

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

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

**RESPONDENTS’ BRIEF IN OPPOSITION TO
ABBOTT LABORATORIES’ AND TOWERS PERRIN’S
JOINT MOTION TO QUASH SUBPOENAS**

Introduction

Respondents Evanston Northwestern Healthcare Corporation & ENH Medical Group, Inc. (“collectively “ENH”), oppose Abbott Laboratories’ (“Abbott”) and Towers Perrin’s, (“Towers”) Joint Motion to Quash or Limit Respondents’ Subpoenas *Duces Tecum* and Subpoena *Ad Testificandum*.¹ Movants’ outrageous request to quash all of Respondents’ subpoenas should be denied because the subpoenas seek relevant discovery through depositions of Tower’s employees Thomas Kuhlman and Elizabeth Shelley and Abbott’s employee Lois Laurie who are identified as potential witnesses in Complaint Counsel’s Revised Witness List. (A copy of Complaint Counsel’s Revised Witness List is attached as Exhibit A.) Abbott - Towers has also not articulated an adequate reason for opposing the production of the relevant subpoenaed documents for the three witnesses. For the reasons discussed below, the Commission should order the Movants

¹ Respondents’ counsel was not served with Abbott’s and Towers’ Joint Motion until September 7, 2004, after the Labor Day weekend. Pursuant to FTC Rule of Practice 3.22(c), Respondent’s Brief is timely filed on September 17, 2004.

to produce the materials requested by Respondents' counsel and their witnesses pursuant to the Respondents' Subpoenas.

**A. The Discovery Dispute Centers Around Towers' "Drill Down"
Reports Written For Abbott**

During the Federal Trade Commission's investigation of the ENH merger, Abbott sent Tower's "Drill Down Reports" dated November 21, 2001 and December 2001, to the Commission on February 14, 2003. (A copy of Abbott attorney Nancy M. Kim's transmittal letter to Anthony R. Saunders of the Commission is attached as Exhibit B.) The Drill Down Reports were an examination of Abbott's health care costs for 2000 to 2001 and stated that Respondents "acquired Highland Park Hospital (HPH), which then negotiated a large reimbursement increase with health plans" and concluded that "HPH would not have been able to negotiate a large increase in fees had they not been a part of ENH." (Ex. A, p. 10) The Drill Down Reports were prepared for Abbott by Towers and they are referenced in Complaint Counsel's Revised Witness List. The Reports were prepared by Tower's employees Ms. Shelley and Mr. Kuhlman and for Ms. Laurie at Abbott and, therefore, are relevant to the anti-competition issues in this case.

Based on Towers' submission of the Reports to counsel, Complaint Counsel identified the Drill Down Reports and three employees from Abbott and Towers in the Revised Witness List. (Ex. A) Although the Joint Motion does not challenge the Subpoenas *Ad Testificandum* for Towers' employees, they have not been produced for deposition so presumably Towers refuses to comply with them, just as Abbott refuses to produce Ms. Laurie for her deposition. (See Statement of Nicholas A. Pavich attached as Exhibit C.) As discussed in the Argument below, it is clear that the discovery sought from these three witnesses and their related documents have been brought into the case

by Abbott's voluntary involvement. Therefore, the Joint Motion To Quash should be denied.

B. Respondents Timely Served The Subpoenas And Attempted To Resolve Their Discovery Disputes With The Third Parties

On July 26, 2004, Respondents served Abbott and Towers with Subpoenas *Duces Tecum*. Since service of the Subpoenas, Respondents' counsel have engaged in several conferences with Abbott's and Tower's counsel pursuant to FTC Rule of Practice 3.22(f), in a good-faith effort to reach an agreement on the scope of the documents requested. On August 24, 2004, Respondents also served Subpoenas *Ad Testificandum* for the depositions of Thomas Kuhlman, Elizabeth Shelley and Lois Laurie because they are identified as potential witnesses in Complaint Counsel's Revised Witness List. (Copies of the Subpoenas *Ad Testificandum* are attached as Exhibit D).

C. Abbott and Towers Filed Their Joint Motion In Response to Respondents' Demand For Production Of The Subpoenaed Materials

On September 3, 2004, Respondents demanded that Towers immediately produce all documents responsive to the Subpoena *Duces Tecum*, including Tower's Drill Down Reports which were previously produced by Abbott to the Federal Trade Commission as part of its investigation. (A copy of the letter from Respondents' counsel demanding production pursuant to the previously issued subpoenas is attached as Exhibit E). On September 3rd, Abbott and Towers filed their Joint Motion to Quash Or Limit Respondents' Subpoenas *Duces Tecum* and Subpoena *Ad Testificandum* in response to the Subpoenas and Respondents' demand for production.

D. Abbott and Towers Agreed To Produce Certain Categories Of Documents

In his Statement submitted in support of the Joint Motion To Quash Or Limit,

Thomas M. Crisham identifies the disputed requests of Respondents' Subpoenas *Duces Tecum*. Mr. Crisham's Statement is consistent with the discussions and negotiations between the parties' counsel. As reflected in Mr. Crisham's letter to Respondents' counsel dated September 2, 2004, Respondents' counsel, in a good faith attempt to resolve their discovery disputes, agreed to limit their discovery requests as follows:

3. All documents, reports, studies, surveys, or audits referring or relating in any manner to the ENH/Highland Park transaction.

4. All documents prepared by or for Your Company assessing, analyzing, reporting, or comparing prices for healthcare services at ENH or Highland Park and any other health care facility.

6. All documents which describe, compare, or evaluate the health care services, the quality of services, the cost of services, the staff, or the facilities of hospitals in the Geographic Area including, but not limited to, ENH.

8. All documents, information, materials and statistics used, cited, or relied upon in the preparation or drafting of the "Health Care Cost Drill Down" reports by Towers Perrin dated in November and December 2001 and distributed to Abbott Laboratories.

10. All documents relating to competition in the provision of any health care service in the Geographic Area, including, but not limited to, market studies, forecasts, and surveys, and all other documents relating to:

....

(b) the quality of care provided by any hospital;

(c) the relative strength or weakness of hospitals providing any health care service;

....

(e) hospital preferences or perceptions of consumers, patients, or physicians (including, but not limited to, patient satisfaction surveys);

(f) the preferences of third party payors for hospitals;

(g) any comparisons of any hospital's contracted hospital rates with another hospital's rates; or

....

12. All documents describing or evaluating the ability to shift patients from one healthcare facility to another, or to encourage or discourage patients to use one hospital more than another. (The letter is attached as Exhibit F.)

Accordingly, there can be no dispute that Movants should be ordered to produce responsive materials to the above requests contained in the Subpoenas *Duces Tecum* because Respondents' counsel have negotiated in good faith to limit their discovery requests to the most relevant materials for the depositions of Thomas Kuhlman, Elizabeth Shelley and Lois Laurie. (See also Ex. C.)

E. Respondents Have Sought A Limited Extension of The Discovery Deadline To Complete The Discovery With Abbott and Towers

Respondents have moved for an extension of the September 13, 2004 fact discovery deadline for the limited purposes of: (1) completing document discovery with Abbott and Towers; and (2) deposing Tower's employees Thomas Kuhlman and Elizabeth Shelley and Abbott employee Lois Laurie.² Respondents have requested the limited extension in order to resolve the ongoing discovery disputes between the parties concerning the Subpoenas.

ARGUMENT

I. PURSUANT TO THE FTC RULES OF PRACTICE, RESPONDENTS ARE ENTITLED TO THE DEPOSITIONS OF LOIS LAURIE, THOMAS KUHLMAN AND ELIZABETH SHELLEY BECAUSE THEY ARE ON COMPLAINT COUNSEL'S WITNESS LIST

As stated above, Tower's employees Thomas Kuhlman and Elizabeth Shelley and Abbott's employee Lois Laurie are identified as potential witnesses in Complaint Counsel's Revised Witness List. (Ex. A) Towers has not challenged the Subpoenas *Ad Testificandum* issued for its employees, but they have not been produced for their depositions and presumably, Towers refuses to comply with those two subpoenas, just as Abbott refuses to produce Ms. Laurie for her deposition. (Ex. C) In the Revised Witness

² Respondents' Motion for Limited Extension of the Discovery Deadline was filed on September 13, 2004.

List, Complaint Counsel identified Mr. Kuhlman as a possible witness who may be called “to testify about [the Drill Down Reports] which evaluat[ed] costs for health care due, among other things, to the ENH-Highland Park merger.” (Ex A, p. 6.) Complaint Counsel also identified Ms. Shelley as a potential witness who may be called “to testify about a study evaluating costs for health care due, among other things, to the ENH-Highland Park merger.” (*Id.*) Lois Laurie, Abbott’s Director of Benefits, is identified as a witness who may be called “to testify about Abbott's negotiation of health care contracts with ENH and other hospitals and other related topics.” (*Id.*) Because of Complaint Counsel’s identification of the three employees as potential witnesses at trial, there is no basis for Abbott-Towers to claim that their testimony is not relevant or that they should not appear for their depositions. Pursuant to FTC Rules of Practice 3.31(c)(1) and 3.33(a), Respondents are clearly entitled to these depositions and the materials related to their expected testimony. Accordingly, Abbott-Tower’s Joint Motion to Quash should be denied and they should be ordered to produce their employees for depositions pursuant to the Respondents’ Subpoenas *Ad Testificandum* within a reasonable time period.

II. THE DISPUTED REQUESTS IN RESPONDENTS’ SUBPOENAS *DUCES TECUM* ARE REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE

Rule 3.31(c) of the Rules of Practice, like Rule 26 of the Federal Rules of Civil Procedure, is drafted to balance the need for discovery and controlling the costs of litigation. Nevertheless, the scope of discovery is broad:

“Parties may obtain discovery to the extent that it *may be reasonably expected* to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondents.... Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears *reasonably calculated to lead to the discovery of admissible evidence.*” Rule 3.31 (c)(1)(emphasis added).

Pursuant to Rule 3.31(c)(1), neither Abbott nor Towers submitted any evidence to the Commission to support their claim that the Subpoenas' requests are cumulative or duplicative or that the burden or expense of the proposed discovery outweighs its likely benefits. Accordingly, the Joint Motion to Quash should be denied, on this basis alone, because there has been no offer of proof by Abbott or Towers that the subpoenaed documents and witnesses are not relevant or that the document production is truly burdensome.

A. The "Drill Down Reports" Are Relevant To The Complaint's Allegations

The Drill Down Reports, which were prepared by Towers at Abbott's request, (a relevant portion of the Reports are attached as Exhibit G), are central to the Complaint and Complaint Counsel's statements in the Revised Witness List regarding the expected testimony of Tower's and Abbott's employees. The Drill Down Reports are relevant to the Complaint because Towers' conclusion that Highland Park Hospital "would not have been able to negotiate a large increase in fees had they not been a part of ENH" may tend to support (if admissible) anti-competitive allegations of the Complaint. (See Compl., ¶¶ 31-32.)

In the Court's Order Denying Respondents' Motion To Dismiss Count II of the Complaint, the Administrative Law Judge also noted that one of the central allegations was that "Count II alleges that the merger of ENH and Highland Park enabled ENH to raise its prices to private payers above the prices that the hospitals would have charged absent the merger, and that consequently, the merger has substantially lessened competition in a line of commerce in a section of the country, in violation of Section 7 of

the Clayton Act, as amended, 15 U.S.C . § 18.” Order, p. 5 *citing* Complaint ¶32. The Drill Down Reports and their underlying documents are clearly relevant to the allegations in the Complaint. See, *F. T. C. v. Anderson*, 631 F.2d 741, 746, (D.C. Cir. 1979) (The relevancy of a subpoena is measured against the charges specified in the complaint, i.e. whether they are reasonably relevant.) Accordingly, Abbot-Tower’s claim of irrelevancy is simply wrong.

1. Respondents’ Requests Regarding The Drill Down Reports and Related Documents Are Narrowly Tailored

Consistent with their attempt to obtain only relevant materials, Respondents submitted the following requests in the Subpoenas *Duces Tecum* which Abbott and Towers dispute as overly broad:

3. All documents, reports, studies, surveys, or audits referring or relating in any manner to the ENH/Highland Park transaction.
4. All documents prepared by or for Your Company assessing, analyzing, reporting, or comparing prices for healthcare services at ENH or Highland Park and any other health care facility.
6. All documents which describe, compare, or evaluate the health care services, the quality of services, the cost of services, the staff, or the facilities of hospitals in the Geographic Area including, but not limited to, ENH.

These requests are not overly broad or unduly burdensome. To the contrary, Respondents have made this request less burdensome by referencing a previous document production to the Commission. See *Plant Genetic Sys. v. Northrup King Co.*, 6 F. Supp. 2d 859, 862 (E.D. Mo. 1998) (A production request is less burdensome if the documents have already been or are likely to be produced elsewhere.) In challenging the requests, neither Abbott nor Towers explains the alleged irrelevancy of these requests. Rather, the Joint Motion claims, without analysis, that when the above requests are

“placed alongside the pleadings” they are not reasonably calculated to lead to admissible discovery. To the contrary, when laid next to the Complaint, Respondents’ requests only seek to discover materials which may be relevant to the Drill Down Reports submitted to the Commission which were apparently relied upon in part in the Complaint.

2. Abbott and Towers Have Made No Showing of Burdensomeness

It is well-established that the burden is on the party challenging the subpoena to prove that the subpoena is unduly burdensome. *Plant Genetic Sys.*, 6 F. Supp. 2d at 862. The only burdens specified by Abbott and Towers are cost and time, both of which have been held insufficient to make production unduly burdensome. *See United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 650 (5th Cir. 1999) (although time and effort required to comply were extensive, subpoena was not unreasonably burdensome because compliance did not “unduly disrupt or seriously hinder normal operations” of the business); *United States v. Int’l Bus.Mach. Corp.*, 71 F.R.D. 88, 92 (S.D. N.Y. 1976) (compliance time of 3-6 months and tens of thousands of dollars not burdensome in light of size and significance of antitrust litigation); *Ghandi v. Police Dept.*, 74 F.R.D. 115, 124 (E.D. Mich. 1977) (fact that production will be time consuming is not in itself burdensome). Moreover, the requests are made even more relevant in light of Complaint Counsel’s Revised Witness List which identifies the Drill Down Reports and the witnesses who will testify about its conclusions.

3. Abbott’s and Tower’s Request to Exclude These Categories Is Unfair

Abbott-Towers cannot protect relevant information from one party in this proceeding while making it available to the other. A subpoena may not be avoided merely by saying information sought is available from another. *Covey Oil Co. v. Cont’l*

Oil Co., 340 F.2d 993, 998 (10th Cir. 1965). Respondents should be allowed an opportunity to discover the assumptions or facts relied upon which allegedly support the conclusions contained in the Drill Down Reports. Therefore, the Abbott-Tower's unfair request in their Joint Motion to exclude these categories from the Subpoenas *Duces Tecum* should be denied.

B. The Geographic Scope of the Subpoenas Is Not Overly Broad

In its Order Denying Respondents' Motion To Dismiss Count II of the Complaint, the Court stated that "The Complaint identifies the geographic locations of the hospitals involved in the merger as being in and near Evanston and Cook County in Illinois. See, Order, p. 5 *citing* Complaint ¶¶ 1,4 & 5. One of the issues in any antitrust case is the relevant geographic area. Respondents' discovery should not be curtailed by the geographic area put forth by Complaint counsel in the Complaint. Consistent with other cases involving Section 7 of the Clayton Act, courts from around the country grant broad discovery on issues relating to the geographical areas in antitrust lawsuits. "[E]ven in cases in which the relevant market must be shown, such is essentially a question of fact, which may be properly developed and refined through the discovery process." *Griffiths v. Blue Cross and Blue Shield of Alabama*, 147 F.Supp.2d 1203, 1214 (N.D. Ala. 2001). "Market definition is a highly fact-based analysis that generally requires discovery." *Interior Design Education Research v. Savannah College of Art & Design*, 244 F.3d 521, 531 (6th Cir.2001). "Most often, 'proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers.'" *Double D Spotting Service, Inc. v. Supervalu, Inc.*, 136 F.3d 554, 560 (8th Cir.1998) *quoting* *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3rd Cir.1997). Despite the well-

settled law allowing broad discovery requests to determine relevant geographic markets, Abbott-Towers objects to Respondents' inclusion of five counties in its definition of "Geographic Area" for certain requests. The Subpoena's specific requests involving "Geographic Area" are:

6. All documents which describe, compare, or evaluate the health care services, the quality of services, the cost of services, the staff, or the facilities of hospitals in the Geographic Area including, but not limited to, ENH.

10. All documents relating to competition in the provision of any health care service in the Geographic Area, including, but not limited to, market studies, forecasts, and surveys, and all other documents relating to:

-
- (b) the quality of care provided by any hospital;
- (d) the relative strength or weakness of hospitals providing any health care service;
-
- (e) hospital preferences or perceptions of consumers, patients, or physicians (including, but not limited to, patient satisfaction surveys);
- (f) the preferences of third party payors for hospitals;
- (h) any comparisons of any hospital's contracted hospital rates with another hospital's rates; or
-

12. All documents describing or evaluating the ability to shift patients from one healthcare facility to another, or to encourage or discourage patients to use one hospital more than another.

The above-cited cases demonstrate that Respondents are entitled to broad discovery relating to the determination of the possible relevant geographic market. Moreover, such information is relevant in determining the size of the relevant market. Accordingly, the Movants' Joint Motion to exclude these geographic categories from the Subpoenas *Duces Tecum* should also be denied.

C. The Time Period To Which Respondents' Counsel Agreed Is Relevant

Before they filed their Joint Motion, Respondents' counsel believed that Abbott and Towers had agreed that the time period for the requests in the Subpoenas *Duces Tecum* would be from January 1, 1999, to present. In its Joint Motion, Towers and Abbott concede that "Respondents since have agreed to limit the time period from January 1, 1999 to present." (Joint Motion, p. 5.) Despite the previous agreement, Movants now request that the Commission further limit the time period of the Subpoenas *Duces Tecum* from "January 1, 1999 to the January 2000 merger." (*Id.*)

In this case, the Complaint counsel challenges the January 1, 2000, merger of Evanston Northwestern Hospital, Glenbrook Hospital, and Highland Park Hospital. The Complaint counsel claims that "[f]ollowing the Merger [in 2000]" Respondents exercised their market power gained through the merger to renegotiate their contracts with more than a dozen health insurance companies. (See Complaint ¶ 31.) Obviously, the events immediately before the merger to the present are central to this litigation. Therefore, Movants' request that this Commission limit the time period of the Subpoenas *Duces Tecum* from January 1, 1999 to the January 2000 merger is overly narrow. (Joint Motion, p. 5.) Further, the five-year period requested is the time frame of conduct claimed by Complaint Counsel as relevant to this suit. (See Complaint ¶ 31.) Five years is also not an extraordinary length of time as Abbott and Towers suggest. (Joint Motion, p. 5)

Abbott and Towers imply that the requested documents may be stored off-site and request that the time period be shortened to 13 months. Besides excluding two-thirds of the relevant time frame being investigated by Complaint Counsel, neither Abbott nor Towers has made a showing of burdensomeness; they have only provided conclusory

statements which is an inadequate basis for such a showing. See *FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) (“A subpoenaed party may not merely utter claim of burden – it must prove it.”) Therefore, the time period of five years is reasonable.

III. RESPONDENTS ARE NOT SEEKING FREE EXPERT DISCOVERY

In the Revised Witness List, Complaint Counsel listed Abbott’s and Tower’s employees as potential witnesses. Accordingly, Abbott’s and Towers’ claim that Respondents are seeking “free expert discovery” from them is unfounded. Respondents are merely attempting to conduct proper discovery of fact witnesses on issues which become possibly relevant when it submitted the Tower’s Drill Down Reports. In the cases cited by Abbott-Towers to support their argument that the Respondents could obtain their discovery elsewhere, they conveniently ignore the fact that they are the only parties with the information forming the underlying basis for their Drill Down Reports. Moreover, their arguments are contrary to *Covey Oil Co. v. Cont’l Oil Co.*, 340 F.2d 993, 998 (10th Cir. 1965) (*supra*) which holds that a subpoena may not be avoided merely by saying information sought is available from another.

Conclusion

For the above reasons, Abbott’s and Tower’s Joint Motion to Quash should be denied and the Commission should order the Movants to produce all witnesses and documents responsive to those categories of documents identified above and in Nicholas Pavich’s Statement submitted contemporaneously with this brief, pursuant to the Respondents’ Subpoenas within 10 days following decision on this Motion, as requested

in Respondents' previously submitted Motion for Limited Extension of the Discovery
Deadline filed on September 13, 2004.

Respectfully submitted,


MICHAEL T. HANNAFAN


NICHOLAS A. PAVICH

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Dated: September 17, 2004

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BEFORE THE FEDERAL TRADE COMMISSION**

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a corporation, and)	Docket No. 9315
)	
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COMPLAINT COUNSEL'S REVISED WITNESS LIST

Pursuant to the Scheduling Order, Complaint Counsel hereby designates those persons who may be called upon by Complaint Counsel to testify, by deposition or live testimony, at trial.

PAYER REPRESENTATIVES

1. Robert Mendosa, General Manager Key Accounts, and Anu Malhotra, Aetna – Mr. Mendonsa and/or Ms. Malhotra may be called to testify, without limitation, about the operations of AETNA; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and ENH Medical Group and Aetna; matters addressed in Mr. Mendosa's investigational hearing; and other related topics.
2. Joseph Arango, Director of Provider Contracting and Strategy, and Brad Buxton, Blue Cross and Blue Shield of Illinois – Mr. Arango and/or Mr. Buxton may be called to testify about, without limitation, the operations of Blue Cross and Blue Shield of Illinois; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and ENH Medical Group and Blue Cross; matters addressed in Mr. Arango's investigational hearing; and other related topics.
3. Brian Jans, Director of Provider Networks, CCN – Mr. Jans may be called to testify about, without limitation, the operations of CCN; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and ENH

Medical Group and United Health; matters addressed in his investigational hearing; and other related topics.

4. Sherry Husa, Regional Vice President Contracting, and Bert Wagner, CIGNA– Ms. Husa and/or Mr. Wagner may be called to testify about, without limitation, the operations of CIGNA; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and ENH Medical Group and CIGNA; matters addressed in Ms. Husa's investigational hearing; and other related topics.
5. Ronald Craven, Vice President for Provider Networks, HFN – Mr. Craven may be called to testify about, without limitation, the operations of HFN; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and ENH Medical Group and HFN; matters addressed in his investigational hearing; and other related topics.
6. Paul Maxwell, Vice President, Humana – Mr. Maxwell may be called to testify about, without limitation, the operations of Humana; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and ENH Medical Group and Humana; matters addressed in his investigational hearing; and other related topics.
7. Kevin Dorsey, Vice President Network Development, or Pat Neary, One Health – Mr. Dorsey and/or Mr. Neary may be called to testify about, without limitation, the operations of One Health; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and ENH Medical Group One Health; matters addressed in Mr. Dorsey's investigational hearing; and other related topics.
8. Jane Ballengee, Regional Director of Network Development, Private Health Care Systems ("PHCS") – Ms. Ballengee may be called to testify about, without limitation, the operations of PHCS; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and ENH Medical Group and PHCS; matters addressed in her investigational hearing; and other related topics.
9. James Crones and Robert Curry, Preferred Plan – Mr. Crones and/or Mr. Curry may be called to testify about, without limitation, the operations of Preferred Plan; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and ENH Medical Group and Preferred Plan; matters addressed in Mr. Crones' investigational hearing; and other related topics.
10. Lenore Holt Darcy, Regional Vice President Network Development, Unicare – Ms. Darcy may be called to testify about, without limitation, the operations of Unicare; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and ENH Medical Group and Unicare; and other related topics.

11. Jillian Foucre, COO, United Healthcare Illinois – Ms. Foucre may be called to testify about, without limitation, the operations of United Healthcare Illinois; contracting for general acute care inpatient hospital services; the contract and contract negotiations between ENH and and ENH Medical Group United Healthcare; matters addressed in Ms. Fourcre's investigational hearing; and other related topics.

PERSONS IDENTIFIED BY OR OTHERWISE AFFILIATED WITH RESPONDENTS

1. Complaint Counsel reserves the right to call as witnesses individuals identified in Respondent's Initial Disclosures dated March 24, 2004, as "individuals who are likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to Respondents' defenses." This specifically includes, without limitation, the following individuals:

- A. Teresa Chan
- B. Dr. Joseph Golbus
- C. Jeffrey Hillebrand
- D. Jodi Levine
- E. Homer Livingston
- G. Ronald Spaeth
- H. Jack Gilbert
- I. Tom Hodges
- J. Marsha Miller
- K. Mark Neaman
- L. Ken Herlin
- M. Jon Kaplan
- N. Chuck Farkas
- O. Kim Ogden

P. Tracee Coyle
Q. Bruce Spivey
R. Heidi Schelling
S. Michael Englehart
T. Lou Porn
U. Chuck Farkas
V. Jack Sirabian
W. Harry Jones
X. Mark Newton
Y. Raymond Grady
Z. Neele Stearms
AA. Tom Smith
AB. Nancy Semerdjian
AC. Mary O'Brien
AD. Lois Huminiak
AE. Gary Mecklenberg
AF. Mary Ellen Mitchell
AG. Terry Level
AH. Bonnie Magnoni
AI. Jesse Hall
AJ. Dr. Kandicar
AK. Virginia Vergara

- AL. Norman Guttmann
 - AM. Marion Powell
 - AN. Robert Gladden
 - AO. David Loveland
 - AP. Kathy Garsteki
2. Michelle Mittleman – ENH Medical Group's Network Development Manager. Ms. Mittleman may be called to testify about, without limitation, the operation of the ENH Medical Group, physician contracting, pricing, and related topics. (Ms. Mittleman was not identified by Respondents as an employee of ENH but is likely to have knowledge relevant to the allegations of the complaint, to the proposed relief, or to Respondents' defenses.)
5. Complaint Counsel may call as witnesses the following physicians on the medical staff of Highland Park Hospital, individuals who are employed by physicians on the medical staff of Highland Park Hospital, and other similarly-situated individuals who cannot be identified at this time.
- A. Harry Burstein
 - B. John Coyle
 - C. Avram Kraft
 - D. Neal Moller
 - E. Norman Cohen
 - F. Fred Rosenberg
 - G. Nancy Nora
 - H. Allan Solmor
 - I. Laurie Hochberg
 - J. Richard Katz
 - K. James Kudrna
 - L. Steven Valfer

- M. Alvin Winer
 - N. Leon Benson
 - O. Michael Benson
 - P. Business managers of any partnerships, corporations, or professional associations of physicians on the medical staff of Highland Park Hospital.
6. Complaint Counsel reserves the right to call as witnesses physicians on the medical staff of Evanston Hospital or Glenbrook Hospital who cannot be identified at this time.
 7. Complaint Counsel reserves the right to call as witnesses current or former employees of ENH, Faculty Practice Associates, Inc., ENH Medical Group, Inc. Lakeland Health Services, Inc., Highland Park Hospital and their related entities who cannot be identified at this time.

OTHER WITNESSES

1. Thomas Kuhlman, Towers Perrin – Mr. Kuhlman may be called to testify about a study of Towers Perrin evaluating costs for health care due, among other things, to the ENH-Highland Park merger.
2. Lois Laurie - Director of Benefits, HR Group, Abbott Laboratories – Ms. Laurie may be called to testify about Abbott's negotiation of health care contracts with ENH and other hospitals and other related topics.
3. Elizabeth Shelley, Towers Perrin -- Ms. Shelly may be called to testify about a study evaluating costs for health care due, among other things, to the ENH-Highland Park merger.
4. Don Jones, Illinois State Health Facilities Planning Board – Mr. Jones may be called to testify about the State of Illinois Certificate of Need law and process as it applies to the Evanston, Illinois area.
5. Jason Sussman, Ken Kaufman, Kaufman , Hall – Mr. Sussman and/or Mr. Kaufman may be called upon to testify about the consulting work that Kaufman Hall did for Highland Park Hospital on various strategic and financial issues.
6. Complaint Counsel reserves the right to add names of witnesses necessary for rebuttal; expert witnesses, and supplementary witnesses, and additional persons identified in the course of discovery as having information relevant to the Complaint or Respondents' Answer and Defenses. Complaint Counsel reserves the right not to call any of the

persons listed herein to testify at trial, as circumstances may warrant.

Respectfully submitted,

Dated: _____

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing documents were served on counsel for the respondent by electronic mail and first class mail delivery:

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and delivery of two copies to:

The Honorable Stephen J. McGuire
Federal Trade Commission
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Dated: _____

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Legal Division
Dept. 324, Bldg. AP6D
Abbott Laboratories
100 Abbott Park Road
Abbott Park, Illinois 60064-6034

Telephone: (847) 938-5252
Fax: (847) 938-6235

February 14, 2003

VIA FEDERAL EXPRESS

Anthony R. Saunders
Federal Trade Commission
601 New Jersey Avenue N.W.
Room 5155
Washington, D.C. 20580

RE: Non-Public Investigation of Hospital Mergers

Dear Mr. Saunders:

Enclosed please find copies of the two Towers Perrin reports we mentioned on the call yesterday. As you confirmed, your office has agreed to maintain the confidentiality of the information we provide. We trust you likewise will maintain the confidentiality of the enclosed reports. Should there become a need to disclose the enclosed reports or the contents therein, please provide written notice to David Fishman and myself.

Sincerely yours,

A handwritten signature in cursive script that reads "Nancy M. Kim".

Nancy M. Kim

Enclosures

cc: David Fishman, Esq.

FTC001482

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

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

STATEMENT OF NICHOLAS A. PAVICH

I, Nicholas A. Pavich, do hereby state as follows:

1. Pursuant to FTC Rule of Practice 3.22(f), my firm has had several conferences with counsel for the Movants in a good-faith effort to reach an agreement as to the scope of documents requested in the Subpoenas *Duces Tecum* served upon Abbott Laboratories and Towers Perrin. Pursuant to those discussions, Respondents' counsel agreed with Thomas M. Crisham, attorney for Abbott Laboratories and Towers Perrin, to limit the requests in the Subpoenas *Duces Tecum* as follows:

3. All documents, reports, studies, surveys, or audits referring or relating in any manner to the ENH/Highland Park transaction.

4. All documents prepared by or for Your Company assessing, analyzing, reporting, or comparing prices for healthcare services at ENH or Highland Park and any other health care facility.

6. All documents which describe, compare, or evaluate the health care services, the quality of services, the cost of services, the staff, or the facilities of hospitals in the Geographic Area including, but not limited to, ENH.

8. All documents, information, materials and statistics used, cited, or relied upon in the preparation or drafting of the "Health Care Cost Drill Down" reports by Towers Perrin dated in November and December 2001 and distributed to Abbott

Laboratories.

10. All documents relating to competition in the provision of any health care service in the Geographic Area, including, but not limited to, market studies, forecasts, and surveys, and all other documents relating to:

....

(b) the quality of care provided by any hospital;

(c) the relative strength or weakness of hospitals providing any health care service;

....

(e) hospital preferences or perceptions of consumers, patients, or physicians (including, but not limited to, patient satisfaction surveys);

(f) the preferences of third party payors for hospitals;

(g) any comparisons of any hospital's contracted hospital rates with another hospital's rates; or

....

12. All documents describing or evaluating the ability to shift patients from one healthcare facility to another, or to encourage or discourage patients to use one hospital more than another. (The letter is attached as Exhibit F.)

2. Although the Joint Motion does not challenge the Subpoenas *Ad Testificandum* for the employees of Towers Perrin, they have not been produced for their depositions despite the fact that the Subpoenas called for their appearance at my law firm's office on September 3, 2004 and September 8, 2004. Accordingly, Towers Perrin refuses to comply with the Subpoenas, just as Abbott Laboratories has refused to produce Lois Laurie for her deposition which was scheduled for September 7, 2004.

I declare that the following statements are true and correct to the best of my knowledge, information and belief.



NICHOLAS A. PAVICH

Dated: September 17, 2004



SUBPOENA AD TESTIFICANDUM

Issued Pursuant to Rule 3.34(a)(1), 16 C.F.R. § 3.34(a)(1) (1997)

<p>1. TO</p> <p>Mr. Thomas Kuhlman Towers Perrin, Forster & Crosby, Inc. 200 West Madison Street Suite 3100 Chicago, IL 60606-3414</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
--	---


This subpoena requires you to appear and give testimony, at the date and time specified in Item 5, at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF HEARING</p> <p>Michael T. Hannafan & Assoc., Ltd. One East Wacker Drive, Suite 1208 Chicago, IL 60601</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Michael T. Hannafan or other designated counsel</p> <hr/> <p>5. DATE AND TIME OF HEARING OR DEPOSITION</p> <p>September 3, 2004 at 10:00 a.m.</p>
--	---

6. SUBJECT OF PROCEEDING

In the Matter of Evanston Northwestern Healthcare Corporation, et al., Docket No. 9315

<p>7. ADMINISTRATIVE LAW JUDGE</p> <p>The Honorable Stephen J. McGuire</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>8. COUNSEL REQUESTING SUBPOENA</p> <p>Michael T. Hannafan (312) 527-0055 Nicholas A. Pavich (312) 527-0055</p>
---	---

<p>DATE ISSUED</p> <p>JUL 16 2004</p>	<p>SECRETARY'S SIGNATURE</p> 
---------------------------------------	--

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

in person.

by registered mail.

by leaving copy at principal office or place of business, to wit:
by service upon Attorney Jane McCahill,
counsel for Towers Perrin - Philadelphia

on the person named herein on:

.....
(Month, day, and year)

.....
(Name of person making service)
Nicholas A. Pavich
One of the Attorneys for Evanston Northwestern
Healthcare Corporation and ENH Medical Group
.....
(Official title)



SUBPOENA AD TESTIFICANDUM

Issued Pursuant to Rule 3.34(a)(1), 16 C.F.R. § 3.34(a)(1) (1997)

1. TO

Ms. Elizabeth Shelley
Towers Perrin, Forster & Crosby, Inc.
200 West Madison Street Suite 3100
Chicago, IL 60606-3414

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to appear and give testimony, at the date and time specified in Item 5, at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

3. PLACE OF HEARING

Michael T. Hannafan & Assoc., Ltd.
One East Wacker Drive, Suite 1208
Chicago, IL 60601

4. YOUR APPEARANCE WILL BE BEFORE

Michael T. Hannafan or other designated
counsel

5. DATE AND TIME OF HEARING OR DEPOSITION

September 8, 2004 at 10:00 a.m.

6. SUBJECT OF PROCEEDING

In the Matter of Evanston Northwestern Healthcare Corporation, et al., Docket No. 9315

7. ADMINISTRATIVE LAW JUDGE

The Honorable Stephen J. McGuire

Federal Trade Commission
Washington, D.C. 20580

8. COUNSEL REQUESTING SUBPOENA

Michael T. Hannafan (312) 527-0055
Nicholas A. Pavich (312) 527-0055

DATE ISSUED

JA 10 2004

SECRETARY'S SIGNATURE

GENERAL INSTRUCTIONS

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This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

in person.

by registered mail.

by leaving copy at principal office or place of business, to wit:

by service upon Attorney Jane McCahill,
counsel for Towers Perrin - Philadelphia

.....
.....
on the person named herein on:

.....
(Month, day, and year)

.....
(Name of person making service)

Nicholas A. Pavich
One of the Attorneys for Evanston Northwestern
Healthcare Corporation and ENH Medical Group
(Official title)



SUBPOENA AD TESTIFICANDUM

Issued Pursuant to Rule 3.34(a)(1), 16 C.F.R. § 3.34(a)(1) (1997)

1. TO

Lois Laurie
Abbott Laboratories
100 Abbott Park Road
Abbott Park, IL 60064-6400

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to appear and give testimony, at the date and time specified in Item 5, at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

3. PLACE OF HEARING

Michael T. Hannafan & Assoc., Ltd.
One East Wacker Drive, Suite 1208
Chicago, IL 60601

4. YOUR APPEARANCE WILL BE BEFORE

Michael T. Hannafan or other designated counsel

5. DATE AND TIME OF HEARING OR DEPOSITION

September 7, 2004 at 10:00 a.m.

6. SUBJECT OF PROCEEDING

In the Matter of Evanston Northwestern Healthcare Corporation, et al., Docket No. 9315

7. ADMINISTRATIVE LAW JUDGE

The Honorable Stephen J. McGuire

Federal Trade Commission
Washington, D.C. 20580

8. COUNSEL REQUESTING SUBPOENA

Michael T. Hannafan (312) 527-0055
Nicholas A. Pavich (312) 527-0055

DATE ISSUED

JUL 16 2004

SECRETARY'S SIGNATURE

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

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This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

in person.

by registered mail.

by leaving copy at principal office or place of business, to wit:
by service upon Attorney Thomas M. Crisham,
counsel for Lois Laurie of Abbott Laboratories

.....
.....
on the person named herein on:

.....
(Month, day, and year)

.....
(Name of person making service)

Nicholas A. Pavich
One of the Attorneys for Evanston Northwestern
Healthcare Corporation and ENH Medical Group
(Official title)

MICHAEL T. HANNAFAN & ASSOCIATES, LTD.

One East Wacker Drive
Suite 1208
Chicago, Illinois 60601
(312) 527-0055
Fax: (312) 527-0220

www.hannafanlaw.com

September 3, 2004

Via Facsimile (215) 246-4463 and Mail

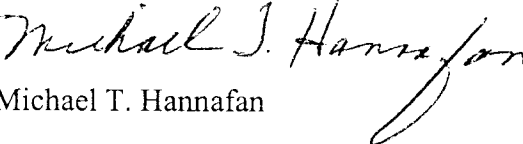
Jane McCahill, Esq.
Towers Perrin Forster & Crosby, Inc.
Legal Resources Department
1500 Market Street
Centre Square East
Philadelphia, PA 19102

Re: Evanston Northwestern Healthcare Corporation and ENH
Medical Group, Inc. FTC Docket No. 9315

Dear Ms. McCahill:

I have attempted to contact you twice over the past two days in an attempt to discuss our discovery requests previously served on Towers Perrin on July 22, 2004. As you know, pursuant to that subpoena *duces tecum*, Towers Perrin should have produced their documents by August 20. To date, your clients have produced nothing in response. As you also know, I have previously requested on several occasions to conduct informal interviews with Thomas Kuhlman and Elizabeth Shelley. To date, you have not responded at all to my requests. Additionally, Mr. Kuhlman's subpoena *ad testificandum* previously served upon you set his deposition for 10:00 a.m. today at my offices and you have ignored that subpoena, as well. The fact discovery cut-off date in this case is September 13 and although we will attempt to obtain an extension of that cut-off date, there is no guarantee that we will be able to get an extension. Please immediately produce all documents which are responsive to the subpoena *duces tecum*, including the Drill Down Report, Part II, dated August 26, 2002, which we previously discussed and contact me immediately to schedule deposition dates for Mr. Kuhlman and Ms. Shelley.

Very truly yours,


Michael T. Hannafan

MTH:lmc

Crisham
& Kubes, LTD.
ATTORNEYS AT LAW

Thomas M. Crisham

Writer's Direct Dial No.
312.917.8460

30 N. LaSalle St., Ste. 2800, Chicago, IL 60602
Telephone 312-327-2500
Facsimile 312-327-2450

www.crishamlaw.com
tcrisham@crishamlaw.com

September 2, 2004

VIA FACSIMILE AND U.S. MAIL

Michael T. Hannafan
Michael T. Hannafan & Associates, Ltd.
One East Wacker Drive
Suite 1208
Chicago, Illinois 60601

In Re: **Evanston Northwestern Healthcare Corporation
and ENH Medical Group, Inc.
FTC Docket No. 9315
Our File No. 50058.10422**

Dear Mr. Hannafan:

According to my notes and recollections, the following reflects the agreement reached in our discussion of Monday, September 30, 2004, regarding limiting the category of documents called for in the subpoena directed to Abbott.

First, the time period has been limited to January, 1999 through the present date.

Referring to the twelve numbered paragraphs of "Documents to be Produced", we agreed as follows:

Paragraph 1: Withdrawn.

Paragraph 2: Withdrawn.

Paragraph 3: You do wish production of these documents and it was clarified that by "transaction" you mean the Highland Park merger.

Paragraph 4: After much discussion as to whether you really wanted these materials, you responded, "maybe".

Paragraph 5: Withdrawn.

Paragraph 6: You clarified that what you are really interested in is any documents we may have either complaining about or complimenting the merger between Evanston, Glenbrook and

Michael T. Hannafan
September 2, 2004
Page 2

Highland Park.

Paragraph 7: Withdrawn.

Paragraph 8: You indicated that you do want any of these documents if we possess them and, in addition, you have specifically requested an August 26, 2002 Abbott Health Care Program Drill Down Report.

Paragraph 9: Withdrawn.

Paragraph 10:

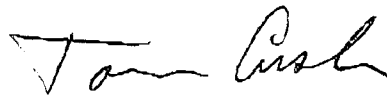
- (a) Withdrawn.
- (b) You do wish these documents, but limited to Evanston, Glenbrook and Highland Park Hospitals.
- (c) Again, this Paragraph is limited to Evanston, Glenbrook and Highland Park Hospitals.
- (d) Withdrawn.
- (e) You wish these, but again limited to the three referenced hospitals.
- (f) You wish these, but again limited to the three hospitals in question.
- (g) My notes indicate that you finally responded, "Yes I want them, but I can probably be talked out of it."
- (h) Withdrawn.

Paragraph 11: Withdrawn.

Paragraph 12: You indicated that you have withdrawn the first portion of this Request, but you are interested in any documents that relate to "encourage or discourage patients to use one hospital more than another", again limiting it to Evanston, Glenbrook and Highland Park Hospitals.

Sincerely,

CRISHAM & KUBES, LTD.



Thomas M. Crisham

TMC/crs



Abbott Laboratories

Health Care Cost Drill Down

November 21, 2001

FTC001483

Note: This report is written from the perspective of Abbott presenting this report to management.

CONFIDENTIAL

Lake County/S.E. Wisconsin Review

Market Background

- Our overview of the Lake County/S.E. Wisconsin markets is based on available data, information from health plans and general market knowledge.
- Lake County physician organizations tend to be financially unstable:
 - Deerpath Medical Group disbanded in 2000 due to financial issues
 - Lake Forest Managed Care Association is currently experiencing financial difficulties.
- There is a move to consolidate health systems to improve bargaining power with health plans:
 - Those with stronger marketplace perception of quality and service have greater clout in bargaining with health plans.
 - Evanston Northwestern Health Care (ENH) acquired Highland Park Hospital (HPH), which then negotiated a large reimbursement increase with health plans.
 - HPH would not have been able to negotiate a large increase in fees had they not been part of ENH.
 - Most large health systems negotiate on an “all or nothing” basis (i.e., ENH, Advocate, etc.).

S:\17159\01abs\h6w\HC Cost Drilldown Rev1127 tjk11C.ppt

FTC001493

CONFIDENTIAL

Abbott Laboratories Health Care Cost Drill Down

December 2001

FTC001581

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2004, a copy of the foregoing **Respondents' Brief in Opposition to Abbott Laboratories' and Towers Perrin's Joint Motion to Quash Subpoenas** was served by first class mail, Federal Express and electronically on:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW (H-106)
Washington, DC 20580
(Via Federal Express) (2 copies)

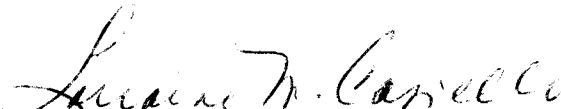
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cpak@ftc.gov
(Electronically)

Mr. Donald S. Clark
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Ave. N.W.
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dclark@ftc.gov
(Via Federal Express)

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