

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

COMMISSIONERS: **William E. Kovacic, Chairman**
 Pamela Jones Harbour
 Jon Leibowitz
 J. Thomas Rosch

In the Matter of)	
)	
)	
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION,)	Docket No. 9315
a corporation, and)	
)	
ENH MEDICAL GROUP, INC.,)	
a corporation.)	

FINAL ORDER

This matter having been heard by the Commission upon the appeal of Respondent and the cross-appeal of complaint counsel; and the Commission having determined that the acquisition by Evanston Northwestern Healthcare Corporation (“ENH”) of Highland Park Hospital (“Highland Park”) in 2000 violated Section 7 of the Clayton Act, for the reasons stated in the Opinion of the Commission issued on August 6, 2007 (“Opinion”); and the Commission having affirmed the Initial Decision as to liability, but having vacated the proposed order issued as part of the Initial Decision, for the reasons stated in the Opinion; and the Commission having considered the submissions of Respondent and complaint counsel regarding a proposed final order; the Commission has now determined to issue a Final Order to remedy Respondent’s violation of Section 7 of the Clayton Act. Accordingly,

It is ordered that the following order to cease and desist be, and hereby is, entered:

I.

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

- A. “Commission” means Federal Trade Commission.

- B. “Contract Administration” means the act or acts associated with compliance with and implementation of final contract terms, such as payment monitoring, communication of Payor medical and administrative policies, utilization management, liaison to the business office, annual updates, and organizing

managed care-related budget information.

- C. “Contract Management System” means a software application or other system that houses contract rates and is utilized for patient billing and modeling Pre-existing Contract rates and/or proposed rates.
- D. “Corporate Managed Care Department” means the department that will be responsible for Contract Administration for both Evanston and Highland Park.
- E. “ENH” or “Respondent” means Evanston Northwestern Hospital Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Evanston Northwestern Hospital Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- F. “Evanston,” means Evanston Hospital and Glenbrook Hospital, the hospitals owned by ENH and located at 2650 Ridge Avenue, Evanston, Illinois, and 2100 Pfungston Road, Glenview, Illinois, respectively.
- G. “Evanston Negotiating Team” means the team responsible for negotiating a Managed Care Contract for Hospital Services for Evanston when a Payor negotiates Managed Care Contracts for Hospital Services for Evanston separate from Hospital Services for Highland Park.
- H. “Final Offer Arbitration” means a manner of arbitration whereby each party in a disputed matter submits its best and final offer to an arbitrator who is then required to choose what he or she believes is the best offer (sometimes referred to as "baseball style arbitration").
- I. “Highland Park,” means Highland Park Hospital, the hospital owned by ENH and located at 777 Park Avenue West, Highland Park, Illinois.
- J. “Highland Park Negotiating Team” means the team responsible for negotiating a Managed Care Contract for Hospital Services for Highland Park when a Payor negotiates Managed Care Contracts for Hospital Services for Highland Park separate from Hospital Services for Evanston.
- K. “Hospital” means any human medical care facility licensed as a hospital in the state in which the facility is located.
- L. “Hospital Services” means all inpatient hospital services, which include a broad cluster of medical, surgical, diagnostic, treatment, and all other services that are included as part of an admission of a patient to an inpatient bed within Evanston

or Highland Park, and all outpatient services that are related to the use of that Hospital.

- M. “Managed Care Contract” means a contract or agreement for Hospital Services between ENH and a Payor, including but not limited to rates, definitions, terms, conditions, policies, and pricing methodology (*e.g.*, per diem, discount rate, and case rate).
- N. “Managed Care Contracting Information” means information concerning Managed Care Contracts and negotiations with a specific Payor for Hospital Services; provided, however, that “Managed Care Contracting Information” shall not include: (i) information that is in the public domain or that falls in the public domain through no violation of this Order or breach of any confidentiality or non-disclosure agreement with respect to such information by Respondent; (ii) information that becomes known to ENH from a third party that has disclosed that information legitimately; (iii) information that is required by law to be publicly disclosed; or (iv) aggregate information concerning the financial condition of ENH.
- O. “Merger” means the 2000 merger of Evanston Northwestern Healthcare Corporation with Highland Park Hospital.
- P. “Operate” means to own, lease, manage or otherwise control or direct the operations of a Hospital, directly or indirectly.
- Q. “Ownership Interest” means any and all rights, present or contingent, of Respondent to hold any voting or nonvoting stock, share capital, equity or other interests or beneficial ownership in an entity.
- R. “Payor” means any Person that pays, or arranges for payment, for all or any part of any Hospital Services for itself or for any other Person. Payor includes any Person that develops, leases, or sells access to networks of Hospitals. The term does not include government payors for public health insurance programs, such as Medicare and Medicaid.
- S. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or government entity, and any subsidiaries, divisions, groups or affiliates thereof.
- T. “Pre-existing Contract” means a Managed Care Contract between a Payor and ENH that is in effect on the date this Order becomes final.

II.

IT IS FURTHER ORDERED that Respondent shall

- A. Negotiate Managed Care Contracts for Hospital Services for Highland Park separately and independently from Managed Care Contracts for Hospital Services for Evanston, and vice versa;
- B. Not make any Managed Care Contract for Hospital Services for Evanston contingent on entering into a Managed Care Contract for Hospital Services for Highland Park, or vice versa;
- C. Not make the availability of any price or term included in a Managed Care Contract for Hospital Services for Evanston contingent on entering into or agreeing to any particular price or term included in a Managed Care Contract for Hospital Services at Highland Park, or vice-versa; and
- D. At the request of the Payor, submit any disputes as to prices and/or terms arising out of the separate and independent negotiations required by Paragraphs II.A.- C. of this Order:
 - 1. first to mediation under the Commercial Mediation Rules of the American Arbitration Association (“AAA”), and, if the dispute cannot be settled by mediation, at the request of the Payor to a single arbitrator, mutually agreed upon by ENH and the Payor, who shall conduct binding arbitration in accordance with the Commercial Arbitration Rules of the AAA at a location mutually agreed upon by ENH and the Payor, in order to determine fair and reasonable prices and/or terms assuming competition between the hospitals as would exist but for the Merger;
 - 2. the arbitration shall be conducted as Final Offer Arbitration, unless ENH and the Payor agree to an alternative manner of arbitration;
 - 3. costs of the arbitration (other than attorneys fees, which shall be borne by the party that incurs them) shall be borne by the loser if Final Offer Arbitration; if a manner other than Final Offer Arbitration or if the parties settle the matter prior to issuance of the final decision by the arbitrator, the arbitrator shall assess costs, unless the parties agree as to the allocation of costs;

4. *provided, however,* that neither the mediator nor the arbitrator shall have any responsibility or authority to resolve issues concerning any violation or possible violation of this Order; the Commission retains jurisdiction over these issues.

Provided further, however, that nothing in this Paragraph shall prohibit Respondent from negotiating a Managed Care Contract with a particular Payor for Hospital Services for both Highland Park and Evanston jointly, if that Payor elects to negotiate jointly for all Hospitals rather than to negotiate separate Managed Care Contracts.

III.

IT IS FURTHER ORDERED that

- A. No later than thirty (30) days after this Order becomes final, Respondent shall establish and thereafter maintain the Evanston Negotiating Team and the Highland Park Negotiating Team, which teams shall operate independent of each other and negotiate Managed Care Contracts separately and in competition with each other and other Hospitals.
- B. The Highland Park Negotiating Team shall be exclusively responsible for negotiating Managed Care Contracts for Hospital Services for Highland Park when separate contracts are negotiated pursuant to Paragraph II. of this Order.
- C. The Evanston Negotiating Team shall be exclusively responsible for negotiating Managed Care Contracts for Hospital Services for Evanston when separate contracts are negotiated pursuant to Paragraph II. of this Order.
- D. At the request of a specific Payor, ENH shall be permitted to negotiate a Managed Care Contract for Hospital Services jointly for both Evanston and Highland Park for that specific Payor for that specific Managed Care Contract; *provided, however,* that neither the Highland Park Negotiating Team nor the Evanston Negotiating Team shall be involved in the joint negotiations.

IV.

IT IS FURTHER ORDERED that

- A. Respondent shall maintain Managed Care Contracting Information with respect to Evanston separate and confidential from Managed Care Contracting Information with respect to Highland Park.

- B. Managed Care Contracting Information with respect to Evanston shall not, directly or indirectly, be transmitted to or received by the Highland Park Negotiating Team, and Managed Care Contracting Information with respect to Highland Park shall not, directly or indirectly, be transmitted to or received by the Evanston Negotiating Team, except as otherwise provided in this Order.
- C. No later than thirty (30) days after this Order becomes final, Respondent shall implement procedures and protections to ensure that Managed Care Contracting Information for Evanston, on the one hand, and Highland Park, on the other, is maintained separate and confidential, including but not limited to:
1. establishing a firewall-type mechanism that prevents the Evanston Negotiating Team from requesting, receiving, sharing, or otherwise obtaining any Managed Care Contracting Information with respect to Highland Park, and prevents the Highland Park Negotiating Team from requesting, receiving, sharing, or otherwise obtaining any Managed Care Contracting Information with respect to Evanston;
 2. establishing a Contract Management System for the Highland Park Negotiating Team that is separate or clearly-partitioned from the Contract Management System for the Evanston Negotiating Team to ensure the confidentiality of Managed Care Contracting Information; and
 3. causing each of Respondent's employees with access to Managed Care Contracting Information to maintain the confidentiality required by the terms and conditions of this Order, including but not limited to:
 - a. requiring each employee to sign a statement that the individual will comply with these terms;
 - b. maintaining complete records of all such statements at Respondent's headquarters; and
 - c. providing an officer's certification to the Commission stating that such statements have been signed and are being complied with by all relevant employees.
- D. Nothing in this Order shall prevent the Highland Park Negotiating Team from requesting, receiving, sharing, using or otherwise obtaining Managed Care Contracting Information with respect to Hospital Services for Highland Park.
- E. Nothing in this Order shall prevent the Highland Park Negotiating Team from requesting, receiving, sharing, using or otherwise obtaining non-Managed Care

Contracting Information relating to any ENH Hospital or the entire ENH system, including, but not limited to, information related to costs, quality, patient mix, service utilization, experience data, budgets, capital needs, expenses, and overhead.

- F. Nothing in this Order shall prevent the Evanston Negotiating Team from requesting, receiving, sharing, using, or otherwise obtaining Managed Care Contracting Information with respect to Hospital Services for Evanston.
- G. Nothing in this Order shall prevent the Evanston Negotiating Team from requesting, receiving, sharing or otherwise obtaining non-Managed Care Contracting Information relating to any ENH Hospital or the entire ENH system, including, but not limited to, information related to costs, quality, patient mix, service utilization, experience data, budgets, capital needs, expenses, and overhead.
- H. If a Payor elects to negotiate and contract jointly for Hospital Services for both Highland Park and Evanston, nothing in this Order shall prohibit ENH from requesting or obtaining Managed Care Contracting Information with respect to Hospital Services for both Evanston and Highland Park for that particular Payor or from using that Managed Care Contracting Information for that particular Payor with respect to the joint negotiations and contracting for that particular Managed Care Contract.
- I. Nothing in this Order shall prevent the Corporate Managed Care Department from requesting Managed Care Contracting Information from the Evanston Negotiating Team or the Highland Park Negotiating Team, *provided, however*, that
 - 1. the Managed Care Contracting Information that is requested and obtained is used solely for the purpose of Contract Administration, and
 - 2. the Corporate Managed Care Department is prohibited from providing, sharing, or otherwise making available Managed Care Contracting Information:
 - a. from the Highland Park Negotiating Team to or with the Evanston Negotiating Team; or
 - b. from the Evanston Negotiating Team to or with the Highland Park Negotiating Team.

V.

IT IS FURTHER ORDERED that Respondent shall, solely at the option of the Payor and with no penalty to the Payor, allow Payors with Pre-existing Contracts the option to re-open and renegotiate their contracts under the terms of this Order:

- A. No later than thirty (30) days after this Order becomes final, Respondent shall notify all Payors with a Pre-existing Contract of their rights under this Order, and, for each such Pre-existing Contract, offer the opportunity to negotiate a separate Managed Care Contract for Hospital Services for Highland Park on the one hand and Evanston on the other hand.

- B. Respondent shall send notification of the above requirement and a copy of this Order to the Chief Executive Officer, the General Counsel, and the network manager of each such Payor by first class mail or e-mail, with return receipt requested, and keep a file of such receipts for three (3) years after the date on which this Order becomes final.
 - 1. Respondent shall maintain complete records of all such notifications at Respondent's headquarters, and

 - 2. Respondent shall provide an officer's certification to the Commission stating that such notification program has been implemented and that Respondent has complied with its provisions.

VI.

IT IS FURTHER ORDERED that, no later than ten (10) days after being contacted by a Payor to negotiate a Managed Care Contract, Respondent shall notify said Payor of its rights under this Order by sending a copy of this Order to the Chief Executive Officer, the General Counsel, and the network manager of the Payor by first class mail or e-mail, with return receipt requested. Respondent shall maintain complete records of all such notifications and return receipts at Respondent's headquarters and shall include in reports filed to the Commission an officer's certification to the Commission stating that such notification requirement has been implemented and is being complied with.

VII.

IT IS FURTHER ORDERED that Respondent shall,

- A. Within ten (10) days after this Order becomes final, and every sixty (60) days thereafter until submission of the first annual report required by Paragraph VII.B. of this Order, submit a verified written report to the Commission setting forth in detail
1. the manner and form in which it will comply with Paragraphs II. and III. of this Order, including but not limited to the composition, structure, and intended operation of the Evanston Negotiating Team and the Highland Park Negotiating Team, including but not limited to who will comprise the teams, where they will be located, who will supervise the teams, who will approve the Managed Care Contracts, what instructions the team members will receive, how the team members will be compensated, what other responsibilities the team members will have, and other details necessary for the Commission to evaluate Respondent's compliance with this Order; and
 2. the manner and form in which Respondent will comply with Paragraph IV. of this Order.
- B. One (1) year from the date this Order becomes final, annually for the next nineteen (19) years on the anniversary date this Order becomes final, and at such other times as the Commission may require, submit a verified written report to the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order. In each such verified written report, include, among other things that are required from time to time, the following:
1. a full description of the efforts being made to comply with each Paragraph of the Order, including all internal memoranda and all reports and recommendations concerning compliance with the requirements of this Order;
 2. notification of all requests for mediation and/or arbitration and a full description of the mediation and/or arbitration, including but not limited to identification of the arbitrator and the location of the arbitration, a full description of the status and results of mediation, a full description of the status of the arbitration and, if resolved, of the resolution of each arbitration; and

3. the identity of each member of the Evanston Negotiating Team, the Highland Park Negotiating Team, and the Corporate Managed Care Department.
- C. Within sixty (60) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent has fully complied with paragraphs V and IX.A., and has obtained the signed statements of all of Respondent's employees described in Paragraph IV.C.3. and who are employed by the Respondent as of the date this Order becomes final, submit a verified written report to the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and five (5) days notice to the Respondent made to its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and all other records and documents in its possession, or under its control, relating to any matter contained in this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that Respondent shall

- A. Within thirty (30) days after the date this Order becomes final, send by first class mail, return receipt requested, a copy of this Order to each officer and director of ENH; and
- B. Within ten (10) days of appointment of any new officer or director of ENH, send by first class mail, return receipt requested, a copy of this Order to such officer or director.

X.

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondent shall not, directly or indirectly, through subsidiaries or otherwise, without providing advance written notice to the Commission:

- A. Acquire any Ownership Interest in:
 - 1. a Hospital that is located within the Chicago Metropolitan Statistical Area;
or
 - 2. any Person that Operates a Hospital that is located within the Chicago Metropolitan Statistical Area; or
- B. Enter into any agreement or other arrangement to Operate or otherwise obtain direct or indirect ownership, management, or control of a Hospital that is located within the Chicago Metropolitan Statistical Area, or any part thereof, including but not limited to a lease of or management contract for any such Hospital.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the code of Federal Regulations as amended (hereinafter referred to as the “Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification; Notification shall be filed with the Secretary of the Commission; Notification need not be made to the Department of Justice; and Notification is required only of the Respondent and not of any other party to the transaction. Respondent shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 802.20), Respondent shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested by Respondent and, where appropriate, granted by a letter from the Commission’s Bureau of Competition, *provided however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

XI.

IT IS FURTHER ORDERED that, Respondent shall notify the Commission at least thirty (30) days prior to (1) any proposed dissolution of Respondent; (2) any proposed acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment or creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date on which this Order becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: April 24, 2008