PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

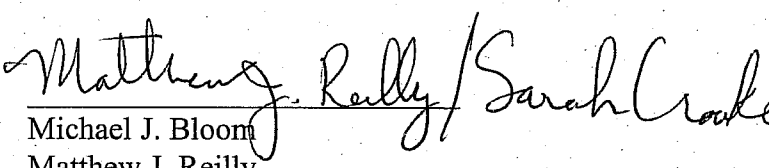
In the Matter of NORTH TEXAS SPECIALTY PHYSICIANS, a corporation.	**DOCKET NO. 9312**

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

PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

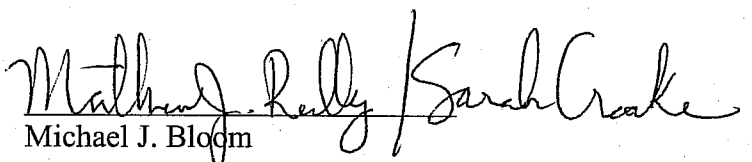
In the Matter of NORTH TEXAS SPECIALTY PHYSICIANS, a corporation.	**DOCKET NO. 9312**

COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE CERTAIN TESTIMONY OF ROBERT S. MANESS

Respondent North Texas Specialty Physicians ("NTSP") has proffered Robert S. Maness to testify to, among other areas, his cost analysis to determine whether NTSP achieves efficiencies in its risk-sharing and non-risk sharing practices and his analysis of the relevant product and geographic markets. Complaint Counsel respectfully submits this motion *in limine* to exclude testimony of these areas by Dr. Maness.

As described more fully in the attached Memorandum in Support of this Motion, Dr. Maness' cost studies are unaccompanied by any indicia of reliability. Dr. Manness failed to measure the costs from the correct physician population. Dr. Maness also failed to test the results for statistical significance and to use control variables to adjust for differences in the patient populations. In addition to failing to apply standard statistical tools, Dr. Maness's methodology used to delineate the relevant product and geographic markets is also flawed and unreliable. Dr. Maness fails to correctly apply the Horizontal Merger Guidelines's test and methodologies and instead relies on untested or irrelevant facts to make a "qualitative" assessment of the relevant product and geographic markets.

Respectfully submitted,



Michael J. Bloom
Matthew J. Reilly
John P. Wiegand

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

PUBLIC VERSION

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of NORTH TEXAS SPECIALTY PHYSICIANS, a corporation.	**DOCKET NO. 9312**

MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO PRECLUDE CERTAIN OPINION TESTIMONY OF ROBERT S. MANESS

Complaint Counsel moves *in limine* to bar respondent North Texas Specialty Physicians ("NTSP") from proffering certain testimony and from making arguments at trial based upon the opinions of one of its experts, Robert S. Maness. The opinions and testimony at issue have no factual basis, are methodologically flawed, and are inherently unreliable. Thus, Dr. Maness' opinion does not meet the standard set forth in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and Kumho Tire Co. V. Carmichael, 526 U.S. 137 (1999).

The Court should preclude NTSP from offering Dr. Maness' testimony regarding his comparative studies and his delineations of product and geographic markets. Dr. Maness' opinions regarding these issues are neither valid nor reliable because Dr. Maness failed to follow accepted economic methodology and ordinary logic Under even modest scrutiny, the Court will see that there is no rigorous, scientific basis to Dr. Maness's opinion. Dr. Maness's conclusions

about measurable, quantitative facts at issue in this matter are not based on any generally accepted, reliable principles or methods but rather on unsupported and conclusory opinions which do not assist the Court. Therefore, his expert testimony on these issues should be excluded.

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 provides for the admissibility of expert testimony in federal court:

> 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.

Although this Rule provides a court wide latitude to admit expert testimony, such testimony is inadmissible unless it is: (1) based on the special knowledge of the expert; and (2) 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); Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 708 (2d Cir. 1989) ("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.").

Under Daubert, expert testimony that lacks a "reliable foundation" must be excluded. Daubert, 509 U.S. at 597. The proffered testimony "must be supported by appropriate validation – i.e., 'good grounds,' based on what is known." *Id.* at 590. It must be shown that the "reasoning or methodology underlying the testimony is scientifically valid" and that the "reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93.[1] The point is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the *same level of intellectual rigor* that characterizes the practice of an expert in the relevant field." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) (emphasis supplied). Because the Respondents seek to present expert testimony, they have the burden of showing that Dr. Maness's opinions "are based on sound science." Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316 (9th Cir.), opinion after remand, *cert. denied*, 516 U.S. 869 (1995); Aluminum Phosphide Antitrust Litigation, 893 F. Supp. 1497, 1506 (D. Kan. 1995). The court's task "is to analyze not what the experts *say*, but what *basis* they have

---

[1] Without attempting to set out a "definitive checklist or test," the *Daubert* Court identified factors that bear on the reliability issue: (1) whether a "theory or technique . . . can be (and has been tested);" (2) whether it has been "subjected to peer review and publication;" (3) whether the particular technique has a "known or potential rate of error" and whether there are "standards controlling the technique's operation;" and (4) whether the theory or technique enjoys "general acceptance" in the relevant scientific community. *Daubert*, 509 U.S. at 593-94.

for saying it." Daubert v. Merrell Dow, 43 F.3d at 1316, (emphasis supplied).

II. Dr. Maness' "Measurement" of Spillover is Illogical, Methodoligically Flawed, and Not the Result of Application of Reliable Principle and Methods.

A. Dr. Maness did not test for the correct variable.

Dr. Maness purports to find that efficiencies flowing from NTSP's capitated risk practices substantially spill over to its non-risk arrangements and, most importantly, to the practice of medicine by those NTSP physicians who have not participated in any of NTSP's risk-sharing arrangements. The applicability of Dr. Maness's evidence to NTSP's non-risk sharing physicians, rather than just to the risk-sharing physicians in their practices of fee-for-service medicine, is of critical importance. The Commission has charged NTSP with fixing the price of fee-for-service medical services for non-risk sharing arrangements.[2] Dr. Maness's spillover argument becomes arguably relevant upon Complaint Counsel's coming forward with evidence of that price-fixing, but it is relevant in fact–*i.e.*, can tend to justify NTSP's price-fixing–only if it tends to establish that NTSP's and its physicians' price-fixing was reasonably necessary to the accomplishment of substantial efficiencies by NTSP's price-fixed non-risk sharing physicians. Dr. Maness's "study," however, has no applicability to those physicians because Dr. Maness incomprehensibly failed to measure one of the necessary variables–the efficiency of NTSP physicians who do not participate in risk-sharing.

As described more fully below, Dr. Maness sought to compare NTSP's capitated physicians (its XXXXXX physicians) with XXXXX physicians. His conclusions regarding

---

[2] Approximately half of NTSP's 600 members do not participate in risk-sharing contracts.

spillover are based on that analysis. Dr. Maness made a rare effort to control for one or more confounding variables. As he put it: "In order to control for possible practice differences, NTSP restricted the analysis to physicians that had contracts with both XXXXXXXXX." Expert Report of Robert S. Maness ("Report") at 45 (February 13, 2004), included in Appendix as Exhibit A. This was an incorrect choice of "controls," resulting in Dr. Maness actually comparing the efficiency of NTSP capitated physicians relative to XXXXXX physicians *who also were* NTSP capitated physicians (alternatively put, Dr. Maness compared the set of all NTSP-capitated physicians (its XXXXX physicians) with the subset of those physicians who also participated in XXXXXX products).[3] Report at 45. NTSP's non-risk participating physicians were no part of Dr. Maness's equation. Therefore, no conclusion can be made about this critical group. In fact, giving Dr. Maness every benefit of methodological doubt–of which there is an abundance–Dr. Maness's study can only establish that NTSP's capitated physicians' fee-for-service practice may benefit from their participation in NTSP's capitated arrangements. That may be true, but it is irrelevant, and Dr. Maness's spillover opinion should be disregarded for that reason first and foremost.

B. Dr. Maness failed to use standard statistical methodologies in his spillover analysis, and therefore this work does not reliably compare anything at all.

Even assuming that this Court might somehow be aided by reliable expert testimony that spoke to the limited question of whether NTSP's capitated physicians' fee-for-service practice benefit substantially from their participation in NTSP's capitated arrangements, Dr. Maness'

---

[3] Dr. Maness was confused at his deposition regarding which XXXX physicians were included in his study, stating that he would have to "check with his RAs [research assistants]." Maness Deposition Transcript ("Tr") at 94-96 (February 26, 2004), a copy of which is included in Appendix as Exhibit B.

testimony should be excluded. Dr. Maness failed to use commonplace and necessary statistical techniques in evaluating his data, which render his opinion useless. Dr. Maness attempted a two part analysis: First, Dr. Maness purportedly analyzed whether NTSP's physicians perform more efficiently under risk-sharing arrangements than non-NTSP physicians who are not sharing risk. Using data from the health insurance provider XXXXXX, Dr. Maness compared these two groups of doctors by reviewing the number of procedures and costs of treatment for each group. Report at Exhibit 11. Based on this comparison, Dr. Maness concluded that physicians who share risk are more efficient than physicians who do not participate in risk sharing. Tr. at 71.

After concluding that NTSP's risk-sharing results in efficiencies, Dr. Maness purportedly examined whether these efficiencies allegedly developed through risk-sharing contracts produced similar efficiencies in the practices of NTSP physicians who share no risk (although, as we pointed out in a preceding paragraph, Dr. Maness oddly failed to include non-risk sharing NTSP physicians in his data set). Using select data from XXXXXXXXX, Dr. Maness analyzed NTSP's per member per month costs for each health plan and concluded that the cost numbers were similar. Based on that analysis, Dr. Maness then (erroneously, as we have explained) concluded that the comparison supports the opinion that NTSP obtains relevant spillover efficiencies. Tr. at 94-97. Whatever conclusion Dr. Maness reaches for, however, must be rejected as unsupported because Dr. Maness's "study" does not remotely approach the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). Indeed, Dr. Maness' work here would not pass muster in a graduate level statistics class.

When social or physical scientists seek to draw conclusions from statistical comparisons,

they must address two critical questions. First, "what is the likelihood that the observed differences could have resulted from chance," and second, "have I adequately controlled for other, confounding, variables that might have accounted for some or all of the observed difference." Dr. Maness has not addressed either of those critical questions. And Dr. Maness's spillover opinion should be rejected for that reason, as well.

A bare minimum of intellectual rigor would have required Dr. Maness to apply statistical techniques to ensure that the differences he observed, and on which he based his opinion, were not likely products of chance. That is to say, Dr. Maness should have applied a test of "statistical significance" before opining, as an intellectually rigorous economist would have done.[4] The courts, along with social and physical scientists, recognize that the mere observation of a similarity or a difference, of whatever magnitude, does not allow one to attribute causation. Thus, courts employ statistical reliability measures to test the observed outcome against chance distribution and assure the reliability of any statistical analysis proffered as evidence.[5] Only

---

[4] The results of significance tests are sometimes expressed as "t-statistics," and, generally speaking, a difference is statistically significant only if the "t-statistic" is greater than 2.0 (courts commonly refer to this as "two standard deviations"). See Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977) ("As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.").

[5] See Hazelwood School District v. United States, 433 U.S. 299, 312 n.17 (1977) (discussing requirement of two to three standard deviations); Castaneda v. Partida, 430 U.S. at 496 n.17; Brock v. Merrell Dow Pharmaceuticals, Inc., 874 F.2d 307, 312 (5th Cir. 1989) ("it is important to remember that the confidence interval attempts to express mathematically the magnitude of possible error . . . and therefore a study . . . must always be considered in light of its confidence interval before one can draw conclusions from it."), *cert. denied*, 494 U.S. 1046 (1990); *Moultrie v. Martin*, 690 F.2d 1078, 1082-83 (4th Cir. 1982) ("the courts of this circuit must apply a standard deviation analysis . . . before drawing conclusions from statistical comparisons . . . . Without the use of hypothesis testing, a court may give weight to statistical differences which are actually mathematically insignificant.").

statistical analysis estimates that pass these tests of precision are said to be "statistically significant" and, therefore, reliable evidence.[6]

Dr. Maness failed to perform tests of statistical significance for both of these studies. Tr. at 79-80, 98. Without these tests, Dr. Maness is unable reliably to determine whether any of the observed cost similarities/differences resulting from his comparisons are statistically significant or plausibly random events. Even without tests of statistical significance, Dr. Maness still concludes that the differences in cost between the NTSP risk-sharing physicians and non-NTSP doctors are large enough to support his opinion, but that is a matter not of application of sound principles and methodologies, but of Dr. Maness's say-so. It is clear, however, that an expert's *ipse dixit*, does not pass muster as opinion evidence, and the Courts have regularly rejected expert opinion based on even the most qualified expert's *ipse dixit*. See Miller v. Pfizer, 2000 U.S. Dist. LEXIS 9816, *11 (2000); Wilk v. American Medical Association, 895 F.2d 352, 361 (1990).

Daubert makes clear that the evidentiary reliability of expert testimony depends on the scientific validity of the methodology chosen by the expert.[7] *Daubert*, 509 U.S. at 594-95.

---

[6] See Robert P. Charrow & David E. Bernstein, *Scientific Evidence in the Courtroom: Admissibility and Statistical Significance after Daubert* at 27 (Washington Legal Foundation 1994) (statistical significance for an expert means that the "likelihood that the observed differences were due to chance is less than some predetermined probability, which by custom has been set at [5%].").

[7] In Daubert itself, the Ninth Circuit, after remand from the Supreme Court, refused to admit the very expert testimony that gave rise to the Supreme Court's decision because while "plaintiffs' epidemiologists make *vague assertions* that there is a statistically significant relationship between Bendectin and birth defects, none *states*" that Bendectin more than doubled the likelihood of limb reduction birth defects. Daubert v. Merrell Dow, 43 F.3d at 1321 (emphasis supplied); see also Allen v. Pennsylvania Engineering, 102 F.3d at 197 (affirming grant of judgment n.o.v. because "suggestiveness" by plaintiff's experts of a causal link between

When an expert fails to follow accepted methodology, the expert can expect his opinion to be excluded from evidence.[8] As Chief Judge Posner observed in excluding expert testimony, if "an expert proposes to depart from the generally accepted methodology of his field and embark upon a sea of scientific uncertainty, the court may appropriately insist that he ground his departure in demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry." Braun v. Lorillard Inc., 84 F.3d 230, 235 (7th Cir.), *cert. denied*, 519 U.S. 992 (1996).

Dr. Maness also failed to address the second critical question, "have I adequately controlled for other, confounding, variables that might have accounted for some or all of the observed difference. use any control variables to adjust for differences in patient populations in the two studies?" Specifically, Dr. Maness failed to control or adjust for differences in patient populations within his experimental groups. Tr. at 76, 95. Not only did Dr. Maness fail to control for possible differences in patient populations, but he also has no knowledge about the demographics and characteristics of the patient populations in the studies. Tr. at 76. Dr. Maness admitted that it is "conceivable" that the patient populations used in his study may have different demographics and characteristics. Tr. at 76. It is statistically meaningless, meaning the results

---

plaintiff's injury and defendant's product did not equate to "statistical significance.").

[8] Allen v. Pennsylvania Engineering Corp., 102 F.3d 194, 197 (5th Cir. 1996) (affirming trial court's exclusion of expert evidence where there was no statistically significant evidence linking plaintiff's brain cancer to defendant's product); Brock v. Merrell Dow, 874 F.2d at 312 (reversing denial of judgment n.o.v. for defendant where plaintiff's expert evidence showed "confidence interval" indicative of equal likelihood of no causal link between plaintiff's birth defects and defendant's product); Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 830-31 (D.C. Cir. 1988) (affirming grant of judgment n.o.v. where there was no statistically significant expert evidence linking plaintiff's birth defects to defendant's product), *cert. denied*, 493 U.S. 882 (1989); Kelley v. American Heyer-Schulte Corp., 957 F. Supp. 873, 878 (W.D. Tex. 1997) (motion to exclude evidence where "confidence interval less than one for the relative risk linking breast implants" to plaintiff's illness).

are neither valid nor reliable, to compare cost and outcome information for different patient populations without controlling or at least measuring differences between these groups. For example, it is possible that the non-risk sharing patient groups in the non-NTSP XXXXX group were, on average, older and less healthy than the NTSP group. In fact, there are a variety of reasons why the non-NTSP patient group may have higher medical costs that are wholly unrelated to the type of physician compensation. Likewise, the XXXXX NTSP patient population may have differences in its demographic and health characteristics that may result in lower health costs than the NTSP XXXXXX patient population.

Following Dr. Maness's approach of not using control variables, one may conclude that physicians in a town of college students are more efficient, lower-cost providers than a group of physicans practicing in an elderly, retirement community because the physicians in the college town likely have significantly lower per patient costs than the doctors who treat the elderly population. Without controlling for patient demographics and health, this comparison would be both meaningless and illogic. Thus, even if the demographic differences in Dr. Maness' patient populations are not as dramatic as the hypothetical study, without controlling for possible differences, Dr. Maness's cost comparisons are also meaningless and illogical and thus his conclusions based on these studies are unreliable and invalid.

For the XXXXXX cost study, Dr. Maness did not even control for the fact that some of the XXXXX cost information derived from XXXXX's risk-sharing doctors. Tr. at 94-95. Not only did Dr. Maness fail to separate out XXXXX's risk-sharing physicians from the study, he also does not know the extent to which these doctors are even in his study. Tr. at 94-95. In other words, Dr. Maness has not compared cost data from an NTSP risk-sharing group to an NTSP

non-risk sharing group. He has compared a risk-sharing group to a group that includes both risk-sharing and non-risk sharing doctors. Even with this flaw, Dr. Maness still concludes that the cost study supports his opinion that the non-risk sharing physicians perform similarly to the risk-sharing ones.

Whether or not Dr. Maness feels comfortable with his results because of the sample size and assumptions of similarity between the patient groups in the study, a statistical analysis that does not reflect normal levels of statistical confidence and use of control variables, as conventionally demanded by experts in the field and by courts, should not be acceptable under *Daubert*.[9] The Court should conclude that Dr. Maness has not conducted any reliable studies, and that his impressionistic conclusions that (1) under risk-sharing contracts, NTSP's physicians perform better than non-NTSP physicians, and (2) NTSP physicians perform comparably in terms of cost under risk-sharing and non-risk-sharing arraignments cannot and should not be considered by the Court or relied upon by defendants or their other experts, Drs. Edward F. X. Hughes and Gail R. Wilensky.

C. Dr. Maness did not use appropriate methodology to delineate product and geographic markets.

---

[9] Even Dr. Wilensky, another NTSP expert, criticized the methodology used in Dr. Maness' study. Dr. Wilensky testified that she inquired whether the cost comparison attempted to adjust for differences in age, sex, or health status between the XXXXX and XXXX population and she was told that there had been no adjustments. She admitted that it "would be better to make the adjustments." Wilensky Deposition Transcript Excerpts ("Wilensky Tr") at 42 (March 4, 2004), a copy of which is included in Appendix as Exhibit C. Dr. Wilensky also acknowledged that the differences in costs between the two health plans were not tested for statistical significance and that the study would have been "technically better" if a test of statistical significance was undertaken. Wilensky Tr. at 43. According to Dr. Wilensky, there also was "no reason not to do a test of statistical significance." Wilensky Tr. at 44.

In his report, Dr. Maness purportedly uses a "widely used analytical method," the Horizontal Merger Guidelines's ("Guidelines") "small but significant and nontransitory increase in price" test, to assess relevant product and geographic markets. Report at 6-7. To delineate product markets, Dr. Maness considered that many health plans allow members to use family practice, internal medicine, OB/GYN, and pediatricians as primary care physicians. He also asserted that medical care performed by ear, nose, and throat specialists can often be provided by family practice physicians and pediatricians, among others. Tr. at 9. Based on these observations, Dr. Maness concluded that the relevant product markets include a primary care physicians' market and a number of specialty area markets. Tr. at 9.

Dr. Maness states that the key question for geographic market definition is whether, if all physicians in a product market merged and attempted to increase prices, enough patients and health insurance providers practicably could substitute away from those physicians as to defeat the attempted price increase. Report at 10. To delineate geographic markets, Dr. Maness cites evidence from the Texas Department of Insurance and federal guidelines stating the maximum distance away that covered patients can be from physician services. Report at 11. Dr. Maness cites additional evidence, such as the *Dartmouth Atlas of Health Care*, two payors' testimony that adequate network coverage includes Dallas-Fort Worth Metroplex[10], the recognition in the *U.S. News and World Report* of two Dallas-based hospitals for having top specialists, the fact that the Mid-Cities area covers a relatively small portion of both Dallas and Tarrant counties, and the testimony of NTSP physicians stating that they draw patients from a wide area, to conclude

---

[10] These payors did not testify that they can substitute away from Fort Worth doctors in response to a concerted price increase among those doctors.

that the geographic market likely includes an area as large as the Dallas-Fort Worth metropolitan area. Tr. at 11-14.

Even though Dr. Maness claimed that he used the "widely used analytical method" to delineate product and geographic markets, he failed to correctly apply the Guidelines' test. For product market definition, Dr. Maness performed no analysis to determine whether a five-to-ten percent price increase for a specific type of physician practice, e.g., orthopedic surgeons, would be profitable. In his report and testimony, Dr. Maness does not even evaluate the current prices or profits for different types of physician services. Nor does Dr. Maness attempt to delineate the product markets by estimating price elasticities of demand or cross-price elasticities with the use of regression analysis or critical loss analysis.[11] Dr. Maness does not even review historic price information for various specialties and primary care physicians to determine whether price movements among the different types of physicians' practices is correlated or even related. In fact, Dr. Maness admits that he performed *no quantitative analysis* whatsoever to define product markets:

> Q: Did you apply any test of cross elasticities, cross-price elasticities to determine your relevant markets?
>
> A: I would say following the guidelines approach, following the methods that I learned at the FTC and have applied since the FTC, all of this stuff is designed to get at at least a qualitative answer to whether there is higher or low cross-price elasticities.

---

[11] Critical loss is the amount of sales the firms in the relevant antitrust market would have to lose before a given price increase would become unprofitable. In other words, the critical amount is the level of reduced sales where the small but significant price increase multiplied by the sales made at the higher price is just balanced against the profit margin lost on those sales lost due to the higher price.

Q: Did you do anything specifically to determine your relevant markets?

A: As I said, I collected information that gave me a qualitative feel for what cross-price elasticities would be.

Q: Anything better than a qualitative feel?

A: I did what I did at the FTC and since, and I have a qualitative feel, nothing beyond that.

Tr. at 146-147.

Dr. Maness used a similar, qualitative approach rather than the Guidelines methodology to delineate his geographic market. Dr. Maness provided no concrete evidence to determine whether a monopolist of a specific type of physician services could profitably increase prices by five-to-ten percent. Furthermore, he did not review historical pricing data in Fort Worth and surrounding areas to determine if movements in Fort Worth physician prices were correlated with price movements in other geographic areas. Nor did Dr. Maness attempt to examine relative changes in the price of physician services in Fort Worth to determine whether there was a corresponding change in patient demand for these services. He also failed to review data from Fort Worth physicians to determine from where their patients are traveling. Nor did Dr. Maness review patient data from physicians located outside of Fort Worth to determine whether Fort Worth residents were traveling outside of the city to obtain medical services. Thus, rather than engaging in a rigorous, quantitative approach, Dr. Maness instead relied on information from sources such as the *Dartmouth Atlas of Health Care* and the *U.S. News and World Report*.[12]

---

[12] The *Dartmouth Atlas of Health Care* is [], and is not at all intended to describe or correlate with antitrust markets. [] The material Dr. Maness cites from *U.S. News and World Report* simply [], and again has no intended or inferential significance in defining antitrust markets.

The reliability of Dr. Maness's analysis, and thus its admissibility, is undermined both by flaws in the methodology used to delineate the relevant markets and the lack of precision in those delineations. *Daubert* makes clear that the evidentiary reliability of expert testimony depends on the scientific validity of the methodology chosen by the expert. *Daubert*, 509 U.S. at 594-95. When an expert fails to follow accepted methodology, the expert can expect his opinion to be excluded from evidence. Here, Dr. Maness asserts that a Guidelines test is the appropriate methodology to determine the relevant product and geographic markets and he even outlines an accurate description of the five-to-ten percent price test used in the Guidelines. Dr. Maness, however, fails to apply the Guidelines test and methodologies and instead relies on untested or irrelevant facts to make a "qualitative" assessment of the relevant product and geographic markets. Thus, Dr. Maness's market definition analysis does not pass the rigors of his profession, or of the courts, to be called valid and reliable and therefore it is not admissible. See In Beryln Inc. v. The Gazette Newspapers Inc., 214 F.Supp. 2d 530, 539 (D. MD 2002) ("the lack of any specific and independent market research seems to indicate a decidedly unreliable route to determining the specific outer boundaries of markets."); see also Lantec v. Novell, 2001 U.S. Dist. Lexis 24816, *13 (D. Utah 2001) (While the expert was aware from the merger guidelines of the analysis of consumers ability to switch to a competitor in the event of a small but sustained price increase, the court found fault in his methodology for determining consumer sentiment. The court said that the expert "did not perform a survey of consumer preferences and buying patterns and did not cite any such independent surveys in his testimony... Rather than gathering or citing to any empirical evidence of consumer preferences, [the expert] relied upon generally unspecified 'industry information'."); Bailey v. Allgas, 148 F. Supp. 2d 1222 (N.D. Ala. 2000)

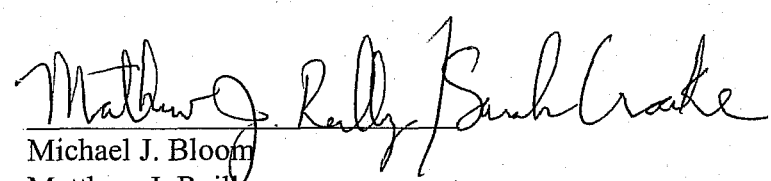
(expert testimony excluded in part because "contradictory statements demonstrate that there is no economic analysis underpinning Gunther's definition of the relevant geographic market");

Virginia Vermiculite v. W.R. Grace, 98 F. 2d 729 (W.D. Va. 2000).

CONCLUSION

Dr. Maness's opinions regarding these issues are unreliable because of basic logic errors and a rather thoroughgoing failure to follow accepted and necessary economic methodologies. Under even modest scrutiny, the Court will see that there is no rigorous, scientific basis to Dr. Maness's opinions. Accordingly, because Dr. Maness's opinions are not based on any reliable principles or methods but rather on infirm analysis and unsupported and conclusory opinions, Your Honor should grant Complaint Counsel's motion to exclude certain opinion testimony of Dr. Maness.

Respectfully submitted,



Michael J. Bloom
Matthew J. Reilly
John P. Wiegand

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

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of NORTH TEXAS SPECIALITY PHYSICIANS, a corporation.	Docket No. 9312

PROPOSED ORDER

Upon consideration of the Motion *In Limine* to Preclude Certain Testimony of Dr. Robert S. Maness, 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, and Complaint Counsel's Motion *In Limine* To Preclude Certain Opinion Testimony of Dr. Robert S. Maness 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

Sarah Croake