

In The Matter Of:

EVANSTON NORTHWESTERN HEALTHCARE CORP., ET AL
MATTER NO. D09315

FINAL PRETRIAL CONFERENCE
February 8, 2005

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Exhibit 1

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[1] MS. HENNING: It's HENNING.
[2] JUDGE MCGUIRE: Okay, thank you, Ms. Henning.
[3] Then for respondents?
[4] MR. KELLEY: Good morning, Your Honor, I'm Duane
[5] Kelley from Winston & Strawn in Chicago.
[6] JUDGE MCGUIRE: Thank you.
[7] MR. SIBARIUM: Good morning, Your Honor, Michael
[8] Sibarium, Winston & Strawn, Washington.
[9] JUDGE MCGUIRE: Thank you.
[10] MR. KLEIN: Good morning, Your Honor, Charles
[11] Klein, Winston & Strawn in Washington.
[12] JUDGE MCGUIRE: Thank you, Mr. Klein.
[13] Counsel, as you know, the main purpose of this
[14] prehearing conference today is going to determine what
[15] evidence is going to come in at this point in time, but
[16] before we go to that, there's a few other housekeeping
[17] tasks I want to take up, and at the end of this
[18] prehearing conference, if there are any outstanding
[19] issues that either side wants to take up, we'll be happy
[20] to do so.
[21] The first thing I want to address is pending
[22] motions. I think we have before us currently three
[23] motions. The first is from complaint counsel, and that
[24] is a motion to strike an expert report from Evanston's
[25] pretrial brief. I've had a chance to go over your own

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[1] briefs on this issue.
[2] Does anyone want to say anything else before I
[3] go into that? I already know what I'm going to do, but
[4] if you want to add any further comments.
[5] Mr. Brock?
[6] MR. BROCK: Thank you, Your Honor.
[7] The one thing that I would mention is that the
[8] expert reports have also been — some of the expert
[9] reports have also been submitted as exhibits. The three
[10] expert reports of respondents have been included. We
[11] have included one of the expert reports as a protective
[12] matter, and in the event that the Court does rule in
[13] favor of allowing expert reports on the record, we would
[14] seek leave to file some additional expert reports.
[15] Having said that, we still take the position
[16] that they're hearsay and should not be admitted.
[17] JUDGE MCGUIRE: Well, I agree with that.
[18] Hearsay is what expert reports are.
[19] Are you saying that there's other — there's
[20] other expert reports that the parties have agreed to
[21] come in? Because as — as a rule, we do not enter
[22] expert reports in the record. They are hearsay.
[23] MR. BROCK: No, we have not agreed to that.
[24] JUDGE MCGUIRE: Okay.
[25] MR. BROCK: The respondents submitted them on

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[1] their exhibit list. We did this purely as a defensive
[2] measure, and as I said, if the Court were to allow
[3] the — we still oppose the submission of expert reports
[4] on the record.
[5] JUDGE MCGUIRE: Okay, I understand.
[6] Did you have anything you want to add to this,
[7] Mr. Kelley? I am not going to spend a lot of time on
[8] this.
[9] MR. KELLEY: Your Honor, I don't believe so, and
[10] my understanding from Mr. Klein is that we have not —
[11] I'll let him —
[12] MR. KLEIN: The only thing to add is that we
[13] haven't moved any expert report into evidence.
[14] JUDGE MCGUIRE: Right, right.
[15] Well, let me just say that first of all, expert
[16] reports are hearsay. It's my understanding that
[17] Evanston has not asked that they be entered into the
[18] record, and it shall not be entered into the record.
[19] So, if that will help complaint counsel overcome
[20] whatever anxiety it may have about that fact, I will
[21] assure you that that expert report is not going to come
[22] into the evidence.
[23] Other than that, I don't see anything in the
[24] Part 3 rules that would preclude it being attached as
[25] long as it's not entered, and therefore, I don't find

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[1] any prejudice to the opposition that it is attached.
[2] So, on that grounds, I'm going to deny complaint
[3] counsel's motion, again, with the clarification that the
[4] expert report that is attached to their pretrial brief
[5] is not going to be entered into evidence, okay?
[6] Are we clear on that?
[7] There is another outstanding motion from
[8] complaint counsel where they filed a revised pretrial
[9] brief.
[10] Is there any opposition to that, Mr. Kelley?
[11] MR. KELLEY: No, Your Honor.
[12] JUDGE MCGUIRE: If not, then that motion is
[13] granted.
[14] Then I understand there are currently some party
[15] and nonparty in camera motions still pending. Do the
[16] parties want to comment on their own motions? I
[17] understand there's two outstanding motions from
[18] complaint counsel, and I believe there's three from
[19] respondents.
[20] I will say that when we get a chance, we are
[21] going to go through those and issue an order on all of
[22] those, probably within the next two or three days, but
[23] is there anything else on that that we need to take up?
[24] MR. BROCK: No, Your Honor, thank you.
[25] MR. KELLEY: No, Your Honor.

[1] understanding that was your feeling, so —
[2] **JUDGE MCGUIRE:** Good, good, because I know it
[3] comes in handy when you don't have a person to put on
[4] the stand, but other than that, it does waste time,
[5] so — okay, very good.

[6] Is there anything else regarding the evidence at
[7] this time that the parties want to take up?

[8] **MR. KELLEY:** Your Honor, I think that
[9] Mr. Sibarium is working on this rebuttal issue that was
[10] raised —

[11] **JUDGE MCGUIRE:** Well, I was going to take that
[12] up next, and let's talk about that now while we're here.

[13] **MR. BROCK:** Okay, thank you.

[14] **JUDGE MCGUIRE:** I know that our correspondence
[15] to the parties on this has created maybe a little
[16] tempest in a teapot, but let me assure the parties —
[17] and I received your correspondence on that from
[18] complaint counsel, and I'll give Evanston a full
[19] opportunity to speak to that issue here today.

[20] It is not my intention to unduly, you know,
[21] restrict parties putting on their evidence in rebuttal.
[22] It is merely my intention to see that what should
[23] properly be evidence presented in a case in chief come
[24] in during the case in chief. Certainly a party, as our
[25] case law provides, is not required to be clairvoyant in

[1] trying to determine what the other side is putting on in
[2] their argument. So, to that extent, I received some
[3] positive comments on this issue from the correspondence
[4] of complaint counsel, and I do not intend to change
[5] standing FTC law on this question, and I will give the
[6] parties their due right to enter evidence on rebuttal.

[7] However, I am asking that in accordance with law
[8] that you do so where it's proper and you not do so where
[9] it's not proper. Now, if that — and I apologize, maybe
[10] our correspondence to the parties wasn't as clear as it
[11] could have been, and what we might do is clarify that in
[12] the next day or so with some more correspondence, but I
[13] do not intend to change any rules of evidence as
[14] regarding your right to put on that evidence.

[15] Now, is there anything you all want to say? I
[16] mean, I don't need to go into this to any great extent,
[17] but I just —

[18] **MR. SIBARIUM:** No, Your Honor. I didn't really
[19] see anything in the correspondence that resulted in a
[20] change of law.

[21] **JUDGE MCGUIRE:** I was concerned that maybe this
[22] has suddenly created a big storm of controversy. So, if
[23] there's not, that's great.

[24] **MR. BROCK:** Well, Your Honor, there is one
[25] concern, and this is simply a matter of clarification,

[1] and we do not want to be in the position, Your Honor,
[2] that we forego presenting evidence that — in our case
[3] in chief that we believe is properly presented as
[4] rebuttal testimony.

[5] **JUDGE MCGUIRE:** Well, that's the test, and
[6] that's all I'm asking, is that if it's — if it's — I
[7] just want to see that it's in the proper scope of
[8] rebuttal, and if it is, then by all means, you'll be
[9] able to offer it.

[10] **MR. BROCK:** At present, Your Honor, the only two
[11] questions that we would have would be regarding the two
[12] experts that we designated as rebuttal witnesses.

[13] **JUDGE MCGUIRE:** Right.

[14] **MR. BROCK:** Mr. Werden will be addressing the
[15] testimony of Dr. Noether, their expert economist, and we
[16] would ask the Court for leave to present Dr. Werden's
[17] testimony as a rebuttal expert, and I talked earlier
[18] with respondents about this.

[19] **JUDGE MCGUIRE:** Well, that's fine, but are
[20] you — you're not asking me to qualify him at this time.
[21] You're just saying you're asking me to say it's okay
[22] that he — he or she —

[23] **MR. BROCK:** If we could qualify him at this
[24] time, we would like to, Your Honor, because —

[25] **JUDGE MCGUIRE:** All right. Well, let's go ahead

[1] and entertain that.

[2] **MR. BROCK:** Okay, and can we — I think that the
[3] testimony in the deposition, and if I understand things
[4] correctly, the respondents' counsel would agree, is that
[5] Dr. Werden is properly presented as a rebuttal expert.

[6] **JUDGE MCGUIRE:** Okay.

[7] Mr. — did you have any opposition to that,
[8] Mr. Sibarium?

[9] **MR. SIBARIUM:** Yeah, I — Dr. Werden's
[10] testimony, I would think that that is one which I think
[11] we should take up once we get to the — get to the point
[12] in time when we get to rebuttal. There are two rebuttal
[13] witnesses that were mentioned in complaint counsel's
[14] letter. One was Dr. Ashenfelter, and we certainly
[15] believe Dr. Ashenfelter can only be a rebuttal witness.

[16] **JUDGE MCGUIRE:** Yes.

[17] **MR. SIBARIUM:** He didn't submit any sort of
[18] initial report. He didn't do anything except respond to
[19] Dr. Baker really.

[20] Dr. Werden also did not submit an initial
[21] report. There may be certain things from Dr. Baker's
[22] report that we may take issue with as to whether they're
[23] proper rebuttal or not, so I think we would rather just
[24] postpone that until the right time and see how it goes.

[25] I would bring up, though, a second issue just