

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

JOINT MOTION TO MODIFY SCHEDULING ORDER

Pursuant to the Federal Trade Commission’s Rules of Practice (“Rules”), 16 C.F.R. §§ 3.21(c)(2) and 3.51(a), as well as the Scheduling Order dated March 24, 2004 (“Scheduling Order”), Complaint Counsel and Respondents¹ (collectively, the “Parties”) hereby move to modify the Scheduling Order by extending the remaining deadlines and hearing date by approximately ninety (90) days. Attached is a proposed Amended Scheduling Order that, if entered by the Court, would set a new hearing date of January 10, 2004.²

This motion should be granted because this is the first time the Commission has challenged a hospital merger in years, and it is one of very few consummated merger challenges. Accordingly, the Court and the Commission need a full factual record and comprehensive expert testimony to decide this case.

¹ Respondents are Evanston Northwestern Healthcare Corporation (“ENH”) and ENH Medical Group, Inc. (“ENH Medical Group”).

² The hearing date in this action initially was going to be scheduled for September 14, 2004, but that date was continued until September 29, 2004, in light of the Jewish holidays of Rosh Hashanah and Yom Kippur.

On March 8, 2004, this Court found good cause in a post-consummation case to grant the respondent's requested four week extension. The Court held that respondent needed adequate time to review and analyze hundreds of boxes of documents produced by the parties and third parties as well as the transcripts of more than 40 depositions. Aspen Tech., Inc., Docket No. 9310, Mar. 8, 2004 Order (Ex. 1). Similarly, on June 14, 2002, Judge Timony, in another case challenging a consummated merger, granted an extension of discovery of sixty days after finding that adequate discovery could not be completed under the current deadlines. In re Chicago Bridge & Iron Co., Docket No. 9300, June 18, 2002 Order (Ex. 2); see also MSC Software Corp., Docket No. 9299, Mar. 5, 2002 Order at 2 (granting "extension of two months for the close of discovery and an extension of six to eight weeks for most other dates remaining in the Scheduling Order, including the commencement of the hearing") (Ex. 3); In re Intel Corp., 1998 FTC LEXIS 146 (F.T.C. 1998) (extending deadlines because, among other reasons, "resolution of all disputes concerning third-party document subpoenas is required for the parties to conduct meaningful third-party and expert depositions") (Ex. 4); In re Intel Corp., 1999 FTC LEXIS 216 (F.T.C. 1999) (granting further extension because both parties "require additional time to prepare their cases") (Ex. 5).

II. The Parties Have Demonstrated "Good Cause" To Extend The Scheduling Order Deadlines.

Despite their extraordinary efforts to meet the Scheduling Order deadlines, the Parties have demonstrated "good cause" to warrant the jointly requested extension of these deadlines. The need for an extension is particularly compelling in the instant case because some

of the 53 noticed depositions already have been taken and many others have been scheduled to meet the July 12, 2004, fact discovery deadline even though a significant number of relevant materials have yet to be produced by third parties. As in the cases cited above where extensions were granted, an extension here would afford the Parties more time to cull the enormous amount of electronic and paper discovery already produced and collect, organize and analyze those documents that have yet to be produced.

The time presently afforded to the Parties to complete these tasks will have effects that ripple throughout these proceedings. Not only are the Parties currently required to take more than 50 fact witness depositions by the July 12, 2004, fact discovery deadline without being afforded a prior opportunity to review and analyze adequately all pertinent materials, but the Parties' experts can benefit from more time to evaluate *all* pertinent data to prepare their reports by the July and August, 2004, deadlines.

Finally, a revised timeline may allow for a better expert deposition schedule. The current schedule requires all expert reports to be submitted by August 3, 2004. Under this schedule, the Parties will have barely more than 1 ½ months – from August 3, 2004 to the eve of trial, September 29, 2004 – to analyze a total of *at least* 10 expert reports, review the countless documents relied on by these experts, and depose the designated experts. More time to depose the experts would enable the parties to better prepare for a complex and lengthy trial.

CONCLUSION

Given the practical reality of this complex proceeding, both the Court and the parties would benefit from more time to review and analyze *all* pertinent materials (including those that have yet to be produced by third parties) *before* the depositions of key fact witnesses.

The requested 90-day extension will assist Complaint Counsel and Respondents in presenting their cases.

For the foregoing reasons, the Parties request that this Court grant their Joint Motion to Modify Scheduling Order.

Respectfully Submitted,

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2004, a copy of the foregoing Joint Motion to Modify Scheduling Order was served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW (H-106)
Washington, DC 20580
(two courtesy copies delivered by messenger only)

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Charles B. Klein

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ORDER

Upon consideration of the Joint Motion to Modify Scheduling Order and Complaint Counsel's response thereto, and the Court being fully informed, it is this _____ day of _____, 2004 hereby

ORDERED, that the Motion is GRANTED; and it is further

ORDERED, that the following deadlines set in the Court's Scheduling Order dated March 24, 2004, are hereby modified as in the attached Amended Scheduling Order

The Honorable Stephen J. McGuire
CHIEF ADMINISTRATIVE LAW JUDGE
Federal Trade Commission

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AMENDED SCHEDULING ORDER

- | | | |
|--------------------|---|---|
| July 23, 2004 | - | Deadline for issuing document requests, requests for admission, interrogatories and subpoenas <i>duces tecum</i> , except for: 1) discovery for purposes of authenticity and admissibility of exhibits; or 2) discovery regarding new fact witnesses identified on Complaint Counsel or Respondent Counsel's revised witness lists. |
| August 6, 2004 | - | Complaint Counsel provides revised witness lists, including preliminary rebuttal fact witnesses, with description of proposed testimony (excluding experts). |
| August 13, 2004 | - | Respondent's Counsel provides revised witness lists, including preliminary rebuttal fact witnesses, with description of proposed testimony (excluding experts). |
| September 12, 2004 | - | Close of discovery, other than discovery permitted under Rule 3.24(a)(4), expert depositions, and discovery for purposes of authenticity and admissibility of exhibits. |
| September 21, 2004 | - | Complaint Counsel provides expert witness reports. |
| October 13, 2004 | - | Deadline for filing motions for summary decision. |
| October 19, 2004 | - | Respondents' Counsel provides expert witness reports. |
| November 2, 2004 | - | Complaint Counsel to identify all rebuttal expert(s) and provide rebuttal expert report(s) to the extent that those rebuttal reports do not address econometric analyses proffered by Respondents' |

experts. Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).

November 3, 2004 - Deadline for filing responses to motions for summary decision.

November 3, 2004 - Complaint Counsel provides to Respondents' Counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the testimony of each witness.

Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.

November 10, 2004 - Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the testimony of each witness.

Respondents' Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.

November 15, 2004 - Parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).

November 16, 2004 - Complaint Counsel to provide rebuttal expert report(s) to the extent that those reports address econometric analyses proffered by Respondents' experts. Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).

November 18, 2004 - Deadline for filing motion *in limine* and motion to strike.

- November 30, 2004 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- December 3, 2004 - Deadline for filing responses to motions *in limine* and motions to strike.
- December 10, 2004 - Deadline for filing responses to motions *in camera* treatment of proposed trial exhibits.
- December 13, 2004 - Exchange proposed stipulations of law, facts, and authenticity.
- December 17, 2004 - Parties file pretrial briefs.
- December 22, 2004 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be filed as agreed by the parties.
- January 4, 2005 - Final prehearing conference. The parties are to meet and confer prior to the conference regarding trial logistics; proposed stipulations of law, facts, and authenticity; and admissibility of any designated deposition testimony. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded at this conference, to the extent practicable.
- January 10, 2005 - Commencement of Hearing, to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

(b) by order of the Administrative Law Judge upon showing of good cause; or

(c) if needed, to authenticate or provide evidentiary foundation for documents in dispute, with notice to the opposing party and the Administrative Law Judge.

A party seeking to add witnesses after submission of the final witness lists shall promptly notify the other parties of its intention to do so, to facilitate completion of discovery within the dates of the scheduling order. Opposing counsel shall have a reasonable amount of time to subpoena documents for and depose any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the hearing. Such discovery shall not be subject to the return/response otherwise ordered scheduling or notice provisions of paragraph 5 or the minimum period for subpoena/discovery requests of this paragraph unless by the Administrative Law Judge.

A party may depose any witness identified on the final witness list of the opposing party who was not identified on the preliminary witness list.

10. The final exhibit list shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after submission of the final lists only: (a) by order of the Administrative Law Judge upon a showing of good cause; (b) by agreement of counsel with notice to the Administrative Law Judge; or (c) where necessary for purposes of impeachment.

11. At the time an expert is first listed as a witness by a party, the party will provide to the other party:

- (a) materials fully describing or identifying the background and qualifications of the expert, and all prior cases in which the expert has testified or been deposed.
- (b) transcripts of such testimony in the possession, custody, or control of the listing party or the expert, subject to any confidentiality orders entered in prior litigation.
- (c) This paragraph shall not require the production of materials in litigation to which the expert was a party.

At the time an expert report is produced, the listing party will provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in

shall provide one another with copies of any demonstrative exhibits twenty-four hours before they are used with a witness.

19. At the final pre-hearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. Counsel will also be required to give *the originals* of exhibits to the court reporter, which the court reporter will keep.

ORDERED:

Administrative Law Judge

Date: May _____, 2004

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