

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

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

**RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO COMPEL DISCOVERY AND FOR EXTENSION
OF TIME TO FILE ECONOMETRIC REBUTTAL REPORT**

Pursuant to the Federal Trade Commission's Rules of Practice ("Rules"), 16 C.F.R. § 3.22(c), Respondents Evanston Northwestern Healthcare Corporation ("ENH") and ENH Medical Group, Inc., by counsel, hereby oppose Complaint Counsel's Motion to Compel Discovery and for Extension of Time to File Econometric Rebuttal Report ("Motion for Extension").

INTRODUCTION

This Court already granted Complaint Counsel one extension of two weeks to submit its report rebutting econometric analyses proffered by Respondents' experts. Complaint Counsel now seeks even more time – an extension for a *rebuttal* report that would virtually equal the six weeks afforded to Respondents to prepare their principal expert reports – based on demonstrably erroneous assertions. Despite Complaint Counsel's allegation to the contrary, Respondents already have produced all that is required under 16 C.F.R. § 3.31(b)(3) and, indeed, their production of expert materials was more extensive than that of Complaint Counsel. **To be**

clear, Complaint Counsel has had for some time now all necessary data and instructions to obtain the information it requests. The requested *further* extension of time, if granted, would stand the concept of a “rebuttal” report on its head, provide Complaint Counsel an unfair advantage in terms of expert report preparation time, and unnecessarily disrupt the pre-trial schedule. For these reasons, this Court should summarily deny the Motion for Extension.

BACKGROUND

The initial Scheduling Order in this case (which has been revised three times) imposed on Complaint Counsel the obligation to provide any rebuttal reports in half the time afforded Respondents to respond to Complaint Counsel’s original expert reports. *See* Scheduling Order, dated March 24, 2004. Complaint Counsel later asserted that it needed an additional two weeks (for a total of four weeks) to rebut econometric analyses proffered by Respondents’ experts. The Court ultimately (but not initially) granted that request in the Second Revised Scheduling Order, dated June 15, 2004.

On September 21, 2004, pursuant to the Second Revised Scheduling Order, Complaint Counsel provided five expert reports. But Complaint Counsel’s production of expert data was far from complete. One of the reports was authored by Dr. Deborah Haas-Wilson, who relied, in part, on a software program developed by 3M Health Information Systems (“3M Grouper”). This software program assigns Diagnosis Related Groups (or DRGs) to patients based on various diagnoses and treatment codes as well as other pieces of information. Complaint Counsel, however, never produced the 3M Grouper to Respondents. Instead, despite repeated requests by Respondents, it was not until more than three weeks after Complaint Counsel’s expert reports were filed that Respondents received directly from 3M the 3M Grouper. *See* Majerus Decl. ¶ 5 (Ex. 1). Nor did Complaint Counsel ever produce the final processed data

sets that resulted from all of the data processing steps. *See* Exhibit B in Complaint Counsel's Motion for Extension (Email dated November 24, 2004 from Michael Sibarium to Thomas Brock). Complaint Counsel's production deficiencies required Respondents' experts to re-process all of the underlying data to replicate the results in Dr. Haas-Wilson's reports. *See* Majerus Decl. ¶¶ 3-7 (Ex. 1).

Due to Complaint Counsel's failure to timely provide the 3M Grouper (or, at a minimum, to provide Respondents with adequate notice to obtain a copy of that software by the time Dr. Haas-Wilson's report was submitted), Respondents and Complaint Counsel negotiated a new schedule and filed a joint motion for a third revised scheduling order on October 8, 2004. *See* Joint Motion to Enter Third Revised Scheduling Order ("Joint Motion"). Significantly, a mere few hours after the Joint Motion was filed with the Court (and the parties held a teleconference with Chief Judge McGuire's attorney advisor), and 18 days after the original deadline for Complaint Counsel's expert reports, Complaint Counsel surprised Respondents with a revised report by Dr. Haas-Wilson – a report filed without leave of the Court, and without a showing of good cause.¹ Under the negotiated revised scheduling order, Respondents had only 24 days (fewer than the 28 days Complaint Counsel has under the current scheduling order to submit econometric rebuttal reports) to respond to the untimely revised Haas-Wilson report. Complaint Counsel never adequately explained why it waited until immediately *after* the Joint Motion was filed to notify Respondents of the revised Haas-Wilson report.

Despite the prejudice incurred by Respondents due to the untimely revised Haas-Wilson report, Respondents decided to honor the negotiated schedule and thus they provided their expert reports on November 2, 2004, including the expert reports of Drs. Jonathan Baker

¹ *See* 16 C.F.R. § 3.21(c) ("The Administrative Law Judge may grant a motion to extend any deadline or time specified in this scheduling order only upon a showing of good cause.").

and Monica Noether at issue in the Motion for Extension.² Respondents also provided to Complaint Counsel, in conjunction with Dr. Baker's expert report, all of the statistical programs, specifications, and precise instructions "on how to reproduce Drs. Baker and Noether's results." Mot. for Extension at 3, n.1; Majerus Decl. ¶ 8 (Ex. 1).

After Respondents produced their expert reports, Complaint Counsel asked for various instructions regarding the computer programs and data produced with such reports. Respondents replied quickly to Complaint Counsel's concerns and questions, thus allowing Complaint Counsel's experts to fully understand Respondents' experts' techniques and the use of pertinent computer programs. For example, on November 10, 2004, Complaint Counsel requested the very same information at issue in the Motion for Extension -- namely, "the contents of the folder 'payer_data_final' that was included on the CD with Bates number 'ENH -- JBB4.'" Email dated November 10, 2004 from Thomas Brock to Michael Sibarium and Charles Klein (Ex. 2). The very next day, on November 11, 2004, Respondents refused to produce this information because the same type of information was not produced by Complaint Counsel with its reports:

The data production that accompanied Respondents' expert reports is entirely consistent with the data production that accompanied Complaint Counsel's expert reports. With the exception of the output from the 3M Grouper, a program which Complaint Counsel did not produce to Respondents, Complaint Counsel's experts did not turn over any of their processed data files. The "payer_data_final" folder on "ENH - JBB4" was created for the purpose of providing Complaint Counsel a place to store data sets generated from the programs Respondents' experts have provided. *Complaint Counsel currently has all the programs, raw data, and instructions, necessary to generate the contents of that folder.*

² Dr. Baker fashioned an econometric analysis of the price changes between ENH and managed care companies.

Email dated November 11, 2004 from Charles Klein to Thomas Brock (Ex. 3) (emphasis added). Complaint Counsel did not respond to this email. Accordingly, Respondents had no reason to believe that this response was unsatisfactory to Complaint Counsel, until last week.³

On November 23, 2004, Complaint Counsel served on Respondents five rebuttal reports – three of which were authored by new experts.⁴ The next day, at Respondents' request, Complaint Counsel belatedly disclosed the identity of a *sixth* rebuttal report from yet a *fourth* new expert, who purportedly intends to provide a report on November 30, 2004, rebutting Dr. Baker's econometrics analyses.⁵ (Despite doing additional analysis, including what is reflected in Exhibit 1 to the Haas-Wilson rebuttal report, Complaint Counsel did not turn over *any* additional programs or process data sets.) To date, Complaint Counsel intends to file a total of *six* "rebuttal reports" even though Respondents identified only four experts and provided only four reports in response to Complaint Counsel's original expert reports. In many instances, Complaint Counsel's purported "rebuttal" experts are offering opinions that could have been provided at the time its original expert reports were due. To be sure, Complaint Counsel already stretched the reach of proper rebuttal even without the requested extension.

The underlying Motion for Extension is based on an untimely request by Complaint Counsel on the eve of the Thanksgiving holiday to revisit the so-called "processed data files" issue that was addressed by Respondents on November 11, 2004. The Motion for

³ The underlying motion to compel is untimely. Under paragraph 5 of the scheduling order's additional provisions, Complaint Counsel was obligated to file its motion to compel within 5 days of this impasse. This time period expired on November 18, 2004.

⁴ Three new experts – Drs. Gregory J. Werden, Lawton R. Burns and Arnold Epstein – submitted rebuttal reports. Drs. Deborah Haas-Wilson and Patrick Romano, both of whom previously submitted reports on behalf of Complaint Counsel, also submitted rebuttal reports.

⁵ The Third Revised Scheduling Order required Complaint Counsel to disclose its econometrics rebuttal expert on November 23, 2004. Complaint Counsel's disclosure of its econometric rebuttal expert was thus untimely.

Extension was filed just two business days before the deadline for Complaint Counsel's econometric rebuttal reports, yet such motion fails to explain Complaint Counsel's delay in bringing this issue before the Court.

ARGUMENT

Respondents have produced to Complaint Counsel everything that is required under 16 C.F.R. § 3.31(b)(3), and more than Complaint Counsel provided to Respondents with its expert reports. The purpose of providing computer information relied on by experts is to let the opposing party "know[] the precise methods employed in programming the computer as well as the [] ability to determine the effectiveness of the persons responsible for feeding data into the computer." *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1257, 1266 (N.D. Ohio 1980). In that case, unlike here, the plaintiff provided the defendant with its expert report, but *no* computer information relied upon by the expert.

Here, it is undisputed that Respondents timely provided computer programs and data underlying their expert reports. Complaint Counsel's Motion for Extension concerns a request for additional information limited to "processed data files," *i.e.*, raw data that is organized in a particular format for use in econometric analysis. Mot. for Extension at 2. **Complaint Counsel neglects to mention in its Motion for Extension, however, that Respondents already have produced information that would allow Complaint Counsel to generate for itself these "processed data files."**⁶ Complaint Counsel points to no authority to support its view that Respondents are under any obligation to produce information that Complaint Counsel can generate for itself.

⁶ Complaint Counsel produced processed data files in lieu of the 3M Grouper program. Complaint Counsel does not claim that Respondents owe any production of software programs that would warrant a similar production of processed data files.

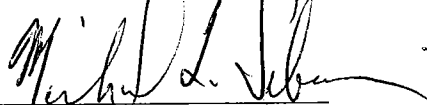
Complaint Counsel's experts presently have all of the underlying data, programs, specifications, and detailed instructions to replicate Dr. Baker's results and to examine its reliability and Dr. Baker's effectiveness. *See* Majerus Decl. ¶ 8 (Ex. 1) Complaint Counsel, which never produced complete processed data files with its reports, thus has no right to compel such information from Respondents. Consistent with Respondents' burden, Complaint Counsel should have to replicate Dr. Baker's results within the negotiated expert report deadlines. Indeed, allowing Complaint Counsel's econometrics rebuttal expert an additional 10-day extension would result in an anomalous situation where Complaint Counsel would have virtually as much time to prepare its *rebuttal* econometric report as that afforded Respondents to prepare their principal reports (not counting the belated production of the 3M Grouper and the untimely production of the revised Haas-Wilson report).

Finally, granting the Motion for Extension would unduly disrupt the pre-trial schedule. Expert depositions are being scheduled between December 6, 2004 and January 14, 2005. Under Complaint Counsel's proposed schedule, it would have well over two months to prepare for Dr. Baker's deposition, while Respondents would have barely a month – including the December and New Year's holidays – to prepare to take the deposition of Complaint Counsel's econometric rebuttal expert. Due process and fairness do not allow for such a result, and Respondents oppose any hearing delay on the grounds stated in the Motion for Extension.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Complaint Counsel's Motion to Compel Discovery and for Extension of Time to File Econometric Rebuttal Report.

Respectfully Submitted,



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Dated: November 29, 2004

Attorneys for Respondents

CERTIFICATE OF SERVICE


I hereby certify that on November 29, 2004, a copy of the foregoing *Respondents' Opposition to Complaint Counsel's Motion to Compel Discovery and for Extension of Time to File Econometric Rebuttal Report* was served by email and first class mail, postage prepaid, on:

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ORDER

Upon consideration of Complaint Counsel's Motion to Compel Discovery and for Extension of Time to File Econometric Rebuttal Report ("Motion") and Respondents' opposition thereto, and the Court being fully informed, it is this _____ day of _____, 2004 hereby

ORDERED, that the Motion is DENIED.

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