

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

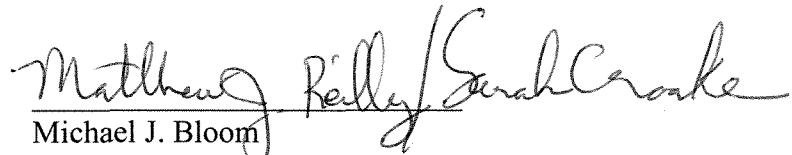
DOCKET NO. 9312

MOTION FOR LEAVE TO FILE MOTION *IN LIMINE* OUT OF TIME

Complaint Counsel requests leave to file the attached motion *in limine* on March 24, 2004, one day after the court-ordered cut-off for such motions. Complaint Counsel had filed this motion incorrectly with the Office of the Secretary on March 23, 2004. Because the motion *in limine* was marked “public” and the memorandum in support of the motion was marked “non-public,” these documents should have been submitted as separate filings rather than submitted as a single filing. Also, Complaint Counsel did not provide the Office of the Secretary with an electronic version of the filing before the 5:00 PM March 23, 2004 deadline. As a result, the filing was not timely.

We request that the Court accept this motion *in limine* because it raises important evidentiary issues of concern. Moreover, there is no possibility that Respondent will suffer prejudice from Complaint Counsel’s filing this motion one day late because this *identical* motion was served on Respondent on March 23, 2004, which was the court-ordered deadline for such motions.

Respectfully submitted,



Michael J. Bloom

Matthew J. Reilly

Attorneys for Complaint Counsel

Federal Trade Commission

Northeast Region

One Bowling Green, Suite 318

New York, NY 10004

(212) 607-2829

(212) 607-2822 (facsimile)

Dated: March 31, 2004

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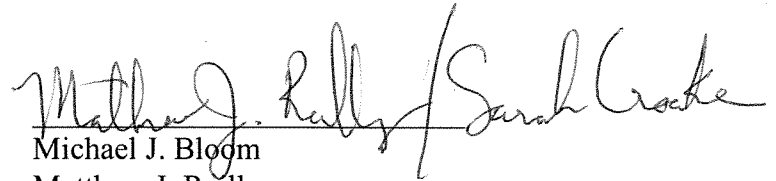
DOCKET NO. 9312

**COMPLAINT COUNSEL’S MOTION *IN LIMINE* TO PRECLUDE REPORT AND
TESTIMONY OF EDWARD F. X. HUGHES**

Respondent North Texas Specialty Physicians (“NTSP”) has proffered Edward F. X. Hughes to testify to the behavior of NTSP physicians with respect to their functioning as a “team” and their effect on the quality and cost of medical care. Complaint Counsel respectfully submits this motion *in limine* to exclude the report and testimony of Dr. Hughes.

As described more fully in the attached Memorandum in Support of this Motion, Dr. Hughes’ opinions are based not on facts at issue here, but rather on NTSP’s speculative future plans and motives for its actions. Moreover, Dr. Hughes’ opinions are unreliable because he conducted no independent analysis and his opinions are based on insufficient data, unverified assumptions, and are little more than guesswork. In sum, his opinions are impossible to test because they are not based on any science or methodology but instead are based upon his intuition, emotions, and, at times, “common sense,” which experts of course have no particular skill in assessing. Thus, Dr. Hughes’ expert report and testimony should be excluded.

Respectfully submitted,


Michael J. Bloom
Matthew J. Reilly

Attorneys for Complaint Counsel

Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004
(212) 607-2829
(212) 607-2822 (facsimile)

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DOCKET NO. 9312

**MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO PRECLUDE REPORT
AND TESTIMONY OF EDWARD F. X. HUGHES**

Complaint Counsel respectfully submits this motion *in limine* to bar, in whole or in part, Respondent North Texas Specialty Physicians (“NTSP”) from proffering testimony from and making arguments at trial based upon the opinions of one of its experts, Edward F. X. Hughes. Though Dr. Hughes may well have been “enormously emotionally moved” by his “emotionally powerful experience” at an NTSP meeting in 2002, his testimony, based on his view that “birds of a feather flock together,” rather than on any data, scientific methodology, or even review of any objective information, is not admissible.

Dr. Hughes’ opinions have no factual basis, are based on inherently unreliable principles and methodologies, and are little more than guesswork. Your Honor should preclude NTSP from offering this expert’s testimony for a number of reasons. First, Dr. Hughes’ report and testimony will not help this Court to understand the evidence because his opinions are based not on facts at issue here, but rather on NTSP’s speculative future plans and motives for its actions. Not only does Dr. Hughes’ speculation regarding NTSP’s future plans and motives not meet the standard of expert admissibility, but also is wholly irrelevant to this matter. Second, Dr. Hughes’ opinions

are unreliable because he conducted no independent analysis and his opinions are based on insufficient data, unverified assumptions, and guesswork. In sum, his opinions are impossible to test because they are not based on any science or methodology but instead are based upon his intuition, emotions, and, at times, “common sense,” which experts of course have no particular skill in assessing. Expert opinion that is not grounded in the facts of the case will not assist Your Honor. Thus, Dr. Hughes’ opinions do not meet the standard set forth in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) nor in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and therefore should be excluded from this matter.

ARGUMENT

I. Legal Standard

Although not strictly controlling in this proceeding, Rule 702 of the Federal Rules of Evidence and the case law applying it should inform this Court’s assessment of the admissibility of expert testimony in this proceeding. See In re Herbert R. Gibson, Jr., 1978 FTC LEXIS 375, at *2, n.1 (May 3, 1978) (Federal Rules of Evidence are “persuasive authority” in FTC adjudicative hearings). Rule 702 of the Federal Rules of Evidence provides for the admissibility of expert testimony in the federal courts:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Under Rule 702, testimony is inadmissible unless it is likely to help the Court understand evidence or determine a fact at issue; and it is based on the special knowledge of the expert and is the product of reliable principles and methods. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-91 (1993); Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1211 (D.C. Cir. 1997); United States v. Jackson, 425 F.2d 574, 576 (D.C. Cir. 1970). Moreover, for an expert's testimony to be admissible, it must be directed to matters within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help. Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 708 (2d Cir. 1989). The party offering the proposed expert bears the burden of demonstrating that the proffered testimony meets these requirements. ID Security Systems Canada, Inc. v. Checkpoint Systems, Inc., 198 F. Supp.2d 598, 602 (E.D. Pa. 2002).

II. Background

Dr. Hughes is a Professor of Management and Strategy at the Kellogg School of Management and a Professor of Preventive Medicine in the Medical School of Northwestern University. Respondent retained Dr. Hughes to investigate the behavior of NTSP physicians with respect to their "functioning as a team in order to improve the quality of health care, reduce its costs, and enhance its value". Hughes Deposition Transcript ("Tr") at 12 (February 27, 2004), a copy of which is included in Appendix as Exhibit A. Dr. Hughes testifies that NTSP physicians, by functioning as a team, develop a corporate culture, generate organizational capital, and use network systems to enhance quality and reduce costs. Dr. Hughes also asserts that the salutary clinical processes developed and refined on NTSP's risk patients are implemented on the

non-risk patients. Report at 4, 5, 10.

III. Dr. Hughes Has Not Performed Any Analysis To Determine Whether NTSP Has Achieved Any Efficiencies And Thus His Testimony Is Not Based Upon Sufficient Facts Or Data.

A. Dr. Hughes has reviewed little of the available evidence pertaining to NTSP's efficiencies (or lack thereof).

While Dr. Hughes has no shortage of opinions about how NTSP improves the effectiveness of its physicians, his testimony demonstrates that he reviewed, at best, only a small fraction of the relevant evidence when preparing his opinion. For example, the only documents that he apparently reviewed were a few minutes of NTSP's Medical Management Committee and the expert reports. Tr. at 82-83. In addition, Dr. Hughes did not interview anyone outside of the NTSP organization. Tr. at 13. For example, Dr. Hughes did not interview any of the health care payers that negotiate contracts with NTSP nor has he read their deposition transcripts. This type of evidence in particular would be critical to an efficiencies expert because payers – the direct customers for NTSP's members' services – are in a unique position to determine if NTSP improves cost and performance.

While Dr. Hughes represents that he has reviewed some relevant documents, he admits that he has reviewed much fewer documents here than he typically would:

Q. Do you review the historical document record to corroborate statements made by NTSP's management?

A. Much less so here, because of my previous experience with the organization, I knew who they were certainly culturally, symbolically and functionally.

Tr. at 35

Even though Dr. Hughes is offering an expert opinion on the quality of care that NTSP achieves through teamwork, he did not deem it necessary to review the agenda and minutes of NTSP's Quality Assurance Committee and only knew that such a committee existed.¹ Tr. at 103-104.

As lacking as Dr. Hughes' review of the documentary evidence was, it appears that his analysis of the relevant data had even more shortcomings. In fact, Dr. Hughes did not perform any independent analysis regarding how membership in NTSP affects the performance, quality, or overall costs of its physicians. When formulating his opinion regarding performance, quality, and cost, Dr. Hughes' failure to perform independent analyses seriously undermines the reliability of his conclusions. For example, Dr. Hughes testifies that NTSP's management information systems are an important contributor to NTSP's high level of care and value. Tr. at 73-74. Dr. Hughes, however, admits that he has not even attempted to measure the importance of the information management systems:

Q. Now, has there been any attempt to measure and quantify the efficiencies that have arisen through the management information systems and the programs that having that data allows NTSP to administer?

A. The -- that is -- there are two questions there. The efficiency of the management information system, I would say no, I don't know, I don't know. Secondly, have there been any attempts to measure efficiencies resulting from the use of the information, that is, from the information system provide, and the answer would be yes. The answer is in Rob Maness' report, represents that type of data.

Q. And you didn't undertake any of that on your own?

¹ Dr. Hughes did review and discuss at length in his report an article by Commissioner Thomas Leary. Expert Report of Edward F. X. Hughes ("Report") at 9-11 (February 13, 2004), included in Appendix as Exhibit B. This article however was not, by Dr. Hughes' own admission, "relevant to the formation of his conclusions in this matter." Tr. at 32.

A. No.

Tr. at 77.²

In fact, Dr. Hughes admits that he received “reams” of data from NTSP to analyze, yet he did not analyze any of the data because he is an “idea” person rather than a data person. Tr. at 36. With the possible exception of a couple of anecdotes, Dr. Hughes offers not a scintilla of analysis or evidence in his report and deposition that supports his opinions. As a result, Dr. Hughes’ opinions in this matter are entirely based on insufficient, or even non-existent, data and a few untested facts. See Wilk v. American Medical Association, 895 F.2d 352, 361-362 (1990) (even if the defendant focused on the right inquiry, there was no underlying data to support its theory). See also Niebur v. Town of Cicero, 136 F. Supp.2d 915, 918-19 (N.D.Ill 2001) (“even a supremely qualified expert cannot waltz into a courtroom and render opinions unless those opinions are based upon some recognized scientific method.”) (citations omitted); Securities and Exchange Commission v. Lipson, 46 F Supp.2d 758, 763 (N.D. Ill 1999) (court characterized the experts’ opinions as “at worst, rank speculation” and “at best, credibility choices that are within the province of the jury, not [the expert] to make.”)

B. Dr. Hughes’ opinion is based not on the actual facts at issue here, but on speculation regarding NTSP’s future plans and its desire to achieve efficiencies.

Since Dr. Hughes’ expert opinions are not based on concrete facts at issue here or analysis of such facts, an obvious question arises regarding the basis for his testimony. It appears that the basis of Dr. Hughes’ opinions is his belief that NTSP has good intentions and will

² Dr. Maness is an economic expert hired by NTSP in this matter. To the extent that Dr. Hughes mentions any concrete analysis in his report or deposition, this analyses has been performed by Dr. Maness, the economic expert hired by NTSP in this matter.

implement several positive steps and guidelines in the future. At an August 2002 NTSP retreat, Dr. Hughes, without having analyzed any NTSP's programs, decided to become a proponent of NTSP as a result of an "emotionally powerful experience."³

A. And there is also one other very important fact that has not surfaced but played a very important role in my deciding to become a proponent for NTSP, and is -- this is in the report, that in the summer of 2002 I was the keynote speaker for their board meeting. And I went to the entire board retreat. I was enormously impressed. It was an *emotionally and intellectually experience*, and that set the groundwork. I saw the entire board in action, I saw them claim their commitment in clinical integration, I saw them state the promises of guidelines, I saw them argue for ethics. It was an *emotionally powerful experience*. That's why I agreed to do this.

Q. When, again, was that retreat held?

A. August, 2002.

Q. And at that time, how would you evaluate the clinical integration programs that were already in place at NTSP?

A. At that time, I had no way to evaluate them and I was not in a place to evaluate them.

Tr. at 33-34.

Dr. Hughes repeatedly refers to NTSP's motives and state of mind during his testimony. When asked whether his opinion regarding the effectiveness of an NTSP committee would change if the committee lacked certain data, Dr. Hughes' testified that his opinion would not change because at least NTSP is trying:

Because it is the -- it is what they're trying to do. I mean, I believe in giving credit where credit is due. These dedicated professionals are trying to improve the quality of health care in what they're doing. That doesn't mitigate or doesn't

³ At another point in his testimony, Dr. Hughes again reiterated his emotional reaction to the NTSP organization: "I was *enormously emotionally moved*. I haven't experienced a physician organization that committed to social values in my life." Tr. at 50.

denigrate the intent of what they're trying to do with the means at their disposal.

Tr. at 86.

In addition to Dr. Hughes' "emotionally moved" reliance on NTSP's alleged benevolent motives and intentions, he also testifies at length about programs that he believes NTSP will implement in the future. Dr. Hughes describes NTSP's steps to implement procedures that may improve healthcare quality and value as an on-going "journey" where many initiatives will be coming in the future. Tr. at 101. But he repeatedly admitted that NTSP as of now has not implemented procedures that would improve the efficiency and performance of NTSP physicians. Tr. at 111-112, 119-124.

Dr. Hughes' opinions about NTSP's motives and intention to implement future programs are unreliable and irrelevant because future programs and intentions are not at issue in this matter. Clearly, the basis for the Commission's action against NTSP's past conduct has nothing to do with policy and procedural changes that NTSP may, or may not, choose to implement after the complaint has been filed. Furthermore, to the extent that NTSP's state of mind is relevant, Your Honor could as readily evaluate NTSP's state of mind as an "expert" could. There is nothing in Dr. Hughes' background or testimony that indicates that he has "knowledge, skill, experience, training, or education" that would provide "specialized knowledge" about NTSP's state of mind. Fed. R. Evid. 702. Courts have repeatedly recognized that an expert's testimony regarding a party's state of mind does not assist the fact finder because the expert is no more capable of ascertaining a party's intent or motive than a layperson. See, e.g., Woods v. Lecureux, 110 F.3d 1215 (6th Cir. 1997); United States v. Benson, 941 F.2d 598 (7th Cir. 1991). Accordingly, as a result of Dr. Hughes' significant reliance on NTSP's motives and intentions, an

area in which he has no specialized expertise, his “expert” opinion testimony should be excluded. See Taylor v. Evans, 1997 U.S. Dist Lexis 3907, at *5 (S.D.N.Y. Apr. 1, 1997) (“[M]usings as to defendants’ motivations would not be admissible if given by any witness – lay or expert”).

VI. Dr. Hughes’ Opinions About the Critical Issue of “Spillover” are Unreliable Because They are Based on Insufficient Data and Untested Facts

Even assuming that NTSP is able to achieve efficiencies in its risk-sharing contracts, the absence of spillover or other efficiencies to its non-risk-sharing physicians should foreclose Respondent from arguing that fixing prices for fee-for-service procedures is ancillary to the creation of cognizable efficiencies. Not surprisingly, Dr. Hughes testified that NTSP has achieved spillover efficiencies by “the salutary clinical processes developed and refined on NTSP’s risk patients ... implemented on the non-risk patients.” Report at 14. Because Dr. Hughes believes that NTSP functions as a team, he uncritically accepts that the supposedly efficient practices adopted by physicians in NTSP’s risk-sharing programs improves the practices and care of its physicians in the non-risk-sharing areas, apparently including the several hundred NTSP physicians who never share any risk. (“NTSP is a team. Its participating physicians are self-selected because they want a culture committed to high professional standards and high quality care.”) Report at 17. As it turns out, however, Dr. Hughes has no idea how NTSP selects physicians to join its organization:

Q. Doctor, do you have any familiarity with how NTSP selects physicians to be members of its organization?

A. I do not.

Tr. at 105.

According to Dr. Hughes, NTSP is able to improve physicians' practices in its non-risk arrangements by fostering a culture of teamwork through communication among risk and non-risk physicians and practices. Report at 99-100, 102-103, and 117-118. Notwithstanding Dr. Hughes' claims about the importance and benefits of communication among NTSP members, he has not performed any analysis to determine whether these benefits are more than theoretical nor has he attempted to quantify these benefits. In fact, Dr. Hughes is unable to point to any specific examples regarding where or how NTSP has improved physician communication. For example, when asked how NTSP facilitates communication between specialists and primary care physicians, Dr. Hughes testified that he was not sure but was able to provide "evidence" that an NTSP medical director sent out a monthly newsletter about a specific disease of the month. Interestingly, Dr. Hughes also acknowledged that this monthly newsletter had not been sent in over three years. Tr. 117-118. Dr. Hughes has offered no other specific evidence regarding communication among risk and non-risk members.

Dr. Hughes relies on inference rather than concrete evidence to demonstrate that NTSP's practices result in better communication among physicians ("The fact the culture of teamwork exists, one would infer that communication is enhanced"). Tr. at 118. Dr. Hughes has difficulty pointing to formal methods that NTSP has established to foster communication among members⁴ yet believes that, by providing informal opportunities for physicians to talk in the hallways and cafeterias, NTSP has achieved significant benefits that independent physicians would not obtain:

So if you know who the physician is, you are communicating all the time. If you are at the cafeteria, you walk over and sit next to him. There is all of these

⁴ For example, Dr. Hughes does not know whether NTSP physicians meet as a collective group on a regular basis. Tr. at 94.

informal networks that contribute to enhanced care.

Tr. at 100.

* * *

Q. Do you know how frequently that kind of activity occurs?

A. No. It occurs every day in the informal network of physicians bumping into each other in the hallways. That is how physicians communicate. And -- but in terms of formal meetings, I do not know.

Tr. at 97.

Dr. Hughes admits that he does not have data to demonstrate that physicians practicing under non-risk-sharing arrangements would change their practice patterns as a result of programs such as case-finding methodology used in the risk-sharing practice to identify high-intensity cases. He does, however, offer this expert analysis of the spillover effect:

By virtue of the fact that birds of a feather flock together, physicians practicing in a division within the program, within the plan may attend meetings where these programs are discussed.

Tr. at 58.

Again, this type of analysis is not exactly the rigorous, scientific analysis required by an expert. Niebur, 136 F. Supp.2d at 918-919.

Dr. Hughes does in fact cite in his report a cost analysis that appears to facially support his opinion that spillover efficiencies have been achieved by NTSP:

[T]he total PMPM⁵ cost (physician, facility, and pharmacy) for NTSP's
XX
XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX XXXXXXXXXXXX XXXXXX
XX
XXXXXX XXXXXX XXXXXXXXXXXX XXXXXXXXXXXX. These numbers are

⁵ Per Member Per Month

virtually identical and suggest similar practice patterns across both patient populations.

Report at 15.

But Dr. Hughes admits that he did not perform the analysis.⁶ Tr. at 36. Moreover, Dr. Hughes did not attempt to obtain information about the XXXXXXXXXX contracts in order to determine whether the cost comparisons are valid. Dr. Hughes' lack of knowledge regarding a single piece of quantitative analysis cited in either his report or testimony is staggering:

Q. Have you reviewed the actual contracts and their terms, say, of the contract between XXXXXXXX and NTSP?

A. No.

Q. Do you know how the capitation in that contract is structured?

A. No.

Q. Do you know whether that contract requires each patient to select a primary care physician?

A. I do not.

Q. Do you know whether primary care physicians under that contract serve as gate keepers and control referrals?

A. Do not.

Q. You also mention the XXXXXXX contract in that paragraph. Have you read that contract?

A. No.

Q. Do you know anything about the structure of capitation arrangement in that

⁶ Complaint Counsel believes that Dr. Maness' cost study is fatally flawed for several reasons and should be excluded. The study's shortcomings are discussed in detail in Complaint Counsel's Motion *In Limine* to Exclude Certain Opinion Testimony of Dr. Robert Maness.

contract?

A. No.

Q. Do you know whether patients are required to select primary care physicians under that contract?

A. No.

Q. Do you know whether primary care physicians have gate keeping power under the terms of that contract?

A. No.

Q. Do you know whether there are any demographic differences between the patient populations under the XXXXX contract and under the XXXXX contract?

A. No.

Tr. at 126-127.

As demonstrated by Dr. Hughes' ignorance of the specific facts of the analysis cited in his expert report, his opinions are unreliable because of the glaring lack of due diligence to gather the most basic data and information to support his theory. See Kay v. First Continental Trading, Inc., 976 F.Supp. 772, 776 (N.D.Ill. 1997) (rejecting expert's opinion for using unreliable information).

Dr. Hughes frequently did not know whether the programs and initiatives that he claims NTSP has implemented were available only for the NTSP risk-sharing contracts or were available for the non-risk-sharing arrangements as well. Tr. at 63-64, 73, 83, and 119-125. Without some minimal level of knowledge regarding NTSP's resources available to the non-risk-sharing practice, the work conducted by Dr. Hughes regarding NTSP's non-risk-sharing efficiencies falls far short of the requirements in Rule 702 and Daubert. He simply does not

propose a method to evaluate whether spillover efficiencies exist, let alone provide a quantitative valuation of these efficiencies. Instead, his opinion is exactly that – his *personal* opinion. See Miller v. Pfizer, 2000 U.S. Dist. LEXIS 9816, *11 (2000); Wilk v. American Medical Association, 895 F.2d 352, 361 (1990). By providing only borrowed analyses and minimal facts regarding the critical issue of spillover efficiencies, Dr. Hughes has failed to provide Your Honor with the factual or analytical basis necessary to test his conclusions and thus they should be excluded. See IQ Product Co. v. Pennzoil Products Co., 305 F.3d 368, 376 (5th Cir. 2002) (excluding two experts when neither conducted any market or survey research or any data subject to testing and one of the opinions was based on common sense).

V. Dr. Hughes Report and Testimony Did Not Demonstrate That Setting Minimum Price Was Necessary to Achieve Any Alleged Efficiencies

If Your Honor finds that NTSP’s non-risk-sharing arrangements actually results in significant efficiencies in NTSP’s non-risk-sharing business, the question of ancillarity will become relevant to this Court’s analysis. For this reason, Dr. Hughes attempted to provide some justification for NTSP’s establishment of a minimum fee. Once again, Dr. Hughes’ opinions on this issue are inherently unreliable and do not meet the standards established in Daubert and Kumho.

Dr. Hughes again relies on the concept of NTSP “being a team” to explain why fees must be set at some minimum level:

Critical to the continuation of NTSP as an effectively functioning team is continuity of team membership. If NTSP were forced to pass on any and all contracts, it could lose critical network physicians in a number of contracts. . . . Every game would have a different roster.

Report at 17.

In essence, Dr. Hughes is asserting that, in order to maintain a continuity of the team, NTSP must negotiate a fee that will attract a substantial number, or critical mass, of physicians. Dr. Hughes however offers no evidence or analysis to support the proposition that some critical mass of physicians does in fact exist. Nor does he offer any guidance for determining what the critical mass of physicians is:

Q. You have talked several times about the importance of NTSP being a team or teamwork within the organization?

A. Right

Q. Is there a threshold of volume of patients that are needed to make a system work as a team?

A. I would assume so. I would assume so.

Q. Do you have any approximation as to what kind of patient level that would need to be?

A. No.

Q. Looking at it another way, do you have any estimation as to the proportion of the physicians patients that would need to be subject to a certain system of organized processes so that -- so that there is really a teamwork efficiency realized?

A. Right. I don't know what -- there obviously is some critical mass. I don't know what it is, though.

Tr. at 97-98.

Dr. Hughes testifies that continuity of care among doctors is important so that "every game [does not] have a different roster." Report at 17. Dr. Hughes apparently believes that a minimum physicians' fee is required in order to ensure the same roster of doctors for every NTSP

contract. Dr. Hughes, however, has not offered any analysis or evidence supporting this expert conclusion. When pressed, Dr. Hughes cites a single example of an NTSP doctor who referred a patient to a non-NTSP specialist who prescribed tests that the NTSP doctor did not think was necessary.⁷ Tr. at 102. He is unable to cite to any evidence or analysis that demonstrates that there is a correlation between the NTSP physician participation rate and the effectiveness of care. Nor is Dr. Hughes able to provide examples of any situations where the effectiveness of healthcare was lessened because a contract did not include a sufficient number of NTSP doctors. Dr. Hughes also admits that he does not know how the continuity of care among NTSP doctors compares with the continuity of care among independent doctors. Tr. at 101-102.

It is difficult to imagine how Dr. Hughes can offer a reliable opinion regarding NTSP's continuity of care without having any basis for comparing NTSP's doctors performance with independent doctors' performance. Based on Dr. Hughes' glaring inability to cite to any evidence or analysis to support his opinion that NTSP must have a critical mass to be effective, his opinion is inherently unreliable and thus offers little value to the Court. See Mitchell v. Gencorp, Inc., 165 F.3d 778, 781 (10th Cir. 1999) (rejecting expert testimony where conclusions were little more than guesswork). In sum, the court's reasoning in In re Brand Name Prescription Drugs Antitrust Litigation, 1996 WL 167350, *22 (N.D. Ill.) for excluding two experts aptly applies to Dr. Hughes' expert work in this matter:

The contentions by [two experts] manifest ignorance of one of the most fundamental characteristics of the brand name prescription drug industry.

⁷ Dr. Hughes could not provide additional information about this situation. For example, he did not know why the NTSP doctor was referring a patient out-of-network nor did he state any evidence linking this single anecdote to an insufficient number of NTSP physicians under contract. Tr. at 103.

Accordingly, their opinions are rendered worthless. ... The idea of a carefully developed position based on full and relevant information, reached after appropriate analysis and tested by acceptable criteria, the hallmark for the admissibility of expert testimony is lacking.

CONCLUSION

The proffered expert testimony and report of Dr. Hughes is inadmissible because his opinions are based upon unreliable assumptions and guesswork. In addition, Dr. Hughes' common sense opinions about NTSP's state of mind are essentially lay testimony that requires no specialized knowledge. Accordingly, Your Honor should grant Complaint Counsel's motion to exclude Dr. Hughes' report and prohibit Dr. Hughes from testifying in this matter.

Respectfully submitted,


Michael J. Bloom
Matthew J. Reilly

Attorneys for Complaint Counsel

Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004
(212) 607-2829
(212) 607-2822 (facsimile)

Dated: March 31, 2004

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Docket No. 9312

PROPOSED ORDER

Upon consideration of the Motion *In Limine* to Preclude Report and Testimony of Dr. Edward F.X. Hughes, dated March ____, 2003.

IT IS HEREBY ORDERED that Complaint Counsel's Motion is Granted.

D. Michael Chappell
Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I, Sarah Croake, hereby certify that on March 31, 2004, I caused a copy of Complaint Counsel's Motion for Leave to File Motion *in Limine* Out of Time, Complaint Counsel's Motion *In Limine* To Preclude the Report and Testimony of Edward F. X. Hughes and Supporting Memorandum to be served upon the following persons:

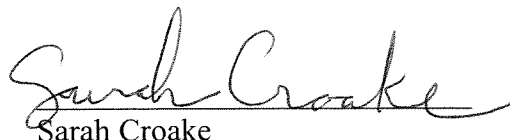
Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Gregory S. C. Huffman, Esq.
Thompson & Knight, LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693

and by email upon the following: Gregory S. C. Huffman (gregory.huffman@tklaw.com),

William Katz (William.Katz@tklaw.com), and Gregory Binns (gregory.binns@tklaw.com).


Sarah Croake