational interest to re-evaluate the basis for its decision denying the motion to compel. As the Court is well aware, litigants regularly stake out bargaining position in discovery disputes, which they know will be subject to further negotiations. Under the Court's decision, however, both Complaint Counsel and private parties will be obligated to petition the Court immediately in any discovery disputes, even though the parties have not exhausted alternatives for resolving the discovery dispute before they ask the Court to intervene.[4] For these reasons, Complaint Counsel respectfully suggest that reconsideration of the Court's November 30, 2004, Order is appropriate.

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[2] *See* Ex. D (Letter from Thomas Brock to Charles Klein, dated November 22, 2004) (attached).

[3] *See* Ex. E (E-mail from Michael Sibarium to Thomas Brock, dated November 24, 2004).

[4] In this light, if the Court lets its reasoning stand, its decision would require the parties to bring future discovery disputes to the attention of the Court immediately, even if there were various ways to resolve the issues without court intervention.

ON RECONSIDERATION THE COURT SHOULD GRANT COMPLAINT COUNSEL'S MOTION TO COMPEL

In Complaint Counsel's original motion, we asked the Court both to order Respondents to produce the disputed files and to give Complaint Counsel's expert additional time to file a supplemental report. For the purposes of reconsideration, however, Complaint Counsel merely ask the Court to order Respondents to produce the disputed files. This production will at least allow Complaint Counsel's experts to complete their analysis of Respondents' expert reports without imposing any costs on Respondents (other than the costs of replicating a CD) and without interfering with the Court's Scheduling Order dated October 12, 2004.

This intermediate relief is particularly appropriate because there are critical errors in Respondents' opposition to granting Complaint Counsel *any* relief. *See* Respondents' Opposition, dated November 29, 2004 ("Opposition"). Complaint Counsel seek the *final* processed data sets on which Respondents' expert, Dr. Jonathan Baker, began his statistical analysis. These data sets are essential for Complaint Counsel's rebuttal experts to have a complete opportunity to evaluate Respondents' expert reports, and for Complaint Counsel to prepare for the depositions of the experts and for trial.[5]

Access to Respondents' processed data files is a crucial prerequisite to Complaint Counsel's full evaluation of Respondents' experts reports and to prepare adequately for expert depositions and trial. In turn, the Court cannot evaluate the merits and adequacy of the expert's

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[5] Moreover, Respondents are absolutely incorrect that Complaint Counsel did not produce "complete processed output files." Opposition at 7. Respondents acknowledge that Complaint Counsel produced "the output from the 3M Grouper." Opposition at 4. Complaint Counsel seek precisely these equivalent processed output files used by Respondents' experts, which Respondents did not produce. Kambara Decl. at ¶¶ 4-5.

testimony without confirming that the underlying data are reliable. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) ("[W]here such [expert] testimony's factual basis, data, principles, methods, or their application are called sufficiently into question . . ., the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline." (quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592 (1993)).

Weighed against this substantial potential prejudice is the minimal burden that would be placed upon Respondents in producing the requested files. Producing the processed output files would impose no hardship on Respondents because such files have already been generated by Respondents. They would merely be required to copy the files and transmit them to Complaint Counsel. If Respondents produce the requested files immediately, prior to depositions of the economic experts, any disruption to the overall proceedings would be minimized.[6]

For these reasons, Complaint Counsel respectfully request the Court to reconsider its decision to deny Complaint Counsel's Motion to Compel.[7]

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[6] Complaint Counsel reserve the right to petition the Court for further relief in the form of, for example, leave to file supplemental reports as circumstances warrant. However, at minimum, Complaint Counsel request that the Court order Respondents to produce the needed processed output files.

[7] In order to preserve this point on appeal, Complaint Counsel respectfully request that this Court, whatever its decision, issue an order on the merits of Complaint Counsel's Motion to Compel.

December 3, 2004

Respectfully submitted,

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ORDER

UPON RECONSIDERATION,

Of this Court's Order, dated November 30, 2004, denying Complaint Counsel's Motion to Compel Discovery and For Extension of Time to File Econometric Rebuttal Report;

IT IS HEREBY ORDERED THAT

Respondents immediately produce all of their experts processed data output files (contained in the file folder "Payer_Data_Final") and all other related files necessary to reproduce the results in Respondents' expert report.

ORDERED:

Hon. Stephen J. McGuire
Chief Administrative Law Judge

Dated: _____, 2004

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing documents was hand delivered to

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
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Washington, D.C. 20580

and served on counsel for the Respondents by electronic and first class mail delivery to:

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Dec. 3, 2004
Date

Albert Y. Kim

EXHIBIT A [redacted]

EXHIBIT B [redacted]

EXHIBIT C [redacted]

EXHIBIT D [redacted]

EXHIBIT E [redacted]