

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

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Orson Swindle
 Thomas B. Leary
 Pamela Jones Harbour
 Jon Leibowitz

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

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having heretofore issued its Complaint charging, *inter alia*, ENH Medical Group, Inc. (“ENH Medical Group”) with violating Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 (“FTC Act”) (“Count III”); and

Evanston Northwestern Healthcare Corporation (“ENH”), ENH Medical Group, and ENH Faculty Practice Associates (“Faculty Practice Associates”), their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by ENH and ENH Medical Group, referred to hereinafter collectively as “Respondent,” of all the jurisdictional facts, solely as those facts relate to Count III of the Complaint, set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is only for the purpose of settling claims, as alleged in Count III the Complaint, and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts related to Count III of the Complaint and the facts

admitted in Respondent's Answer to the Complaint, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter withdrawn this matter, as to the allegations contained in Count III of the Complaint, from adjudication in accordance with Section 3.25(c) of the Commission's Rules, 16 C.F.R. § 3.25(c), and the Commission having considered the matter and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. ENH is a non-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address located at 1301 Central Street, Evanston, Illinois 60201. Respondent ENH is the sole member or owner of Faculty Practice Associates.
2. Faculty Practice Associates is a non-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address located at 1301 Central Street, Evanston, Illinois 60201. Faculty Practice Associates is the sole shareholder of ENH Medical Group.
3. ENH Medical Group is a for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address located at 1301 Central Street, Evanston, Illinois 60201.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "ENH" means Evanston Northwestern Hospital Corporation, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; the joint ventures, subsidiaries (including, but not limited to Faculty Practice Associates), divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. "ENH Medical Group" means ENH Medical Group, Inc., its officers, directors,

employees, agents, attorneys, representatives, successors, and assigns; the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

- C. “Respondent” means ENH and ENH Medical Group.
- D. “Affiliated physician” means any physician participating in a contract with ENH Medical Group, but not as an ENH employed physician.
- E. “ENH employed physicians” means physicians employed by Respondent.
- F. “ENH physician services” means only those physician services provided by ENH employed physicians on behalf of Respondent, and for which Respondent receives all financial remuneration from the payor for the physician’s services.
- G. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide physician services, agree to provide physician services, or offer to provide physician services, including, but not limited to, as an affiliated physician, to a payor through such entity. This definition applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- H. “Payor” means any person that pays, or arranges for payment, for all or any part of any physician services for itself or for any other person. Payor includes any person that develops, leases, or sells access to networks of physicians.
- I. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- J. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- K. “Preexisting contract” means a contract that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent by ENH Medical Group pursuant to Paragraph V.A of this Order of such payor’s right to terminate such contract.
- L. “Principal address” means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.

- M. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
1. All physicians who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. Any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.
- N. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:
1. All physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving the:
 - a. Provision of physician services to payors at a capitated rate,
 - b. Provision of physician services for a predetermined percentage of premium or revenue from payors,
 - c. Use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals, or
 - d. Provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient’s condition, the choice, complexity, or length of treatment, or other factors; and
 2. Any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any

corporate or other device, in connection with the provision of physician services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:
 - 1. To negotiate on behalf of any physician with any payor;
 - 2. To deal, refuse to deal, or threaten to refuse to deal with any payor;
 - 3. Regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or
 - 4. Not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent’s arrangements;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician’s willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal with a payor;
- C. Attempting to engage in any action prohibited by Paragraphs II.A or II.B, above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED HOWEVER, that nothing in Paragraph II shall prohibit any agreement involving, or conduct by, Respondent that:

- 1. subject to the provisions of Paragraph IV of the Order, is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified-clinically integrated joint arrangement, so long as the arrangement does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement. In any proceeding to enforce this Order, Respondent shall bear the burden of proof with regard to demonstrating that the challenged agreement or conduct is reasonably necessary to any formation, participation, or action; or
- 2. solely involves ENH employed physicians with respect to ENH physician services.

III.

IT IS FURTHER ORDERED that, for three (3) years after the date this Order becomes final, Respondent shall notify the Secretary of the Commission in writing (“Paragraph III Notification”) at least sixty (60) days prior to entering into any arrangement with affiliated physicians under which Respondent would act as a messenger, or as an agent on behalf of those affiliated physicians, with payors regarding contracts. Paragraph III Notification shall include the proposed geographic area in which the proposed arrangement will operate; a copy of any proposed affiliated physician participation agreement; a description of the proposed arrangement’s purpose and function; a description of any resulting efficiencies expected to be obtained through the proposed arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Paragraph III Notification is not required for Respondent’s subsequent acts as a messenger or agent pursuant to an arrangement for which this Paragraph III Notification has been given. Receipt by the Commission from Respondent of any Paragraph III Notification pursuant to this Paragraph III of the Order is not to be construed as a determination by the Commission that any action described in such Paragraph III Notification does or does not violate this Order or any law enforced by the Commission.

IV.

IT IS FURTHER ORDERED that, pursuant to each qualified clinically-integrated joint arrangement or each qualified risk-sharing joint arrangement (“Arrangement”) in which Respondent is a participant, Respondent, for five (5) years after the date this Order becomes final, shall notify the Secretary of the Commission in writing (“Paragraph IV Notification”) at least ninety (90) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any affiliated physicians in such Arrangement relating to price or other terms or conditions of dealing with any payor; or
- B. Contacting a payor, pursuant to an Arrangement, to negotiate or enter into any agreement relating to price or other terms or conditions of dealing with any payor, on behalf of any affiliated physician in such Arrangement;

PROVIDED, HOWEVER, that Paragraph IV Notification shall not be required for subsequent contacts with any payor pursuant to any Arrangement for which Paragraph IV Notification has been given pursuant to Paragraph IV.A or Paragraph IV.B of this Order;

PROVIDED, HOWEVER, that Paragraph IV Notification shall not be required with respect to the renegotiation of any risk-sharing contract identified at confidential Appendix 1 of the Order;

PROVIDED FURTHER:

1. that with respect to any Paragraph IV Notification, Respondent shall include the following information:
 - a. a description of the Arrangement and its purpose, function, and geographic area of operation;
 - b. a description of the nature and extent of the integration and the expected efficiencies from the Arrangement;
 - c. an explanation of how any agreement on prices, or on contract terms related to price, furthers the integration and achievement of the efficiencies resulting from the Arrangement;
 - d. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and
 - e. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for physician services in any relevant market; and

2. if, within sixty (60) days from the Commission's receipt of the Paragraph IV Notification, a representative of the Commission makes a written request for additional information to Respondent, then Respondent shall not engage in any conduct described in Paragraph IV.A or Paragraph IV.B of this Order prior to the expiration of sixty (60) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing by the Bureau of Competition. The expiration of any waiting period described herein without a request for additional information or without the initiation of an enforcement proceeding shall not be construed as a determination by the Commission, or its staff, that a violation of the law, or of this Order, may not have occurred. Further, receipt by the Commission from Respondent of any Paragraph IV Notification, pursuant to Paragraph IV of this Order, is not to be construed as a determination by the Commission that any such Arrangement does or does not violate this Order or any law enforced by the Commission.

V.

IT IS FURTHER ORDERED that ENH Medical Group shall:

- A. Within thirty (30) days after the date this Order becomes final, send by first-class mail, with return receipt requested, a copy of this Order and the Complaint:

1. And the notice specified in Appendix A to the Order to each affiliated physician, who participates, or has participated, in Respondent ENH Medical Group since January 1, 2000;
 2. And the notice specified in Appendix B to this Order, to the chief executive officer of each payor that ENH Medical Group has a record of having been in contact with since January 1, 2000, regarding contracting for the provision of affiliated physician services; and
 3. Each officer, director, and employee of Respondent ENH Medical Group;
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of affiliated physician services, at the earlier of: (1) receipt by Respondent ENH Medical Group of a written request from a payor to terminate such contract; (2) one year from the date this Order becomes final; or (3) the earliest termination or renewal date (including any automatic renewal date) of such contract; *provided, however*, that a preexisting contract having a termination or renewal date of less than one year from the date the Order becomes final may extend beyond any such termination or renewal date no later than one (1) year from the date the Order becomes final if, prior to such termination or renewal date, (a) the payor submits to Respondent ENH Medical Group a written request to extend such contract to a specific date no later than one (1) year from the date this Order becomes final, and (b) Respondent ENH Medical Group has determined not to exercise any right to terminate; *provided further* that any payor making such request to extend a contract retains the right, pursuant to part (1) of Paragraph V.B of this Order, to terminate the contract at any time; and *provided further* that Respondent ENH Medical Group is not required by Paragraph V.B of the Order to terminate any risk-sharing contract identified at confidential Appendix 1 of this Order.
- C. Within ten (10) days of receiving notification from a payor to terminate, pursuant to Paragraph V.B of the Order, notify in writing, with delivery confirmation, each affiliated physician who provides physician services through that ENH Medical Group contract of the date such contract is to be terminated.
- D. For a period of three (3) years after the date this Order becomes final:
1. Distribute by certified mail, return receipt requested, a copy of this Order and the Complaint to each:
 - a. Affiliated physician who begins participating in Respondent ENH Medical Group, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the date such participation begins;
 - b. Payor that contracts with Respondent ENH Medical Group for the

provision of affiliated physician services, and that did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the date such payor enters into such contract; and

- c. Person who becomes an officer, director, or manager of Respondent ENH Medical Group, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the date he or she assumes such responsibility; and
2. Annually publish in an official annual report or newsletter sent to all physicians who participate in Respondent ENH Medical Group, a copy of this Order and the Complaint with such prominence as is given to regularly featured articles; and
- E. File a verified written report within one hundred twenty (120) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each such report shall include:
 1. A detailed description of the manner and form in which Respondent ENH Medical Group has complied and is complying with this Order;
 2. Copies of the delivery confirmations and return receipts required by Paragraphs V.A, V.C, and V.D of this Order; and
 3. The identity of each affiliated physician who began to participate with ENH Medical Group since the filing of the last report.

VI.

IT IS FURTHER ORDERED that ENH shall:

- A. Within sixty (60) days after the date this Order becomes final, send by first-class mail, return receipt requested, a copy of this Order and the Complaint to each:

1. Officer, director, and administrator of ENH; and
 2. Officer, director, and employee of Faculty Practice Associates;
- B. For a period of three (3) years after the date this Order becomes final, distribute by certified mail, return receipt requested, a copy of this Order and the Complaint to each person who becomes an officer, director, or administrator of ENH and to each person who becomes an officer, director, manager, or employee of Faculty Practice Associates, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the date he or she assumes such responsibility; and
- C. File a verified written report within one hundred twenty (120) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each such report shall include a detailed description of the manner and form in which ENH and Faculty Practice Associates have complied and are complying with this Order.

VII.

IT IS FURTHER ORDERED that ENH and ENH Medical Group shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution, (2) acquisition, merger or consolidation, or (3) other change in ENH, ENH Medical Group, or Faculty Practice Associates that may affect compliance obligations arising out of the Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in ENH, ENH Medical Group, or Faculty Practice Associates.

VIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession, or under its control, relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to Respondent, and in the presence of counsel, and without

restraint or interference from it, to interview Respondent or employees of Respondent.

X

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it is issued.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED:

Appendix A

[letterhead of Respondent]

[name of affiliated physician]
[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order (“Order”) issued by the Federal Trade Commission against Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc. (“ENH Medical Group”).

Pursuant to Paragraph V.B of the Order, ENH Medical Group must allow each payor with whom it has a contract to terminate, upon its written request without any penalty or charge, any contracts with ENH Medical Group for the provision of physician services by physicians who are not employees of ENH Medical Group (“affiliated physicians”) that were in effect prior to its receipt of a letter notifying it of its right to terminate.

Paragraph V.B of the Order also provides that, if a payor does not terminate a contract, the contract will terminate at the earlier of [appropriate date to be filled in by ENH Medical Group] or its earliest termination or renewal date (including any automatic renewal date). If the termination or renewal date occurs prior to [appropriate date to be filled in by ENH Medical Group], payor may request ENH Medical Group to extend that date to a date no later than [appropriate date to be filled in by ENH Medical Group]. If the payor chooses to extend the term of the contract, it may later terminate the contract at any time. To afford you the opportunity to enter into new contracts, ENH Medical Group will send you written notice of the date each ENH Medical Group contract in which you participate is to be terminated .

Sincerely,

Appendix B

[letterhead of Respondent]

[name of payor's CEO]
[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order (“Order”) issued by the Federal Trade Commission against Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc. (“ENH Medical Group”).

Pursuant to Paragraph V.B. of the Order, ENH Medical Group must allow you to terminate, upon your written request without any penalty or charge, any contracts with ENH Medical Group for the provision of physician services by physicians who are not employees of ENH Medical Group that were in effect prior to your receipt of this letter.

Paragraph V.B of the Order also provides that, if you do not terminate a contract, the contract will terminate at the earlier of [appropriate date to be filled in by ENH Medical Group] or its earliest termination or renewal date (including any automatic renewal date). If the termination or renewal date occurs prior to [appropriate date to be filled in by ENH Medical Group], you may request ENH Medical Group to extend that date to a date no later than [appropriate date to be filled in by ENH Medical Group]. If you choose to extend the term of the contract, you may later terminate the contract at any time.

Any request either to terminate or to extend the contract should be made in writing, and sent to me at the following address: [address].

Sincerely,

Confidential Appendix 1

[Redacted From the Public Record Version But Incorporated By Reference]