

INTRODUCTION

The matter currently pending before this Court is a post-consummation

challenge to the contracting practices of ENH Medical Group under Section 7 of the Clayton Act (Counts I and II) and a

challenge to the contracting practices of ENH Medical Group under Section 5 of the FTC Act (Count III). The purpose of the hearing is to determine if ENH's January 2000 merger with

ENH Medical Group resulted in anticompetitive practices alleged in Counts I and II of the

ENH, like all hospitals, compete to be on the "preferred panel" of private payors' health plans. Private payors build provider networks to compete effectively with other payors for employer contracts. Employers want to limit the amount they spend on employee health benefits, and, as a result, price competition among payors is important. Therefore, payors are interested in obtaining the lowest rates possible from the providers they include in their networks, which fosters price competition among hospitals (and other providers). However, since employers must themselves compete for qualified labor, they also attempt to assure that their employees are reasonably satisfied with the health plan(s) that they offer. Consequently, they demand adequate provider networks that span the range of basic and specialty services that their employees may need, have good quality reputations, and are geographically convenient to their employees and their families. All of these dimensions can be grouped into a category of attributes that is labeled "choice." Different networks and plans provide varying degrees of these dimensions for different prices so that employers make

...that best meet their needs

risk that their costs will exceed reimbursements. Moreover, ENH needs to ensure its financial stability so it can continue to provide medical services to the local communities. Washa Decl. at ¶ 7. The resulting contracts are often in place for several years. Washa Decl. at ¶ 4.

[REDACTED]

Providing this information to competitors would irreparably harm Respondents and significantly lessen competition. In addition, policy and privacy interests would be injured by

[REDACTED]

[REDACTED]

[REDACTED]

1. The following information is being furnished for your information for its general treatment. See

1. E. J. G. 05 ETC 250 255 (1090). Bristol-Myers Co. 00 ETC 155 156.

Once the determination has been made that a document will receive *in camera*

1. The determination of the *in camera* treatment must be determined. 16 C.F.R. § 2.45(b)

II. Documents Requiring *In Camera* Treatment

Documents requiring *in camera* treatment for some documents that have been

[REDACTED]

ENHIL and ENHIL Medical Group trust these documents related to pricing as

Examples of such sensitive information are located at CX 0719, CX 1435. (See Golbus Decl. at 6.)

Public disclosure of ENH's internal cost analyses would leave it exposed in future negotiations with private payors. It would render it very difficult for ENH to negotiate rates and would negate the time and expense currently invested in months of negotiation preparation by ENH. In addition, competition would be diminished as ENH's competitors would have a clear view into ENH's cost structure.

~~ENH's internal cost information is closely held by ENH and would be~~

~~extremely difficult for private payors and competitors to duplicate. While competitors may~~

[REDACTED]

Section 1 (b) (5) - DPP

[REDACTED]

Because of the sensitive nature of these documents, ENH makes every effort to make certain that these documents are not leaked to competitors – primarily by the access

Section 1 (b) (5) - DPP

C. Documents Containing Current Financial Information

REDACTED

D. Documents Containing Market Assessment Information

1. General Discussion

As part of their ongoing effort to attract more patients, ENH's marketing staff continually engages in assessment of the marketplace. These assessments are both specific and

Such documents are valuable to ENH because they permit its employees to

share market data with each other

[REDACTED]

Market assessment documents constitute the intellectual property of ENH. They are the result of extensive experience, time spent with patients and affiliated physicians, and analysis of the markets. Because this information is confidential within ENH, it is unlikely that this information could be obtained by lawful means other than through this litigation.

E. Documents Containing Employee Performance and Peer Review Information

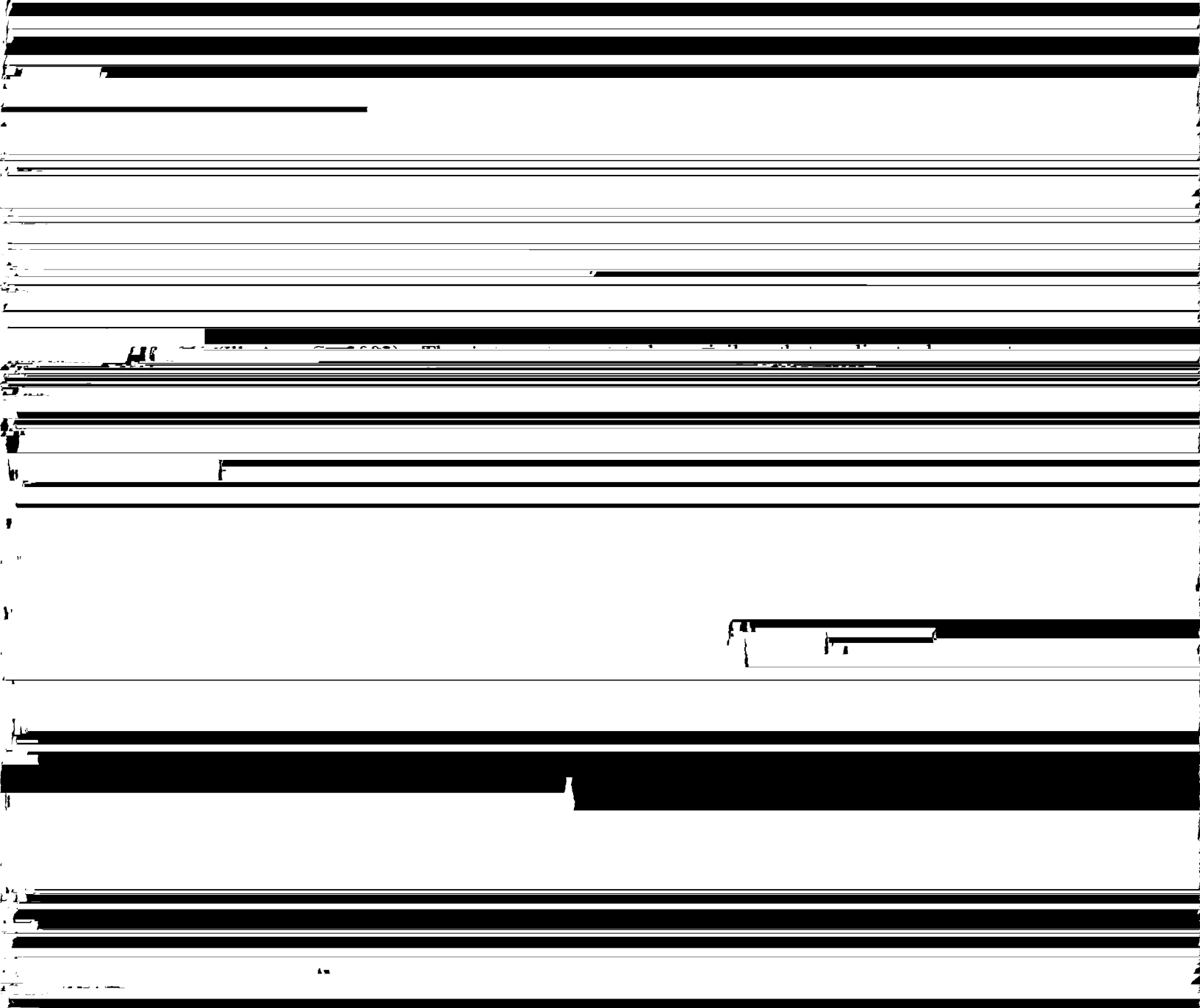
Employee performance and peer review information are competitively sensitive and would damage ENH specifically and competition generally if disclosed to customers and competitors. In addition, law and policy considerations demand that employee performance and peer review information receive the protection of its own treatment. These documents

contain both confidential patient information as well as frank assessments of the performance of services provided at or by ENH. Examples of these documents include:

IREDACTED



The purpose of the Illinois Medical Studies Act is “to ensure that members of the medical profession will effectively engage in self-evaluation of their peers in the interest of advancing the quality of health care.” *Roach v. Springfield Clinic*, 622 N.E.2d 246, 251 (Ill. 1993); *Green v. Lake Forest Hosp.*, 781 N.E.2d



Redacted text: ...been defamatory in protecting documents falling under the

Illinois Medical Studies Act whenever possible to avoid disrupting the course of the litigation. *Id.* at 1061 (“A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy.”) (internal quotations omitted); *see also Northwestern Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 932 (7th Cir. 2004) (quoting and reaffirming *Memorial Hospital for McHenry County*); *Lora v. Board of Education*, 74 F.R.D. 565 (E.D.N.Y. 1977) (And where a “state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule.”). The Act covers information, records, reports, statements, notes, memoranda or data generated specifically for the use of hospital peer review committees. *Green v. Lake Forest Hosp.*, 781 N.E.2d at 662 (Ill. App. Ct. 2002); *Chicago Trust Co. v. Cook County Hosp.*, 698 N.E.2d 641, 646 (Ill. App. Ct. 1998).

Over the years, ENH has engaged in continual efforts to improve patient care. ENH has created documents related to these efforts.

information must secure a protective order or endeavor to contact all patients whose information would be disclosed. 45 C.F.R. § 164.512(e)(1)(v). Although the definition of a qualified protective order does not specifically call for *in camera* treatment of the information, fulfillment of the intent of the regulation clearly demands it.

G. Expert Reports

Each of Respondents' expert reports contains highly sensitive and proprietary information. These reports are based on, describe, and analyze, the same data and documents

that are also contained in the records of the Respondents. It is clear that these documents and data

[REDACTED]

Peer review and patient information should also be protected by *in camera*

... ..

[REDACTED]

These facts demonstrate the measures taken by ENH to protect the secrecy of its peer review and patient information. As

should be made to report that analyze and describe the documents and information

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

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

ORDER

Upon consideration of Respondents' Motion for *In Camera* Treatment of Certain Exhibits, any opposition thereto, any hearing thereon, and the entire record in this action, it is hereby

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

ORDERED, that pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice 16 C F R 8 3 45(b) the documents identified in the index attached as Exhibit A to the

Motion shall be subject to the requested *in camera* treatment and will be kept confidential and not placed on the public record of this proceeding.

The Honorable Stephen J. McGuire
Chief Administrative Law Judge

Date: _____, 2005

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2005, copies of the foregoing Respondents' Memorandum of Law in Support of Their Motion for *In Camera* Treatment of Certain Exhibits and a proposed order (**Public Record Version**) were served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

600 Pennsylvania Ave. NW (H-106)
Washington, DC 20580
(two courtesy copies delivered by messenger only)

Thomas H. Brock, Esq.
Federal Trade Commission
600 Pennsylvania Ave NW (H-274)

**All Attached
Declarations and
Exhibit A's**

REDACTED