

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of)
)
)

Evanston Northwestern Healthcare)
Corporation,)

Docket No. 9315
FD-111-X-11111

ENH Medical Group, Inc.,)
a corporation.)
)

MEMORANDUM IN SUPPORT OF COMPLAINT/COUNSEL'S MOTION FOR

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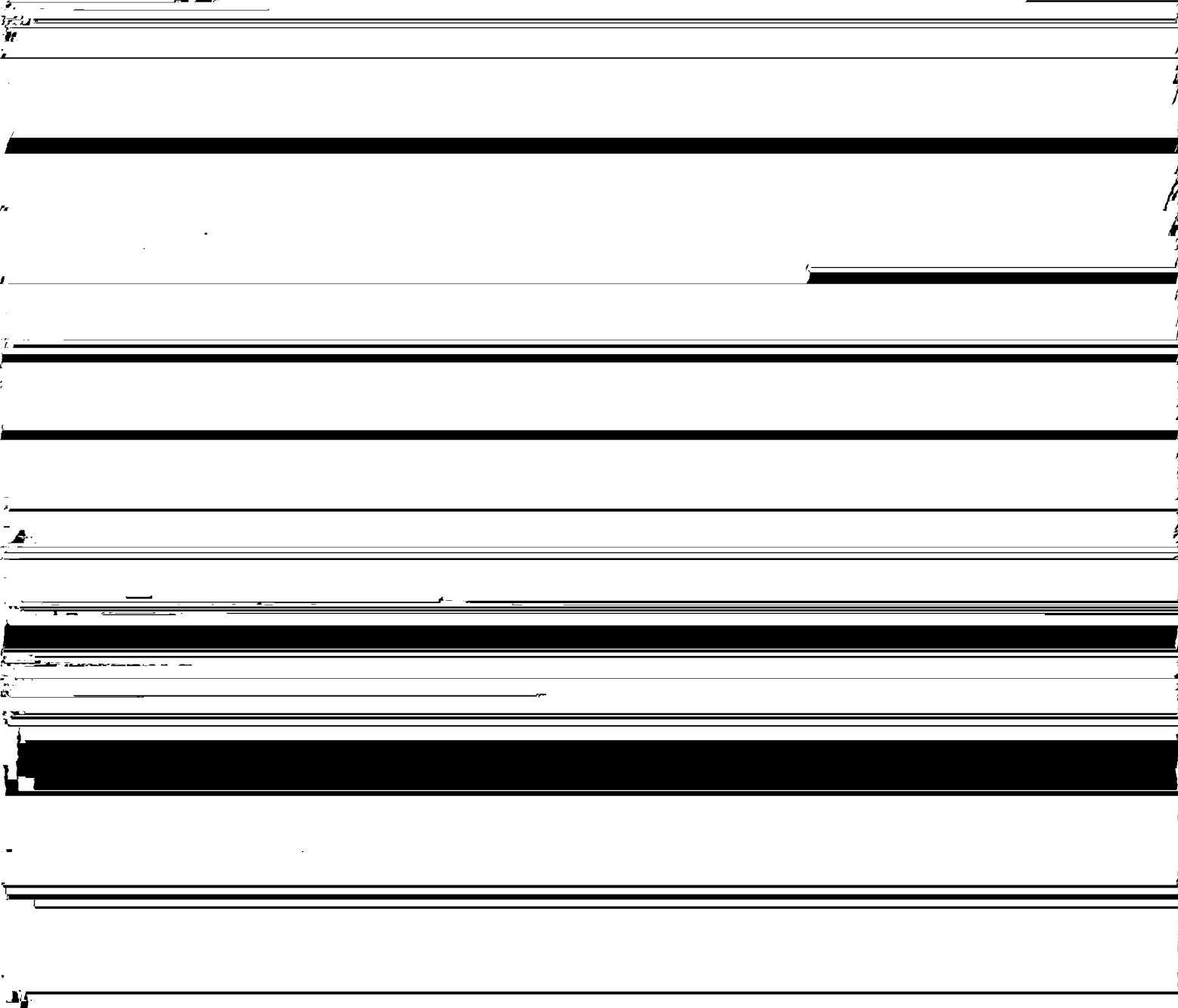
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1996 Department of Justice and Federal Trade Commission,

Department of Justice, Federal Trade Commission, Health Care



including, for example, a separate charge for each office visit, for each procedure that is

performs, or for each consultation, no matter how often such service is provided.⁵

A common formula used in fee-for-service contracts for doctors is to set the contract

payment at a percentage of Medicare's Reasonable Direct Relative Value System ("DDVRS")

against each other and against doctors employed by hospital corporations, among other things, for patients and prices on fee-for-service contracts.

The ENH Doctors and the Independent Doctors

In January 2000, Respondent Evanston Northwestern Healthcare Corporation ("ENH"),

which then owned two hospitals (located in Evanston and Chicago, which is north of Chicago)

merged with Highland Park Hospital (located in Highland Park, which is north of Evanston).12

and the Independent Doctors compete among themselves.¹⁸ *First*, they practice in close geographic proximity to each other.¹⁹ There is no other hospital located inside the triangular region formed by the three hospitals at which the doctors practice.²⁰ Before the price fixing agreement, when the ENH Doctors and the Independent Doctors from Highland Park were in competition, ENH Medical Group sought to expand its reach by acquiring three medical offices

¹⁸ In testimony which the Independent Doctors from Highland Park submitted to the Commission on 1/21/1981.

annual report about the state of “competition” observed that { [REDACTED] }
[REDACTED] } by acquiring nearby sites, the “consequences” of which was that the Highland
Park IPA’s { [REDACTED] }
[REDACTED] }²⁴ In 1997, Highland Park Healthcare’s Board noted that among the factors

contributing to the recent decline in managed care enrollment for the IPA was { [REDACTED] }

[REDACTED]
[REDACTED] }²⁵

The Price-Fixing Agreement

Price competition ended and the price fixing began in late 1999 when, just two months before the hospitals merged, the Independent Doctors from Highland Park joined forces with the doctors already in ENH Medical Group.²⁶ By an “integration” agreement dated November 1,

Medical Group and Faculty Practice Associates, agreed that the Independent Doctors would

{ [REDACTED] } for business with insurance companies.²⁸

As each of the Independent Doctors from Highland Park joined the ENH Medical Group

[REDACTED]

[REDACTED]

In furtherance of the scheme, the Independent Doctors from Highland Park signed standardized "To Whom It May Concern" letters in 2000.³² These letters, on ENH Medical Group stationary, state that the signatory doctor terminates his or her current contract with the insurance company and will participate in the insurance company's plan pursuant to the contracts

[REDACTED]³⁴

The co-conspirators understood the agreement would suppress competition. Terry Chan, the chief managed care contract negotiator for the Independent Doctors from Highland Park Hospital, wrote that { [REDACTED]

[REDACTED]³⁵ The doctors recognized that { [REDACTED]

³¹ E.g., CX 1503 at 12 (Provision 5.8) (Tab 33).

³² CX 1710 at 1 (Tab 37); CX 1714 (Tab 38); CX 1745 (Tab 40).

FNH Doctors who has served on several management committees for FNH Medical Group

including a managed care contracting committee. believes that ...

agreement.⁴²

In January of 2000, pursuant to the price fixing agreement, ENH Medical Group then

began to renegotiate fee-for-service contracts with insurance companies.⁴³ From ENH Medical

[REDACTED]⁴⁴ [REDACTED] was the first insurance company

to acquiesce: its new terms would increase doctor revenues by about [REDACTED] per year.⁴⁵

Over the next six months, ENH Medical Group successfully renegotiated more contracts.⁴⁶ The price increases amounted to approximately [REDACTED] million in increased annual revenues for the

higher prices. No document hints at a pro-competitive rationale, and no document tracks, quantifies or analyzes what, if any, pro-competitive outcomes have been achieved. Indeed, three years into the price fixing, ENH Medical Group realized it did not even have a plan as to how the

~~doctors might be able to achieve any competitive results. It was not until year 4 and 5 2002 at~~

an ENH Doctor or the other Independent Doctors.⁵² Conversely, the compensation that an ENH Doctor receives does not depend on the performance of the Independent Doctors. In 2003, ENH Medical Group itself saw the inevitable conclusion that { [REDACTED]

[REDACTED] }⁵³

As a result, ENH Medical Group committed itself to negotiate non-risk-sharing, fee-for-

service contracts on behalf of the participating doctors. ENH Medical Group has decided that it

{ [REDACTED] }⁵⁸ In December of 2002, an { [REDACTED] }
[REDACTED] } was introduced to management, but the memo states that ENH
Medical Group did { [REDACTED]

[REDACTED] }⁵⁹ In other words, from November 1999

It was not until March of 2003 that the Participation Agreement with new Independent
Doctors nominally required participation in any clinical integration programs that ENH Medical
Group might adopt and implement.⁶⁰ Even after this “requirement” was instituted, however,

A plaintiff is entitled to summary decision on all or part of its case if the “pleadings and

and positions appear to interpose no genuine issue as to any material fact and that the moving party is entitled to such decision as a

no genuine issue as to any material fact and that the moving party is entitled to such decision as a

matter of law.” 16 C.F.R. § 3.24(a)(2).⁶³ This is equally true when the litigation involves an

antitrust claim. “[E]ven in antitrust litigation, if the pertinent area of law is well developed and

the case turns on documentary evidence, disposition by summary judgment may be appropriate.”

among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or foreign commerce.⁶⁴ ABA Section of Antitrust Law, Antitrust Law Development (4th ed.

1977) 40 _____ 414 _____ CTE 92 F.2 1781 788 (04 Cir 1990) _____

We have direct evidence of a conspiracy. The open and notorious Participating Agreements among ENH Medical Group, the ENH Doctors and the Independent Doctors established the agreement.⁶⁵ Each of the Independent Doctors signed the Participating

Agreement, thereby permitting ENH Medical Group to negotiate on their behalf with insurance

companies to abide by the terms of fee-for-service contracts negotiated by ENH

Medical Group. Through these agreements, the Independent Doctors, the ENH Doctors and ENH Medical Group jointly agreed to set the prices they would charge insurance companies in

Under the antitrust laws, it is inconsequential that the doctors themselves did not agree on particular prices but instead appointed ENH Medical Group to negotiate prices that they would then all accept. An agreement among competitors to appoint a third party – here ENH Medical

“inherently suspect” and the defendant “makes no effort to advance any competitive justification

for its practices, then the case is at an end and the practices are condemned.” *Id.* In other words

if the conduct is “inherently suspect,” the defendant “can avoid summary condemnation only by
advancing a legitimate justification for those practices.” *Id.* at 62.

D. C. v. [redacted] “ [redacted] ” [redacted]

power, and no need to determine relevant markets or market shares; these issues are irrelevant.⁷⁰

2. *There are limited legitimate justifications for otherwise illegal collusive conduct, none of which are present here*

Respondent can avoid summary condemnation for the same crime "unless the defendant

legitimate justification for the same crime "unless the defendant

Antitrust Enforcement Policy in Health Care (hereinafter “Health Care Statements”).⁷² The Eighth Statement defines a “physician network joint venture” as a group of doctors who join together and agree on prices or price related terms and jointly market their services.⁷³ ENH

be deemed *per se* illegal unless “the physicians’ integration through the network is likely to

efficiencies. Such risk sharing, if substantial, can create the incentive for doctors to cooperate in controlling costs and improving quality by managing the provision of services by members.⁷⁷

This justification is not present here. The Independent Doctors were independent and separate business units, and did not share financial risk either among themselves or with the ENH

~~Doctors and the ENH. The ENH did not share financial risk with the Independent Doctors.~~

practice under established standards with a degree of interdependence that generates

efficiencies.⁸¹ Significant, efficiency-generating clinical integration requires “an active and ongoing program to evaluate and modify practice patterns by the network’s physician participants

and create a high degree of interdependence and cooperation among the physicians to control

C. The Price Fixing Conspiracy Affected Interstate Commerce

Violation of Section 5 of the FTC Act

[REDACTED] } Moreover, { [REDACTED]

[REDACTED] }⁸⁹ By remaining a party to these jointly negotiated contracts, both the

~~PHILDCO and the Independent Doctors are still engaged in an unlawful conspiracy.~~

A “case is not moot unless there is a showing ‘that there is no reasonable expectation that the alleged violation will recur and that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.’” *In the Matter of Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 615 (1988) (quoting *Conyers v. Reagan*, 765 F.2d

CONCLUSION

There are no genuine issues of material fact that Respondent ENH Medical Group and its

commerce. Therefore, Complaint Counsel respectfully move the Court for summary judgment

that Respondent ENH Medical Group, as set forth in Count III of the Complaint, violated Section

CERTIFICATE OF SERVICE

This is a true and correct copy of the original document.

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