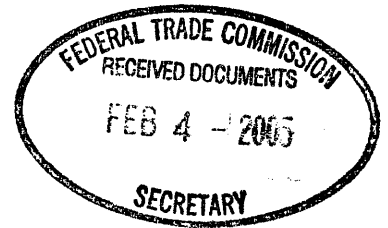


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

**RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION  
TO STRIKE EXPERT REPORT AS EXHIBIT TO RESPONDENT'S PRETRIAL BRIEF**

Pursuant to the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.22(c), Respondent Evanston Northwestern Healthcare Corporation ("ENH"), by counsel, hereby opposes Complaint Counsel's Motion To Strike Expert Report as Exhibit to Respondent's Pretrial Brief ("Motion").

**INTRODUCTION**

Complaint Counsel seeks to preclude this Court from referring to Dr. Noether's report as a background reference to prepare for trial. In support, Complaint Counsel makes two arguments, neither of which is persuasive. First, Complaint Counsel argues, without any citation to authority, that Dr. Noether's report should be stricken as a reference because her discussion of pertinent background materials purportedly has not been verified. At the same time, however, Complaint Counsel relies on a recitation of background information pertaining to managed care in its pretrial brief that barely contains any citation references and, therefore, is unverifiable. Second, Complaint Counsel argues that it needs an order striking Dr. Noether's report as a

reference to prevent confusion as to whether that report was admitted into evidence. This concern is plainly unwarranted because the Court and the parties will no doubt be fully aware of whether expert reports are admitted into evidence. Moreover, Complaint Counsel itself has provided the Court with copies of several other expert reports in this case as exhibits to various motions.

In the end, however, ENH will defer to the Court's discretion as to whether it desires to use Dr. Noether's report – or, for that matter, any of the reports submitted in this matter by experts identified on the parties' respective witness lists – as a reference to prepare for trial.

### **BACKGROUND**

On January 25, 2005, both parties filed their pretrial briefs with the Court. Complaint Counsel's brief included a background discussion of the managed-care industry in the United States and the reasons for the merger of ENH and Highland Park.<sup>1</sup> Rather than duplicate Complaint Counsel's efforts in explaining this case's background, ENH attached the expert report of Dr. Monica Noether to its pretrial brief "as a reference for [the Court's] convenience."<sup>2</sup> That report describes in detail the healthcare industry and its participants, healthcare trends in the Chicagoland area, and the reasons for the merger, among other things. ENH explicitly noted in footnote one of its brief that it did not purport to move Dr. Noether's report into evidence or otherwise include the report as part of the record. Nevertheless, Complaint Counsel has filed a motion to preclude the Court even from using Dr. Noether's report as a reference to prepare for trial.

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<sup>1</sup> See Complaint Counsel's Pretrial Brief at 9-22.

<sup>2</sup> Respondent's Pretrial Brief at 7 n.1 ("Pages 6-26 of this report provide background on the health care industry. Pages 26-33 discuss the Chicago health care market. Pages 34-37 briefly discuss the reasons behind the merger.").

## ARGUMENT

ENH's attachment of Dr. Noether's report to its pretrial brief was perfectly proper. Federal Rule of Civil Procedure Rule 5(d) allows a party to "use" discovery material, such as an expert report, "in the proceeding."<sup>3</sup> See *Fears v. Wilhelmina Model Agency, Inc.*, 2003 WL 21659373, at \*2 (S.D.N.Y. 2003) (considering an expert report, among other materials, attached to a motion to certify a class). The Advisory Committee Note to Rule 5(d) explains that "the rule is to be interpreted broadly; any use of discovery materials in court in connection with a motion, a pretrial conference under Rule 16, or otherwise, should be interpreted as use in the proceeding."<sup>4</sup> Pursuant to this Rule, the parties submitted certain expert reports to the Court in connection with their respective motions *in limine*.<sup>5</sup> Here, ENH's use of Dr. Noether's report as a pretrial reference is authorized under Rule 5(b). Complaint Counsel has provided no basis to preclude this Court from using Dr. Noether's report in that manner.

First, Complaint Counsel argues that the Court cannot use Dr. Noether's report as a reference because "[n]either the Court nor Complaint Counsel has any basis for assessing the veracity" of assertions in that report. Complaint Counsel, however, cites no authority to support its view that pretrial reference information submitted to the Court must satisfy an undefined "veracity" test. Nor does Complaint Counsel cite any legal authority prohibiting the Court in a bench trial context from using inadmissible information as a reference to prepare for trial.

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<sup>3</sup> Fed. R. Civ. P. 5(d); see also FTC Operating Manual for Administrative Litigation § 10.7 (2004) ("[S]ince many adjudicative rules are derived from the Federal Rules of Civil Procedure, the latter may be consulted for guidance and interpretation of Commission rules where no other authority exists").

<sup>4</sup> Fed. R. Civ. P. 5(d), advisory committee note of 2000.

<sup>5</sup> Specifically, ENH attached the respective reports of Drs. Arnold Epstein and Patrick Romano to its motion to preclude Dr. Epstein from testifying. Similarly, Complaint Counsel attached the respective reports of Drs. Mark Chassin and Romano to its motion to preclude Dr. Chassin from testifying. And, in opposition to ENH's motion in

In any event, Complaint Counsel's position conflicts with its own actions in this litigation. Complaint Counsel's pretrial brief includes an *unverifiable* discussion of pertinent background facts concerning the managed care industry. Complaint Counsel's verification objection also overlooks that it deposed Dr. Noether about her report on January 21, 2005, before the pretrial brief was filed. And, of course, Complaint Counsel will have an opportunity to cross-examine Dr. Noether at trial. Given ENH's unambiguous statement in its pretrial brief that it "[was] not proffering [Dr. Noether's] expert report into evidence at th[at] time,"<sup>6</sup> Complaint Counsel currently has no need to cross-examine Dr. Noether about any aspect of her report that is not addressed in her trial testimony.<sup>7</sup>

Second, Complaint Counsel's assertion that Dr. Noether's report should be stricken as an exhibit because the parties might "mistakenly consider [that] report as record evidence in preparing their submissions to the Commission" is more than a "stretch." Well in advance of the pretrial-brief deadline, ENH and Complaint Counsel discussed the possibility of attaching experts reports to their respective pretrial briefs to serve as a reference for the Court.<sup>8</sup> The parties, however, never reached a consensus on this issue. ENH's counsel ultimately notified Complaint Counsel before the pretrial briefs were filed that "ENH intend[ed] to provide the Court with a copy of Dr. Monica G. Noether's expert report as a reference for the Court's

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limine, Complaint Counsel attached Dr. Chassin's expert report and made numerous references to the reports of the parties' respective quality experts.

<sup>6</sup> Respondent's Pretrial Brief at 7 n.1.

<sup>7</sup> Complaint Counsel appears to speculate that ENH may not actually call Dr. Noether to testify at trial and, instead, will rely on her report in lieu of trial testimony. This Court and Complaint Counsel should rest assured that ENH has every intention of calling Dr. Noether to testify at the hearing.

<sup>8</sup> Complaint Counsel mistakenly asserts that, by e-mail dated January 24, 2005, ENH's counsel first informed Complaint Counsel that ENH might attach Dr. Noether's report to ENH's pretrial brief. Mot. at 1 n.1 (citing Ex. A). Contrary to Complaint Counsel's accusation, the parties had "earlier conversations" about the subject, as discussed in Exhibit A to Complaint Counsel's Motion. *Id.*, Ex. A.

convenience along with ENH's pretrial brief."<sup>9</sup> ENH did as promised, clearly explaining that it was providing Dr. Noether's report to the Court as a background reference – not in an effort to move the report into evidence. In its motion to strike, Complaint Counsel acknowledges, as it must, that Dr. Noether's report is not in evidence. ENH is now, yet again, affirming that it has not moved Dr. Noether's report into evidence by attaching it to ENH's pretrial brief. Under these circumstances, it would be absurd for Complaint Counsel to claim that the parties might suffer incurable amnesia as to whether Dr. Noether's report was admitted into evidence before trial.

Finally, the authority relied on by Complaint Counsel to support its motion to strike is inapposite. Relying on *Potts v. Sam's Wholesale Club*, 108 F.3d 1388, 1997 WL 126089 (10th Cir. 1997), Complaint Counsel asserts that the Court should strike Dr. Noether's report as inadmissible hearsay. In *Potts*, the plaintiff attempted to move one of the defendant's expert reports into evidence. *Id.* at \*8. The district court excluded that report from evidence on hearsay grounds and the Tenth Circuit affirmed. *Id.* Again, ENH has not moved Dr. Noether's report into evidence by virtue of attaching it to ENH's pretrial brief. Consequently, unlike the proffered report in *Potts*, there is nothing for the Court to exclude from evidence.

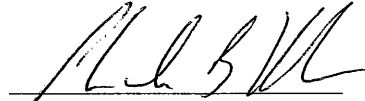
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<sup>9</sup> Respondent's Pretrial Brief at 7 n.1.

**CONCLUSION**

For the foregoing reasons, Respondents respectfully requests that this Court deny Complaint Counsel's Motion To Strike Expert Report as Exhibit to Respondent's Pretrial Brief.

Respectfully Submitted,



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Dated: February 4, 2005

*Attorneys for Respondents*

**CERTIFICATE OF SERVICE**


I hereby certify that on February 4, 2005, a copy of the foregoing *Respondents' Opposition to Complaint Counsel's Motion To Strike Expert Report as Exhibit to Respondent's Pretrial Brief* was served by email and first class mail, postage prepaid, on:

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BEFORE THE FEDERAL TRADE COMMISSION**

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	)	
	)	

**ORDER**

Upon consideration of Complaint Counsel’s Motion to Strike Expert Report as Exhibit to Respondent’s Pretrial Brief (“Motion”) and Respondents’ opposition thereto, and the Court being fully informed, it is this \_\_\_\_\_ day of \_\_\_\_\_, 2005 hereby

ORDERED, that the Motion is DENIED.

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