

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

In the matter of)
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Evanston Northwestern Healthcare)
Corporation,)
and)

ENH Medical Group, Inc.,)
Respondents)
_____)

Docket No. 9315
PUBLIC VERSION

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

Pursuant to the Federal Trade Commission's Rules of Practice ("FTC Rules"), 16 C.F.R. §§ 3.21(c)(2), 3.22, and 3.38(a), Complaint Counsel move for the production of certain documentation used by two of Respondents' expert witnesses, and a corresponding extension of time to file Complaint Counsel's econometric rebuttal report, which is now due on November 30, 2004. This request has been necessitated by Respondents' failure to produce in full all files, programs and other information on which their econometric conclusions are based. By means of this omission, Respondents have interfered with the efforts of Complaint Counsel's rebuttal experts either to verify the conclusions reached by Respondents' experts or to conduct the needed analysis to rebut their conclusions. Therefore, Complaint Counsel respectfully request an order compelling production of this information and an extension of this deadline to at least 10 days after Respondents provide full backup documentation for their expert's report.

BACKGROUND

At the joint request of the parties, the Court entered a revised scheduling order on

October 12, 2004. This Order established a November 2, 2004, deadline for Respondents' expert reports. The order set a corresponding November 30, 2004, deadline for Complaint Counsel's expert reports relating to the econometric analyses proffered by Respondents' experts. See Third Revised Scheduling Order, dated October 12, 2004.

The Scheduling Order, like the Commission's Rules, require the production, with each expert report, "all documents and other written materials relied upon by the expert in formulating an opinion in this case." First Scheduling Order dated March 24, 2004, ¶ 11; see Rule § 3.31(b)(3) (parties must produce with each expert report, "the data or other information considered by the witness in forming the opinions"). This disclosure obligation, equivalent to Rule 26(a)(2) of the Federal Rules of Civil Procedure, includes the requirement to provide data, files, programs and all other information necessary to replicate the expert's reported results. See, e.g., *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F.Supp. 1257, 1267 (N.D. Oh. 1980) (compelling disclosure of program methods "as well as underlying data, inputs and outputs" utilized by party's experts to opposing party).

In a case like this relating to a hospital merger, both parties must begin their work with "raw" data, i.e., the statistics that are available from the State of Illinois, insurance companies and other sources regarding the health care services that have been furnished, literally, to millions of patients. As a first step – which takes weeks – a party must process the raw data so that it is organized in a format – known as "processed data files" – that can be used for econometric analysis. In the second step, the experts analyze these processed data files to reach their conclusions that will be presented in their analysis.

ARGUMENT

As part of their experts' backup documentation, Complaint Counsel produced the processed data files to Respondents. By contrast, Respondents did not provide to Complaint Counsel the processed data files to Complaint Counsel for their experts. As a result, Complaint Counsel's rebuttal experts have confronted lengthy delays while they worked with the raw data to recreate the processed data files that Respondents' experts expressly relied upon in developing their reports and testimony.

Respondents' failure to produce the processed data files is particularly egregious here. Respondents' econometric expert, Dr. Jonathan Baker, expressly relied on these processed data files. However, Dr. Baker himself had nothing to do with processing the raw data. Instead, the raw data was processed by others and Dr. Baker started with these processed data files in developing his expert analysis.¹ Nevertheless, Respondents failed to produce these processed data files upon which Dr. Baker relied in writing his report.² Because Respondents already have

¹ Respondents submitted four expert reports on November 2, 2004, including reports from two economists, Dr. Monica Noether and Dr. Jonathan Baker. Respondents also supplied certain backup documentation for these reports, including electronic data, statistical programs and specifications, and instructions on how to reproduce Drs. Baker and Noether's results. However, Respondents did not produce the processed data files.

As Dr. Baker writes in his report, he relies on, as his starting point, the processed files prepared by Dr. Noether from the raw claims data. Baker Rep. at ¶11. He then performs various econometric tests upon these datasets, reports a number of statistical results, and draws certain conclusions that form the basis of his expert opinion.

² By Respondents' own admission, Complaint Counsel did provide the final processed output files utilized by Complaint Counsel's economists. *See* Ex. A (Email dated November 11, 2004, from Charles B. Klein to Thomas H. Brock); Ex. B (Email dated November 24, 2004, from Michael Sibarium to Thomas Brock). On the other hand, Respondents did not provide these processed data files to Complaint Counsel. *See* Ex. A. The parties have been unable to reach resolution on this issue despite a number of written communications and

created these files for Dr. Baker, Respondents would experience no hardship in producing these materials.

Because of the limited time period available for the econometric rebuttal report, the Respondents' failure to produce the files used by Dr. Baker has hamstrung Complaint Counsel's rebuttal analysis. Complaint Counsel's econometric experts have good reason to believe that Dr. Baker's report sets forth untenable conclusions. However, due to Respondents' failure to produce the processed data files on which Dr. Baker expressly relied, it is unclear whether these mistakes are due to errors in Respondents' development of the processed data files (possibly due to incomplete documentation), due to Dr. Baker's own errors in his analysis of the processed data files, or some other reason. Given these production gaps, Complaint Counsel respectfully request that the Court compel production of the necessary information.

Finally, even if Respondents produce the processed data files used by Dr. Baker immediately, Complaint Counsel's rebuttal experts require time to evaluate Dr. Baker's empirical results.³ Therefore, in conjunction with this motion to compel, Complaint Counsel respectfully suggests that it is appropriate to provide Complaint Counsel rebuttal econometrician an additional ten days after Respondents' produce all responsive materials for the filing of their

teleconferences.

³ Furthermore, with the output files in hand, Complaint Counsel may discover additional information is missing in Dr. Baker's instructions or files that Respondents produced. To address this concern, Complaint Counsel respectfully request that the additional time for rebuttal analysis begin after both parties provide notice to the Court that production is complete. This eliminates the need for the Court to mediate this dispute further. In addition, due to the potentially broad range of problems with their testimony, Complaint Counsel must reserve the right, pursuant to Rule 3.38(b), to ask the Court to preclude Respondents from presenting the testimony of either Dr. Noether or Dr. Baker at trial.

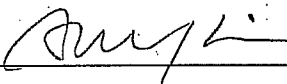
supplemental report.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully request the Court to compel production of the processed output files relied upon by Dr. Baker and to extend the time provided for Complaint Counsel to submit an econometric rebuttal report.

Respectfully submitted,

November 26, 2004



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ORDER

IT IS HEREBY ORDERED THAT

1. Respondents shall immediately disclose and produce all information and documentation, including the final processed output files, relied upon by Respondent's econometric expert, Dr. Jonathan Baker, in his report, AND
2. The Parties shall file a joint notice to the Court when Respondents complete production of all such information and documentation, AND
3. Complaint Counsel shall have ten days following the filing of this joint notice to submit their econometric rebuttal report.

ORDERED:

Hon. Stephen J. McGuire
Chief Administrative Law Judge

Dated: November ____, 2004

CERTIFICATE OF SERVICE

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

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW (H-106)
Washington, D.C. 20580

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

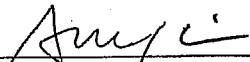
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EXHIBIT A
[REDACTED]

EXHIBIT B
[REDACTED]