

**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
)	PUBLIC VERSION
ENH Medical Group, Inc.,)	
a corporation.)	

**COMPLAINT COUNSEL’S MOTION TO COMPEL RESPONDENTS’
PRODUCTION OF DOCUMENTS RELATING TO SURVEYS**

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 hereby respectfully move the Court for an order compelling Respondents to produce all documents relating to any surveys of the prices charged by hospitals during the period 1995 to present.¹

In Document Request No. 11 of Complaint Counsel’s Fifth Request for the Production of Documents, dated July 23, 2004, Complaint Counsel requested “All documents that constitute or refer or relate in any way to studies, formulas or surveys of Respondent Hospitals regarding the

¹ Complaint Counsel do not want to bring this matter to the Court prematurely. However, Complaint Counsel have explicitly sought an assurance from Respondents by December 3, 2004, that this information would be produced by a specified date and Respondents have not yet provided that assurance. Therefore, Complaint Counsel are obliged to bring this matter to the Court immediately to avoid filing a motion to compel production that might be deemed untimely.

strategies and formulas they have used or have considered using in setting prices for inpatient and outpatient hospital services.” Because Respondents’ production did not include any such documents, Complaint Counsel specifically raised this issue with Respondents on November 29, 2004.² Although the parties have exchanged communications regarding this discovery dispute since then,³ Complaint Counsel have not yet received a commitment Respondents – as requested in our letter – that these materials will be produced by a specified date.

This information is highly relevant to this litigation. First, this discovery may be admissible at trial for the purpose of demonstrating Respondents’ own knowledge of the market and the prices that were charged by other hospitals. Second, this discovery may provide Complaint Counsel with information that will assist in the depositions of Respondents’ experts. For both of these reasons, the request for “this information seems reasonably calculated to lead to the discovery of admissible evidence,” the benchmark for discovery under the Commission’s Rules. *See* FTC Rule 3.31(c)(1).

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully moves the Court for an order compelling Respondents to answer to production of all surveys and other information responsive to Document Request No. 11 of Complaint Counsel’s Fifth Request for the Production of

² *See* Letter dated November 30, 2004, from Thomas H. Brock to Charles B. Klein (Ex. A). (The letter was dated November 30, 2004, but Complaint Counsel transmitted the letter to Respondents via email on November 29, 2004.) As Complaint Counsel explained in the letter, this request sought, *inter alia*, all documents relating to surveys conducted either by Respondents or by third parties, such as city, county, state or national trade associations or any independent contractors, in which Respondents participated.

³ *See, e.g.*, Email from Charles B. Klein, Esq. to Thomas H. Brock, Esq., dated November 30, 2004 (Ex. B); Email from Thomas H. Brock, Esq., to Charles B. Klein, Esq., dated November 30, 2004 (Ex. C).

Documents, dated July 23, 2004.

Dated: 12/6/04

Respectfully Submitted,



Thomas H. Brock, Esq.
Federal Trade Commission
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Room H-360
Washington, D.C. 20580
(202) 326-2813
Fax: (202) 326-2884
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CERTIFICATE OF SERVICE

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


Michael L. Sibarium
Charles B. Klein
WINSTON & STRAWN, LLP
1400 L Street, NW
Washington, DC 20005

Duane M. Kelley
WINSTON & STRAWN, LLP
35 West Wacker Drive
Chicago, IL 60601-9703

and delivery of two copies to:

The Honorable Stephen J. McGuire
Federal Trade Commission
600 Pennsylvania Avenue
Room 113
Washington, DC 20580

12/6/04
Date


Thomas H. Brock
Complaint Counsel

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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Evanston Northwestern Healthcare Corporation,)	
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a corporation.)	
)	

ORDER

Upon motion of Complaint Counsel, and in consideration of the memorandum in support and in opposition thereto, it is hereby

ORDERED: that Respondents shall produce all documents that constitute or refer or relate in any way to studies, formulas or surveys of Respondent Hospitals regarding the strategies and formulas they have used or have considered using in setting prices for inpatient and outpatient hospital services, responsive to Document Request No. 11 of Complaint Counsel's Fifth Request for the Production of Documents, dated July 23, 2004.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: _____



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Thomas H. Brock, Esq.
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Direct Line (202) 326-2813
E-mail: TBrock@FTC.gov

November 30, 2004

FIRST CLASS MAIL AND EMAIL

Michael L. Sibarium, Esq.
Winston & Strawn LLP
1400 L Street NW
Washington, DC 20005

Re: Evanston/Highland Park, Docket No. 9315

Dear Mike:

This letter addresses a deficiency in Respondents' document production.

In Document Request No. 11 of Complaint Counsel's Fifth Request for the Production of Documents, dated July 23, 2004, Complaint Counsel requested "All documents that constitute or refer or relate in any way to studies, formulas or surveys of Respondent Hospitals regarding the strategies and formulas they have used or have considered using in setting prices for inpatient and outpatient hospital services."

Respondents' document production to date has been deficient in that it has not included any surveys of the prices charged by hospitals or independent practice associations during the period 1995 to present. Respondents' production should include surveys conducted by Respondents or by third parties, such as city, county, state or national trade associations or any independent contractor, in which Respondents participated.

Because of our obvious need for these documents, I request that you produce these

Michael L Sibarium, Esq.
November 29, 2004

documents immediately. Further, I will file a motion to compel production if I do not obtain an assurance by December 3, 2004, that Respondents will promptly produce these documents by a mutually-acceptable date.¹

I appreciate your cooperation.

Sincerely,

Thomas H. Brock

cc: Duane M. Kelley, Esq.
Charles B. Klein, Esq.

¹ I acknowledge that Respondents may have produced these materials in just the past week, among the 50,000 plus pages of materials that were delivered to us. Therefore, if I am incorrect and these specific materials were included in that final production, please identify the page numbers of these materials so that we both can eliminate our need to apply to the Court.

Brock, Thomas H.

From: Klein, Charles [CKlein@winston.com]
Sent: Tuesday, November 30, 2004 2:41 PM
To: Brock, Thomas H.
Cc: Sibarium, Michael
Subject: RE: Document Production Deficiencies

Tom,

We received a copy of your letter concerning Document Request No. 11 of Complaint Counsel's Fifth Request for the Production of Documents, but we do not understand what you believe is the deficiency in our production. I am quite sure that we produced some documents that were responsive to that specification. Do you have some reason to believe we did not produce something responsive (putting aside what is in the electronic files that you may not have had a chance to review yet)? It would be helpful if you could supply a little more guidance as to what you think may be missing from our production.

Thanks,
Chuck

-----Original Message-----

From: Brock, Thomas H. [mailto:TBROCK@ftc.gov]
Sent: Monday, November 29, 2004 6:38 PM
To: Sibarium, Michael; Kelley, Duane; Klein, Charles
Subject: Document Production Deficiencies

<<11.29.04 Brock to Sibarium.wpd>>

Chuck/Mike -

Please call me when you want to discuss this matter.

Tom

Thomas H. Brock, Esq.
Office of the Director
Bureau of Competition
Federal Trade Commission
Room 360
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

202/326/2813

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Brock, Thomas H.

From: Brock, Thomas H.
Sent: Tuesday, November 30, 2004 3:19 PM
To: 'Klein, Charles'
Subject: RE: Document Production Deficiencies

Chuck -

I am not sure why you need more guidance. In addition to any documents responsive to the interrogatory, I am specifically interested, as I said in the letter, in "any surveys of the prices charged by hospitals or independent practice associations during the period 1995 to present," including "surveys conducted by Respondents or by third parties, such as city, county, state or national trade associations or any independent contractor, in which Respondents participated"

We have not located any such documents, either in our review of the documents produced earlier or in our initial review of the materials that have been produced recently. Obviously, if Respondents are prepared to certify that these documents have been produced, please let me know.

Tom

-----Original Message-----

From: Klein, Charles [mailto:CKlein@winston.com]
Sent: Tuesday, November 30, 2004 2:41 PM
To: Brock, Thomas H.
Cc: Sibarium, Michael
Subject: RE: Document Production Deficiencies

Tom,

We received a copy of your letter concerning Document Request No. 11 of Complaint Counsel's Fifth Request for the Production of Documents, but we do not understand what you believe is the deficiency in our production. I am quite sure that we produced some documents that were responsive to that specification. Do you have some reason to believe we did not produce something responsive (putting aside what is in the electronic files that you may not have had a chance to review yet)? It would be helpful if you could supply a little more guidance as to what you think may be missing from our production.

Thanks,
Chuck

-----Original Message-----

From: Brock, Thomas H. [mailto:TBROCK@ftc.gov]
Sent: Monday, November 29, 2004 6:38 PM
To: Sibarium, Michael; Kelley, Duane; Klein, Charles
Subject: Document Production Deficiencies

<<11.29.04 Brock to Sibarium.wpd>>

Chuck/Mike -

Please call me when you want to discuss this matter.

Tom

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