

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of)
)
)
Evanston Northwestern Healthcare)
Corporation,)
a corporation, and)
)
ENH Medical Group, Inc.,)
a corporation.)

Docket No. 9315
Public Record Version

**MEMORANDUM IN SUPPORT OF ENH'S MOTION TO STRIKE AND
TO PRECLUDE REDUNDANT REBUTTAL EXPERT TESTIMONY
OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE SUR-REBUTTAL REPORT**

Pursuant to the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings ("Rules"), 16 C.F.R. § 3.43(b), Respondent Evanston Northwestern Healthcare Corporation ("ENH") moves to strike the rebuttal expert report of Arnold M. Epstein, M.D., and moves to preclude him from testifying in this case.

INTRODUCTION

Dr. Epstein is Complaint Counsel's second rebuttal witness on quality of care issues. Complaint Counsel endeavors to set up Dr. Epstein himself as a fact-finder who judges the competing approaches offered by the respective primary quality experts identified by Complaint Counsel and ENH. Dr. Epstein's limited "comments" concerning ENH's quality expert simply repeat those of Complaint Counsel's primary quality expert, Dr. Patrick Romano, who also provided a rebuttal report. Such "piling on" of redundant experts is improper rebuttal, needlessly wastes time and money, and is unhelpful to the finder of fact as a matter of law. Should the Court permit Complaint Counsel to rely on Dr. Epstein's proffered testimony,

however, ENH moves in the alternative for leave to submit a sur-rebuttal report from Dr. Kenneth Kizer, head of the National Quality Forum, to address Dr. Epstein's assertions.

BACKGROUND

The parties have identified experts and exchanged expert reports and rebuttal reports pursuant to the scheduling orders entered in this case. Complaint Counsel produced primary expert reports from five experts,¹ including a report on quality of care issues by Dr. Romano. *See* Romano Report (Ex. 1).² In response, ENH produced four reports, including a report on quality of care issues by Dr. Mark Chassin. *See* Chassin Report (Ex. 2).³ Complaint Counsel, in turn, produced *six* rebuttal expert reports, four of which were from experts who had not previously been identified. Two of Complaint Counsel's rebuttal experts respond only to Dr. Chassin's report – Dr. Romano and one of the new experts, Dr. Epstein. *See* Romano Rebuttal Report (Ex. 4); Epstein Rebuttal Report (Ex. 5).

Dr. Epstein's rebuttal report is ten pages long and is divided into five sections. The vast majority of this rebuttal report (*i.e.*, the first 7 ½ pages) is devoted to the first three background sections, which provide an introduction concerning Dr. Epstein's credentials, a brief overview of the rebuttal report and general information concerning quality of care in hospitals. Dr. Epstein devotes only 2 ½ pages of his rebuttal report to this specific case. In a 1-page section entitled "Comparison of the Approaches of Dr. Chassin and Dr. Romano," Dr. Epstein purports

¹ Complaint Counsel has since decided not to call one of these experts, Ira Rosenberg, at the hearing.

² This Court can, and should, grant this motion without reviewing in detail the parties' respective reports on quality of care issues, especially given that the redundancies in the reports by Drs. Romano and Epstein are summarized in Exhibit 6. Nevertheless, the four quality of care expert reports (without exhibits) are attached as exhibits for the Court's convenience.

³ While ENH initially identified Dr. Kizer as a second quality of care expert, ENH did not provide a report from this expert – thus avoiding cumulative expert testimony on quality of care issues. ENH reserved the right to submit, if appropriate, a sur-rebuttal report regarding matters within Dr. Kizer's field of expertise. Ex. 3.

to judge the respective approaches of Dr. Romano and Dr. Chassin and purportedly finds that Dr. Romano' approach is more persuasive. In the final, 1 ½ page section of his rebuttal report entitled "General Comments on Dr. Chassin's Conclusions," Dr. Epstein provides brief, and unsupported, broad observations on four issues addressed in Dr. Chassin's report.

In the end, Dr. Epstein's summary criticism of Dr. Chassin's report merely repeat those of Dr. Romano. In fact, Dr. Epstein does not even purport to provide any opinion that was not provided by Dr. Romano in his primary and rebuttal reports.

ARGUMENT

I. Dr. Epstein Should Be Precluded From Testifying At The Hearing, And His Rebuttal Report Should Be Stricken.

To date, Complaint Counsel intend to call eight experts at the hearing (six of whom would provide rebuttal testimony), whereas Respondents intend to call four experts. Complaint Counsel's purported need to have *six* experts rebut ENH's *four* experts is facially suspect. This motion addresses one of Complaint Counsel's redundant experts, Dr. Epstein.⁴ As demonstrated below, Dr. Epstein's proffered testimony, as reflected in his rebuttal report, has no place in this litigation because it is unduly cumulative and will not assist the trier of fact. *See* 16 C.F.R. § 3.43(b)(1).

A. Dr. Epstein's Proffered Testimony Is Unduly Cumulative.

Rule 3.43(b) allows the Court to exclude otherwise relevant evidence if its "probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b)(1). When it amended this Rule in 1996, the Commission explained: "[t]he amended rule is intended to make clearer to litigants that the ALJ is empowered to exclude unduly repetitious, cumulative, and marginally

⁴ Respondents reserve their right to ask the Court to limit other redundant expert testimony at the hearing.

relevant materials that merely burden the record and delay trial. This clarification is intended to enhance the ALJ's ability to assemble a concise and manageable record." 61 F.R. 50640, 50644 (Sept. 26, 1996).⁵

In light of Rule 3.43(b), Complaint Counsel cannot "parad[e] additional experts before the [C]ourt in the hope that the added testimony will improve on some element of the testimony by the principal expert." *Leefe v. Air Logistics, Inc.*, 876 F.2d 409, 411 (5th Cir. 1989). "Multiple expert witnesses expressing the same opinions on a subject is a waste of time and needlessly cumulative." *Sunstar, Inc. v. Alberto-Culver Co., Inc.*, 2004 WL 1899927, at *25 (N.D. Ill. 2004) (citation omitted) (Ex. 7).

Dr. Epstein should be precluded from testifying, and his rebuttal report should be stricken, under Rule 3.43(b) because the conclusions in his rebuttal report merely parrot the conclusions in one or both of Dr. Romano's reports. The chart attached as Exhibit 6 demonstrates, in detail, that all of Dr. Epstein's opinions repeat those of Dr. Romano. The following general examples illustrate the extent of such repetition:

[REDACTED]

⁵ The Commission amended Rule 3.43 to track the language of Federal Rule of Evidence 403, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[REDACTED]

The Seventh Circuit has condemned this sort of “me too” expert testimony as impermissibly cumulative. *Kendra Oil & Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240, 243 (7th Cir. 1989) (affirming the exclusion of expert testimony because “[n]othing in the offer of proof suggests that [expert] would have added to [other expert interpretations] a new angle or argument, as opposed to the refrain ‘me too’”); *see also Tunis Bros. Co., Inc. v. Ford Motor Co.*, 124 F.R.D. 95, 98 (E.D. Pa. 1989) (precluding testimony from an expert who would “simply track” another expert’s testimony). Dr. Epstein will only rehash Dr. Romano’s opinions and thus will add nothing of value to this case. Allowing Dr. Epstein to testify would require ENH to waste time and money in preparing for his testimony and unduly prolong the hearing.

B. Dr. Epstein’s Proffered Testimony Also Would Not Assist The Trier Of Fact To Understand The Evidence Or To Determine A Fact In Issue.

Beyond being cumulative, Dr. Epstein’s proposed testimony would be unhelpful and devoid of analysis. Rule 3.43(b) requires the Court to exclude such “irrelevant, immaterial, and unreliable evidence.” 16 C.F.R. § 3.43(b)(1). Federal Rule of Evidence 702 provides a framework for assessing whether expert testimony satisfies this standard.⁶ That Rule states in full:

[REDACTED]

⁶ While not controlling here, the Commission has held that the Federal Rules of Evidence are persuasive authority. *See In re Rambus Inc.*, Dkt. 9302, Order on Respondent’s Objections to the Deposition Testimony of Dr. K.H. Oh, 2003 FTC LEXIS 75, at *4 (June 3, 2003) (“To determine whether evidence is reliable, the Court must look to the Federal Rules of Evidence.”) (Ex. 8); *In re Herbert R. Gibson, Sr.*, 1978 FTC LEXIS 375, at *2, n.1 (May 3, 1978) (recognizing that the Federal Rules of Evidence are “persuasive authority” in adjudicative proceedings) (Ex. 9). Recognizing this, Complaint Counsel has cited Federal Rule of Evidence 702 when moving to preclude expert

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 (emphasis added). Complaint Counsel cannot meet their burden of proving all three of these elements to show that Dr. Epstein's proffered testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." See 16 F.T.C. § 3.43(a) ("[T]he proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto."); see also Fed. R. Evid. 702 Advisory Committee's Note ("[T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.").

1. **Dr. Epstein's Comparison of Competing Experts' Approaches Is Not "The Product Of Reliable Principles And Methods" But, Instead, Usurps The Role Of The Fact-Finder.**

Dr. Epstein was primarily asked "to review the expert reports provided by both Dr. Chassin and Patrick Romano, and evaluate the research methodologies used therein." Epstein Rebuttal Report at 2 (Ex. 5). This is not the proper role of a testifying expert. Dr. Epstein's expert comparison merely addresses "lay matters which [the Court] is capable of understanding and deciding without the expert's help." *Andrews v. Metro N. Commuter R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989).⁷ The Court does not need Dr. Epstein's help to understand the

testimony in other adjudicative proceedings. See, e.g., *In re North Texas Specialty Physicians*, Dkt. 9312, Complaint Counsel's Mem. in Support of Mot. In Limine to Preclude Report and Test. of Gail R. Wilensky (Mar. 31, 2004) (Ex. 10); *In re Rambus, Inc.*, Dkt. 9302, Complaint Counsel's Mem. in Support of Mot. in Limine to Preclude Report and Test. of William L. Keefauver, 2003 WL 21277343 (Mar. 26, 2003) (Ex. 11).

⁷ See also *Taylor v. Illinois Cent. R.R. Co.*, 8 F.3d 584, 586 (7th Cir. 1993) (affirming the exclusion of expert testimony because "any lay juror could understand th[e] issue without the assistance of expert testimony"); *United*

basic issues discussed by the other quality of care experts, particularly those matters concerning the origin and quality of the sources cited by Drs. Romano and Chassin in their respective reports. *See SEC v. Lipson*, 46 F. Supp. 2d 758, 764 (N.D. Ill. 1999) (finding proposed expert testimony unhelpful because “[d]efendant has not established that the financial evidence he will testify about is so complicated that the jury will be unable to understand it without repetition by [the expert].”).

Experts such as Dr. Epstein, who purport to vouch for the reliability of another expert’s opinions, usurp the fact-finder’s responsibility to weigh the evidence. *See, e.g., Epstein Rebuttal Report at 9 (Ex. 5)* [REDACTED]

One federal district court

emphasized this point when it considered similar proffered expert testimony:

[I]f Dr. Kursh is simply going to vouch for Mr. Oxman and the soundness of his opinions, such testimony would appear to be inappropriate. It will be up to the jury to determine the reliability of Mr. Oxman. Merely to have partisan experts appear to vouch for previous experts violates Fed. R. Evid. 403 and would needlessly present cumulative evidence, waste time, and mislead the jury. It is the jury’s function to determine the validity of Mr. Oxman’s opinions and not to judge Dr. Kursh’s opinions of Mr. Oxman’s opinions.

Tunis Bros. Co., Inc., 124 F.R.D. at 98. This Court should preclude Dr. Epstein from acting as a trier of fact by vouching for one expert’s approach over another.

States v. Benson, 941 F.2d 598, 604 (7th Cir. 1991) (noting that “useful expert testimony . . . is based on specialized knowledge that is not within the average layman’s ken”).

2. **Dr. Epstein's Proffered Testimony Is Not Based On "Sufficient Facts Or Data" And Does Not Apply Expert Analysis To "The Facts Of The Case."**

Dr. Epstein's proposed testimony is also unreliable because it is not based on "sufficient facts or data." Fed. R. Evid. 702. Indeed, there is no indication that Dr. Epstein has independently analyzed "the facts of the case" to any meaningful degree. *Id.*

In deciding whether to admit expert testimony, the Court's foremost objective must be to rule out "subjective belief or unsupported speculation." *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1106 (7th Cir. 1994). The Court, therefore, must ensure that an expert will employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Expert testimony is admissible only if it is reasoned, grounded in the methods of the discipline, and founded on the record evidence. *Bourelle v. Crown Equip. Corp.*, 220 F.3d 532, 539 (7th Cir. 2000). "[A]n expert's report that does nothing to substantiate [an] opinion is worthless, and therefore inadmissible." *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997) (warning "that judges not be deceived by the assertions of experts who offer credentials rather than analysis").⁸

The paucity of analysis in Dr. Epstein's rebuttal report is remarkable. In the "Comparison" section of his rebuttal report, Dr. Epstein makes a handful of findings on the differing methodologies that Drs. Romano and Chassin used to evaluate the quality of care issues. But Dr. Epstein does not relate any of these findings to his expertise, relevant research

⁸ See also, e.g., *Bourelle*, 220 F.3d at 537, 539 ("Where the proffered expert offers nothing more than a 'bottom line' conclusion, he does not assist the trier of fact. . . . Talking off the cuff – employing neither data or analysis – is not acceptable methodology."); *Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1087 (7th Cir. 1999) ("An opinion has a significance proportioned to the sources that sustain it. . . . An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.") (quotations and citations omitted).

methodology, or an analysis of the record evidence or independently gathered data. For example, Dr. Epstein says:

[REDACTED]

Epstein Rebuttal Report at 8 (Ex. 5). These are arguments of counsel, not the work of an expert.

Likewise, in the section of his rebuttal report entitled “General Comments on Dr. Chassin’s Conclusions,” Dr. Epstein makes a series of bald assertions about the post-merger improvements at Highland Park Hospital (“HPH”).⁹ For example, Dr. Epstein’s entire analysis of pre-merger quality of care at HPH consists of the following unsupported proclamations:

[REDACTED]

⁹ Again, Dr. Epstein’s findings in this section are cumulative of the conclusions reached by Dr. Romano in his reports. *Compare* Epstein Rebuttal Report at 8-10 (Ex. 5), *with* Romano Rebuttal Report ¶¶ 20-33 (Obstetrics and Gynecology), ¶¶ 34-45 (Nursing), ¶¶ 50-52 (Quality Improvement), ¶ 69 (Intensive Care), ¶ 70 (Emergency Department), ¶ 71-72 (Oncology), ¶ 73-74 (Psychiatry) (Ex. 4).

Epstein Rebuttal Report at 9 (Ex. 5). This summary “opinion” is devoid of any analysis.

Dr. Epstein’s analysis of the post-merger quality of care improvements at HPH is no more enlightening. *Id.* at 9-10. In rapid-fire succession, he makes a number of findings on the issue without explaining how he arrived at any of them, such as the following:

[REDACTED]

Id. at 10; *see also id.*

[REDACTED]

Dr. Epstein cites to none of the “facts of the case” to support his conclusory opinions.

This Court should decline Dr. Epstein’s invitation to accept his unsupported and redundant opinions at face value. *See* Fed. R. 702 Advisory Committee’s Note (“The trial court’s gatekeeping function requires more than simply ‘taking the expert’s word for it.’”). It is incumbent upon Dr. Epstein to supply more than his curriculum vitae to establish the reliability of his opinions. *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999) (“Qualifications alone do not suffice. A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant”).¹⁰ This Court should not accept Dr. Epstein’s superfluous and

¹⁰ *See also Huey*, 165 F.3d at 1087 (“Expertise is a necessary but not a sufficient conditions of admissibility under Rule 702. Verdier may have specialized knowledge or skills, but he did not apply them to the analysis of Huey’s claim.”); *Kirstein v. Parks Corp.*, 159 F.3d 1065, 1067 (7th Cir. 1998) (“It is true that Dr. Nelson has impressive credentials. . . . But the fact is that he did on testing of these products And we have sanctioned the exclusion of speculation offered by persons with credentials as impressive as those of Dr. Nelson.”); *Minasian*, 109 F.3d at 1216 (warning “that judges not be deceived by the assertions of experts who offer credentials rather than analysis”); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318-19 (7th Cir. 1996) (noting that an expert opinion not squarely

conclusory opinions. Instead, the Court should strike Dr. Epstein's rebuttal report and preclude him from testifying at the hearing.

II. Alternatively, ENH Requests Leave To File A Sur-Rebuttal Report In Response To Dr. Epstein's Rebuttal Report.

If the Court were to allow Dr. Epstein to testify, ENH requests leave to file a short sur-rebuttal report addressing the matters that are raised in Dr. Epstein's rebuttal report. The Third Revised Scheduling Order provides that if Complaint Counsel presents "material outside the scope of fair rebuttal . . . , Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondent)." While the Commission apparently has not addressed the issue, ENH submits that Dr. Epstein's superfluous and unreasoned rebuttal report, which essentially offers a new and improper opinion weighing the credibility of the other quality of care experts, is outside the scope of fair rebuttal.

Dr. Kizer (who ENH previously identified as one of its potential experts) like Dr. Epstein, can appraise the methodologies employed and the findings made by the other quality of care experts.

[REDACTED]

See, e.g., Romano Rebuttal Report ¶¶ 3, 5 (Ex. 4); Epstein Rebuttal Report at 8-9 (Ex. 5).

grounded in the principles and methodology of the relevant discipline is "inadmissible no matter how imposing [the] credentials" of the proffered expert.); *Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chicago*, 877 F.2d 1333, 1340 (7th Cir. 1989) ("Bryan offered the court his CV rather than his economic skills. Judges should not be buffaloeed by unreasoned expert opinions."); *Linko, Inc. v. Fujitsu Ltd.*, No. 00 Civ. 7242, 2002 WL 1585551, at *4 (S.D.N.Y. July 16, 2002) (granting motion in limine because the expert merely "aver[red] conclusorily that his experience led to his opinion") (Ex. 12).

Moreover, allowing ENH to call Dr. Kizer would avoid the "piling-on" effect of allowing Complaint Counsel to call two experts to rebut Dr. Chassin's conclusions.

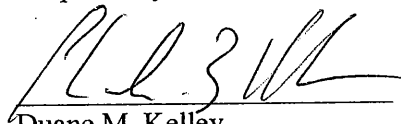
ENH could produce Dr. Kizer's sur-rebuttal report within five business days of an order granting ENH leave to submit that report (but not earlier than January 7, 2005, due to the holidays).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court preclude Dr. Epstein from testifying at the hearing, and strike his rebuttal report.

Dated: December 21, 2004

Respectfully Submitted,



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Counsel for Respondents

**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 Respondent Evanston Northwestern Healthcare Corporation's Motion To Strike and To Preclude Redundant Rebuttal Expert Testimony or, in the Alternative, for Leave To File Sur-Rebuttal Report, Complaint Counsel's response 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 the rebuttal expert report submitted by Arnold M. Epstein, M.D. is stricken; and it is further

ORDERED, that Dr. Epstein is precluded from testifying at the hearing in this action.

The Honorable Stephen J. McGuire
Chief Administrative Law Judge

Date: _____, 2004

CERTIFICATE OF SERVICE


I hereby certify that on December 21, 2004, copies of the foregoing Respondent's *ENH's Memorandum in Support of Motion To Strike And To Preclude Redundant Rebuttal Expert Testimony Or, In The Alternative, For Leave To File Sur-Rebuttal Report (Public Record Version)*, the memorandum in support thereof, and a proposed order were served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

The Honorable Stephen J. McGuire
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EXHIBITS # 1-6

REDACTED

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H
Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.

SUNSTAR, INC., Plaintiff,
v.

ALBERTO-CULVER COMPANY, INC. and Bank
One Corporation f/k/a First National Bank
of Chicago, Defendants.

ALBERTO-CULVER COMPANY, a Delaware
Corporation, Plaintiff,
v.

SUNSTAR, INC., a Japanese corporation, Sunstar
Group Company (f/k/a Alberto-
Sunstar Co., Ltd.), a Japanese corporation, Kaneda,
Kasan, Kabushiki Kaisha, a
Japanese corporation, and Bank One, National
Association, as Trustee under
Trust Agreement No. 22-81196, dated February 27,
1980, a national banking
association, Defendants.

No. 01 C 0736, 01 C 5825.

Aug. 23, 2004.

Craig S. Fochler, Charles Robert Mandly, Jr., John
Sheldon Letchinger, Mike M Yaghmai, Wildman,
Harrold, Allen & Dixon, Chicago, IL, for Plaintiff.

Paul Ethan Slater, Sperling & Slater, Timothy
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Scott Sonny Balber, Janice A Payne, Melissa Jayne
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D'Amico, Chadbourne & Parke LLP, New York,
NY, Daniel A. Dupre, Patricia Susan Smart, John
Bostjancich, Smart & Bostjancich, Chicago, IL, for
Defendant.

MEMORANDUM OPINION AND ORDER

NOLAN, Magistrate J.

*1 These two consolidated cases arises from a dispute between Sunstar, Alberto-Culver, and Bank One regarding Sunstar's use in Japan starting in 1999 of a certain "VO5" mark on women's hair care products that Sunstar manufactures and sells in Japan. [FN1] The parties have filed their Final Pretrial Order and are proceeding to trial. District Judge Ronald A. Guzman referred the case for resolution of pretrial matters. This opinion resolves the nineteen motions in limine.

FN1. The factual background of this case has been set forth in previous decisions in this matter including, *Sunstar, Inc. v. Alberto-Culver Co., Inc.*, 2003 WL 22287380 (N.D.Ill. Sept.30, 2003); *Sunstar, Inc. v. Alberto-Culver Co., Inc.*, 2003 WL 21801428 (N.D.Ill. Aug.1, 2003) ; and *Alberto-Culver, Co. v. Sunstar, Inc.*, 2001 WL 124905 (N.D.Ill. Oct. 17, 2001). The Court assumes familiarity with those facts.

BACKGROUND

On November 7, 2002, the Honorable George W. Lindberg denied Alberto's summary judgment motion on its breach of contract claim regarding the issue of whether Sunstar's use of the 1999 Mark exceeds the scope of the License Agreement. The district court concluded that several genuine issues of material fact exist, including "whether the 1999 Mark falls within the range of marks defined by Japanese trademark law as being encompassed within the use-rights under those registrations" and "what the parties intended in the License Agreement-whether the full range of use-rights inherent in the listed trademark registrations were licensed to Sunstar, or the specific marks only (as Alberto attests)." 11/7/02 Memo. & Order at 10.

On November 14, 2002, these cases were

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Exhibit 7

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reassigned to the Honorable Ronald A. Guzman. In denying Alberto and Bank One's request that the court exclude experts on Japanese trademark law from testifying before the jury, Judge Guzman found that the term *senyo-shiyoken* renders the License Agreement ambiguous. [FN2] 9/30/03 Memo. Opinion & Order at 8. Judge Guzman held that "the jury in this case may consider extrinsic evidence as to the scope of rights under Japanese law that a party may have intended to convey by inclusion of the term *senyo-shiyoken* in the License Agreement." *Id.* Judge Guzman further ruled that "[t]estimony by experts in Japanese trademark law will constitute one piece of evidence as to what the parties may have intended by inclusion of the term *senyo-shiyoken* as a parenthetical to the phrase 'exclusive license' in the License Agreement." *Id.* at 9.

FN2. "It is undisputed that *senyo-shiyoken* is the Japanese term for an exclusive license registered with the Japanese Patent Office ("JPO")." 9/30/03 Memo. Opinion & Order at 3.

DISCUSSION

A. Alberto-Culver's Motions in Limine

1. Conduct of the Trustee

Alberto Culver's first motion in limine seeks to exclude argument and evidence related to Bank One's conduct in suspending the License Agreement and any alleged bias that Bank One supposedly has because of its relationship with Alberto. Alberto's motion is granted.

Alberto argues that the evidence that Sunstar seeks to introduce (i.e. the existence of an indemnification agreement and the contacts and relationships between Alberto and Bank One representatives) only relates to Sunstar's breach of fiduciary duty and breach of contract claims against Bank One and a claim against Alberto for tortious interference which have been dismissed. Alberto states that this evidence should be excluded because Judge Lindberg ruled on summary judgment that Bank One acted reasonably in deciding whether to suspend the License Agreement.

*2 Sunstar responds that § 5 of the License

Agreement sets forth certain conditions precedent to the effectiveness of any suspension of Sunstar's license rights by Bank One. The License provides that Bank One may suspend the rights of Sunstar to use the licensed marks if "in the opinion of [Bank One] based upon reasonable ground," any act of Sunstar presents "a danger to the value or validity of [Bank One's] ownership and title" in the licensed marks. Sunstar wants to show that Bank One failed to act as an impartial, independent, detached neutral decisionmaker in suspending Sunstar's right to use the licensed marks under the License Agreement. Specifically, Sunstar seeks to present evidence at trial showing that prior to Bank One issuing the suspension, "Alberto undertook to ply Bank One decisionmakers with memoranda, private conferences, food, drink and a valuable indemnification, and indeed provided drafts of the very words that Alberto wanted Bank One to issue as its own." Sunstar's Memo. at 8. Sunstar contends that this evidence is relevant to a determination of whether the circumstances here truly evidence an "opinion" by Bank One that was "based upon reasonable ground" and its defense of Alberto's breach of contract claim based upon Sunstar's continued use of the marks after Bank One's suspension of the License Agreement.

The Court agrees with Alberto that the reasonableness of Bank One's actions with respect to the suspension are no longer an issue for trial. Sunstar's breach of contract claim against Bank One was based on Bank One's alleged failure to provide reasonable grounds for suspending the License Agreement. Sunstar Am. Cmplt. ¶¶ 20, 22, 24, 26, 31, 38, 40. Sunstar alleged that the suspension resulted from undisclosed private communications between Bank One and Alberto. *Id.* ¶ 23. Judgment as a matter of law has been granted in favor of Bank One and against Sunstar on Sunstar's breach of contract claim. Judge Lindberg based his dismissal of Sunstar's breach of contract claim as well as its claims for breach of fiduciary duty and waste of trust assets against Bank One on § 4.09 of the Illinois Trust and Trustees Act, 760 ILCS §§ 5/1 *et seq.* As Judge Lindberg noted, when a trustee like Bank One "uses reasonable care, skill, and caution in the selection of the agent, the trustee may rely upon the advice or recommendation of the agent without further investigation and ... shall have no responsibility for action taken or omitted upon the

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advice or recommendation of the agent." 11/7/02 Memo. & Order at 17. In dismissing Sunstar's claims at summary judgment, Judge Lindberg specifically held that the fact that Bank One selected outside counsel based upon the recommendation by Alberto's outside counsel "does not warrant a conclusion that Bank One did not exercise the appropriate level of 'care, skill and caution' in selecting its counsel." 11/7/02 Memo. & Order at 17. Judge Lindberg thus held that Bank One used reasonable care, skill, and caution in the selection of outside counsel.

*3 Sunstar seeks to argue at trial that the indemnification agreement "tempted and permitted Bank One to side with Alberto without fear of liability or litigation expense in a way that the 1980 Agreements did not contemplate as being appropriate." Sunstar Memo. at 9. Judge Lindberg ruled against Sunstar as to this issue. Judge Lindberg held that a reasonable jury could not find in favor of Sunstar on its argument that Bank One made its suspension decision by relying on the indemnification agreement from Alberto rather than the advice of counsel. *Id.* at 18. The district court has ruled that Bank One did not in fact rely upon the indemnification in deciding to suspend the License Agreement.

Sunstar emphasizes that the district court held on summary judgment that Bank One could not be held liable for alleged breaches of its obligations and that Alberto could not be held liable for inducing those alleged breaches based on the statutory protections from legal liability granted to trustees under the Trustees Act but that the district court did not rule that the suspension was reasonable or proper. The district court did discuss Bank One's conduct in connection with the suspension in its opinion. In granting summary judgment, the district court specifically held that no genuine dispute of material fact existed as to whether Bank One used "reasonable care, skill, and caution in the selection" of outside counsel and whether Bank One actually relied on the advice of outside counsel in deciding whether to suspend the License Agreement. 11/7/02 Memo. & Order at 17-18. Sunstar does not adequately explain how Bank One could have used reasonable care, skill, and caution in the selection of outside counsel, a specialist in trademark law at the firm of Michael Best and Fredreich, and actually

relied on the advice of outside counsel in making the decision to suspend the License Agreement but failed to form an "opinion ... based upon reasonable ground" that a danger to the value or validity of the licensed marks existed. To grant summary judgment against Sunstar on its breach of contract claim because Bank One used reasonable care, skill, and caution in the selection of outside counsel and actually relied on counsel's advice is the practical equivalent of holding that Bank One formed an "opinion ... based upon reasonable ground," even if Judge Lindberg's opinion did not explicitly state that the suspension was "based upon reasonable ground." Because the reasonableness of Bank One's conduct in connection with the suspension is no longer an issue for trial, the evidence Sunstar wants to admit is irrelevant and is excluded.

2. Reason or Justification for Adopting the 1999 Mark

Alberto seeks to exclude at trial argument or evidence concerning any reason or justification for Sunstar's adoption and use of the 1999 Mark. Alberto's motion is granted.

Sunstar wants to tell that jury that it adopted the 1999 Mark "to help revitalize the declining VO5 brand in Japan in direct response to consumer market research results and recommendations regarding the VO5 logo received from outside consultants, and not as an attempt to palm off its VO5 products as the products of someone else." Sunstar Memo. at 2. Alberto contends that evidence concerning any reason or justification for Sunstar's adoption and use of the 1999 Mark is irrelevant. Alternatively, Alberto argues that such evidence should be barred under Federal Rule of Evidence 403 because it could confuse the jury by creating the false impression that Sunstar's business reasons for adopting the 1999 Mark constitute a valid defense to Alberto's breach of contract claim and cause the jury to prejudicially perceive Alberto as an unreasonable business partner that ignored Sunstar's marketing studies and efforts.

*4 Sunstar responds that evidence of how and why it adopted the 1999 Mark for use in Japan is critical to the jury's evaluation of the infringement issues raised by both sides in this case. Sunstar states that one of the most important factors in evaluating

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infringement is the intent of the party alleged to have infringed. Sunstar additionally argues that evidence of the reasons why Sunstar adopted the 1999 Mark is admissible as background evidence to give the jury a complete story.

The parties appear to agree that the contractual prohibition in § IV of the License Agreement against acts by Sunstar that "infringe" the licensed marks contractualizes what would otherwise be statutory claims for trademark infringement. Sunstar states, and Alberto does not dispute, that both sides in this case have looked to U.S. federal trademark law to define the nature, elements, and relevant proof for trademark infringement. The Seventh Circuit has noted that "[t]he linchpin of both common law and federal statutory trademark infringement claims is whether consumers in the relevant market confuse the alleged infringer's mark with the complainant's mark." *AHP Subsidiary Holding Co. v. Stuart Hale Co.*, 1 F.3d 611, 614 (7th Cir.1993). The Seventh Circuit has found seven factors, including "defendant's intent to palm off its goods as those of the plaintiffs," relevant to the "likelihood of confusion" analysis. *Ty. Inc. v. Jones Group, Inc.*, 237 F.3d 891, 897 (7th Cir.2001). Bad faith or wrongful intent to "palm off" or lack of intent to confuse customers is not required to establish likelihood of confusion, but when present, it is an important factor in the likelihood-of-confusion analysis. *Eli Lilly & Co. v. Natural Ans., Inc.*, 233 F.3d 456, 465 (7th Cir.2000); *Henri's Food Products Co., Inc. v. Kraft, Inc.*, 717 F.2d 352, 359 (7th Cir.1983). The issue here is whether Sunstar's adoption of the 1999 Mark breached the 1980 Agreements by infringing, i.e. causing a likelihood of confusion.

"[T]he only kind of intent that is relevant to the issue of likelihood of confusion is the intent to confuse." 3 McCarthy on Trademarks and Unfair Competition § 23:110 (4th ed.2004); *Eli Lilly & Co.* 233 F.3d at 465 (stating "the fact that one actively pursues an objective greatly increases the chances that the objective will be achieved."). Presence of good faith or good intent is not a valid defense to a claim of trademark infringement. 3 McCarthy on Trademarks and Unfair Competition § 23:106 (4th ed.2004) (stating "good faith intentions of an infringer are no defense to a finding of liability"); see also *Daddy's Junky Music Stores, Inc. v. Big*

Daddy's Family Music Ctr., 109 F.3d 275, 287 (6th Cir.1997 (stating "the presence of intent can constitute strong evidence of confusion.... The converse of this proposition, however, is not true; lack of intent by a defendant is 'largely irrelevant in determining if consumers likely will be confused as to source.'"); *Polaroid Corp. v. Polaroid Inc.*, 319 F.2d 830, 836 (7th Cir.1963); *Playboy Enterprises v. Frena*, 839 F.Supp. 1552, 1561 (M.D.Fla.1993) (stating "[e]ven though a guilty state of mind is relevant evidence of trademark infringement, an innocent state of mind is irrelevant on the issue of likelihood of confusion since the lack of intent to deceive does nothing to alleviate the confusion precipitate by similarity of trademarks.").

*5 Whether Sunstar had a good business reason for adopting the 1999 Mark is not relevant to the likelihood of confusion issue. [FN3] It does not matter whether Sunstar acted prudently or sensibly by introducing the 1999 Mark. The fact that Sunstar may have adopted the 1999 Mark for legitimate business reasons does not make it more or less probable that Sunstar intended to confuse consumers or negate any wrongful intent to confuse. *Daddy's Junky Music*, 109 F.3d at 287 (stating "lack of intent neither reduces nor increases the probability of consumer confusion."); 3 McCarthy on Trademarks and Unfair Competition § 23:106 (4th ed.2004) (stating "while evidence of intent is probative of likelihood of confusion of customers, the absence of such evidence does not prove that confusion is unlikely."). Sunstar's alleged good faith or business reasons for adopting the 1999 Mark is not probative as to the likelihood of confusion issue and not information the jury needs to determine whether there was a breach of the 1980 Agreements by infringement.

FN3. "Relevant evidence" is "evidence having any tendency to make the evidence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401.

Finally, even if the reasons why Sunstar adopted the 1999 Mark could be considered useful or permissible "background" information, the potential for unfair prejudice outweighs its slight probative value. See Fed.R.Evid. 403. [FN4] Evidence of

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Sunstar's business reasons for adopting the 1999 Mark-allegedly "to help revitalize the declining VO5 brand in Japan in direct response to the information and recommendation received from the DGA consulting firm"-may cause jury confusion regarding the relevant infringement standard or suggest a decision on an improper bias and unfairly prejudice Alberto by suggesting that business reasons or lack of improper intent constitute a valid defense to infringement. The jury may improperly infer that Sunstar was entitled to use the 1999 Mark if it was justified by business conditions. The jury may also infer from such evidence that Alberto was an unreasonable business partner that improperly ignored Sunstar's marketing studies and efforts. The problem with that inference is that Alberto's reasonableness is irrelevant to the issue of likelihood of confusion.

FN4. Under Rule 403, even relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice." The phrase "unfair prejudice" used in Rule 403 "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Notes of the Advisory Committee of the Proposed Rules.

For these reasons, Alberto's motion is granted with the understanding that Alberto will not be allowed to argue at trial that the absence of evidence regarding why Sunstar adopted the 1999 Mark indicates Sunstar intended to confuse consumers.

3. *Unexpressed Intent for Including the Phrase Senyo-Shiyoken in the Agreements*

Alberto's third motion in limine seeks to bar argument, evidence or testimony concerning any unexpressed or uncommunicated intent for including the phrase *Senyo-Shiyoken* in the agreements. Alberto's motion is denied without prejudice.

The License Agreement granted Sunstar an "exclusive license to manufacture, use, sell and offer for sale within the territorial limits of Japan, Licensed Products bearing Licensed Trademarks.... [Sunstar] agrees to cause said exclusive license (

Senyo-Shiyoken) to be registered at the Japanese Patent Office...." Judge Lindberg has ruled that a genuine dispute of fact exists regarding "what the parties intended [by including the phrase *Senyo-Shiyoken*] in the License Agreement-whether the full range of use-rights inherent in the listed trademark registrations were licensed to Sunstar, or the specific marks only (as Alberto attests)." 11/7/02 Memo. and Order at 10.

*6 Sunstar seems to concede that it will not offer any evidence of unexpressed intent at trial. Sunstar claims that Alberto's motion is based on an "utterly false premise." Sunstar Memo. at 10. Sunstar states that Alberto's motion "assumes that nothing was ever communicated during negotiations about the purpose behind '*senyo-shiyoken*' when in fact the opposite is true." *Id.* at 10-11. According to Sunstar, the term "*senyo-shiyoken*" was put into the 1980 Agreements to make clear that Sunstar had the right to use a certain range of variations on the originally-filed trademark designs that is defined by principles of Japanese law. Sunstar asserts that "[t]his understanding was clearly communicated and agreed upon in the course of substantive business negotiations for the 1980 Agreements." *Id.* at 2. Since Sunstar does not appear to intend to offer evidence relating to unexpressed intent behind the inclusion of the phrase *senyo-shiyoken* into the agreements, Alberto's motion is denied without prejudice.

4. *Agreements and Negotiations that Preceded the 1980 Agreements*

Alberto seeks to exclude argument, evidence, or testimony concerning alleged agreements, understandings or conversations that pre-date the execution of the 1980 Agreements to which Bank One was not a party. Alberto's motion is granted in part and denied in part.

Sunstar "plans to offer evidence concerning the history of the negotiation of the deal which led to the 1980 Agreements, including predecessor documents, to show that the parties' intent was for Sunstar as *senyo-shiyoken* licensee to enjoy the full range of use-rights inherent in the licensed trademark registrations under Japanese law for *senyo-shiyoken* licensees." Sunstar Memo. at 4. Alberto argues that this evidence should be

In the Matter of RAMBUS INC., a corporation

Docket No. 9302

Federal Trade Commission

2003 FTC LEXIS 75

ORDER ON RESPONDENT'S OBJECTIONS TO
THE DEPOSITION TESTIMONY OF DR. K.H. OH

June 3, 2003

ALJ: [*1]

Stephen J. McGuire, Chief Administrative Law Judge

**ORDER: ORDER ON RESPONDENT'S
OBJECTIONS TO THE DEPOSITION
TESTIMONY OF DR. K.H. OH**

On May 9, 2003, Respondent submitted a memorandum in support of its objections to Complaint Counsel's proposed deposition testimony of Dr. K.H. Oh, a former Hynix executive. Respondent's objections were in response to Complaint Counsel's stated intention of playing a videotape of that testimony. Respondent argues that Dr. Oh's testimony should be excluded under Commission Rule of Practice 3.43(b) which provides that "irrelevant, immaterial, and unreliable evidence shall be excluded."

Respondent asserts that the bulk of the testimony consists of Dr. Oh testifying about the content of documents that he did not prepare and which he had never seen prior to preparing his deposition. Specifically, Respondent states that the remaining testimony is based on a chart prepared by Dr. Oh's counsel that was not based on Dr. Oh's recollections or personal knowledge. As a consequence, Respondent submits that Dr. Oh's deposition testimony about the meaning of documents is not sufficiently reliable to be admissible.

On May 12, 2003, Complaint Counsel filed its Opposition [*2] to Rambus Inc.'s Request to Exclude the Deposition Testimony of Dr. Oh arguing that the testimony sought to be excluded by Respondent is highly probative and reliable testimony which should be admitted under Rule 3.43(b). Complaint Counsel asserts that Dr. Oh is a prominent engineering professor and former Hyundai executive who resides in Korea and is unavailable to testify live at this proceeding. Moreover, Complaint Counsel submits that even if the Court were to entertain any of the objections raised by Respondent the appropriate solution would not be the draconian approach urged by Respondent of wholesale exclusion of large amounts of testimony, but rather to consider such issues when evaluating the weight to be attached to the testimony in

question. Complaint Counsel suggests that Dr. Oh should be heard as he has extensive experience in the DRAM industry and brings an important perspective to this proceeding.

Specifically, Complaint Counsel asserts that Respondent's objections are limited to specific questions and answers and do not encompass Dr. Oh's entire testimony; that substantial portions of Dr. Oh's testimony are unrelated to Respondent's objections; that Dr. Oh's testimony [*3] is reliable because he answered questions based on his own general knowledge, stemming from years of experience in the DRAM industry; that Dr. Oh was very knowledgeable about the documents used in his deposition; and that the chart Dr. Oh used to refresh his recollection was compiled from other documents produced by Hyundai and was utilized in only a few questions. Finally, Complaint Counsel argues that the Court should overrule Respondent's objections regarding leading questions as such are appropriate to help structure the testimony of a foreign witness.

At the direction of the Court, on May 14, 2003, Respondent filed a Supplemental Memorandum in Support of its Objections which included various attachments containing specific line and page objections to the testimony of Dr. Oh.

Attachment A to Respondent's supplemental memorandum lists the designated deposition excerpts to which Respondent will not object should Complaint Counsel make a sufficient showing of Dr. Oh's unavailability. Attachment B lists all the designated deposition excerpts to which Respondent objects on the grounds that Dr. Oh was neither the author nor a recipient of the document that is the subject of the testimony [*4] in question and had, in fact, not seen the document prior to preparing for his deposition. Attachment C lists all deposition excerpts designated by Complaint Counsel to which Respondent objects on the grounds that Dr. Oh did not recall the timing of Hyundai products but relied on a timeline prepared by his counsel. Attachment D lists all deposition excerpts designated by Complaint Counsel to which Respondent objects on other grounds.

Complaint Counsel filed a response to Respondent's supplemental memorandum on June 2, 2003, asserting that Respondent has failed to sustain its burden of showing that the testimony of Dr. No is irrelevant, immaterial or unreliable, such that it should be excluded entirely from the record pursuant to Section 3.43(b)(1) of the Commission's Rules of Practice.

DISCUSSION

The fundamental standard for admissibility of evidence in FTC administrative proceedings is set forth in Rule of Practice 3.43(b)(1), which provides: "relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded." To determine whether evidence is reliable, the Court must look to the Federal Rules of Evidence, particularly [*5] Rules 801(c) and 802 which provides that hearsay is not admissible unless it meets one of the well-established hearsay exceptions contained in Rule 803.

Rule 701 of the Federal Rules of Evidence further provides that a witness' testimony in the form of opinions or inferences is limited to those opinions or

inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702". The 2000 Amendments provide that Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of "proffering an expert in lay witness clothing". The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony.

Rule 602 further states that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that a witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' [*6] own testimony. Based on these standards, the Court will address the specific objections to the designations at issue as set forth by Respondent as follows:

Attachment B

| Page and Line | Respondent's Objection | Ruling |
|----------------|---|-----------|
| 39:13-21 | Lack of Foundation | Overruled |
| 41:9-43:15 | (Had Not Seen Document) | Sustained |
| 45:4-46:4 | Irrelevant | Overruled |
| 47:11-48:20 | [Exhibit 2] | Overruled |
| 51:4-52:5 | | Sustained |
| 53:10-54:13 | | Overruled |
| 55:2-56:14 | | Overruled |
| 125:3-5, 17-24 | Lack of Foundation | Overruled |
| 127:3-129:9 | (Had Not Seen Document) | Overruled |
| 131:3-135:4 | [Exhibit 7] Admitted into Evidence as CX 2294 | Sustained |
| 135:23-136:8 | | Overruled |
| 136:20-138:4 | | Overruled |
| 138:22-139:16 | | Sustained |
| 140:2-141:22 | | Overruled |
| 142:5-143:4 | | Overruled |
| 144:7-147:2 | | Sustained |
| 148:25-149:1 | Lack of Foundation | Overruled |
| 149:19-150:24 | (Had Not Seen Document) | Overruled |
| 150:25-152:24 | [Exhibit 8] | Sustained |
| 154:10-155:5 | Admitted Into Evidence | Overruled |

as CX 2287

| | | |
|---------------|---|-----------|
| 157:11-159:13 | | Overruled |
| 159:23-160:13 | | Overruled |
| 160:14-160:25 | | Sustained |
| 161:1-4 | Lack of Foundation | Sustained |
| 161:17-22 | (Had Not Seen Document) | Sustained |
| 163:7-18 | [Exhibit 9] | Sustained |
| 165:11-167:7 | Admitted into Evidence as CX 2263 | Sustained |
| 170:5-17 | Lack of Foundation | Sustained |
| 172:15-173:7 | (Had Not Seen Document) | Sustained |
| 173:8-173:23 | [Exhibit 10] | Overruled |
| 174:3-176:25 | Admitted Into Evidence as | Sustained |
| 177:20-178:13 | CX 2264 | Sustained |
| 183:21-24 | Lack of Foundation | Overruled |
| 184:13-190:12 | (Had Not Seen Document) [Exhibit 12] Admitted Into Evidence as CX 2303 | Sustained |
| 198:20-23 | Lack of Foundation (Had Not Seen Document) | Overruled |
| 203:21-205:1 | [Exhibit 13] Admitted Into Evidence as CX 2306 | Overruled |
| 211:5-17 | Lack of Foundation | Overruled |
| 211:25-215:2 | (Had Not Seen Document) | Sustained |
| 215:11-221:15 | [Exhibit 14] | Sustained |
| 222:17-226:25 | Admitted Into Evidence As CX 2334 | Sustained |

[*7]

Attachment C

| | | |
|-----------|--|-----------|
| 37:9-39:1 | Witness Consulted Timeline Prepared By Counsel. No Foundation With Work Of Other Companies | Sustained |
| 343:1-23 | Witness Consulted Timeline Prepared By Counsel. No Foundation For Testimony About JEDEC Standardization of DDR SDRAM | Sustained |

Attachment D

| | | |
|---------------|---|-----------|
| 29:7-31:7 | No Foundation of Knowledge of JEDEC Practices or Beliefs of Segments of Computer Industry Other than Memory Manufacturers | Overruled |
| 56:15-57:2 | Non-responsive | Sustained |
| 57:3-13 | Leading and Irrelevant in Light of Later Testimony | Sustained |
| 58:8-59:7 | No Foundation For Testimony | Overruled |
| 60:14-61:22 | About SyncLink | Overruled |
| 69:2-10 | No Foundation in Light of Later Testimony | Overruled |
| 70:11-73:2 | Testimony as to Exhibit 3 is | Overruled |
| 74:1-3 | Hearsay and Without Foundation; | |
| 75:4-77:7 | No Foundation as to License Negotiations With Rambus | |
| 91:12-92:6 | Irrelevant | Overruled |
| 95:24-96:21 | No Foundation Re Licensing | Overruled |
| 99:5-23 | Agreement With Rambus | Overruled |
| 100:13-101:12 | | Sustained |
| 101:21-102:11 | | Sustained |
| 103:11-13 | No Foundation Re Amendment | Overruled |
| 103:20-105:19 | To License Agreement With Rambus | Overruled |
| 109:3-7 | No Foundation Re Testimony About SyncLink | Overruled |
| 109:23-110:19 | Testimony that Geoffrey Tate | Overruled |
| 115:21-116:9 | of Rambus Suggested That | Overruled |
| 116:22-117:25 | Hyundai Stop Participating In | Overruled |
| 118:22-119:14 | SyncLink Is More Prejudicial Than Probative In Light of Later Testimony | Overruled |
| 119:20-23 | No Foundation Re Similarities Between SDRAM and DDR SDRAM. Improper Opinion Testimony | Overruled |
| 168:10-16 | No Foundation Re Testing By Hewlett-Packard | Sustained |

| | | |
|---------------|--|-----------|
| 227:25-228:19 | Vague | Overruled |
| 230:1-232:11 | No Foundation Re JEDEC and Designing Around Rambus Patents; Improper Opinion Testimony; More Prejudicial than Probative | Overruled |
| 289:21-291:6 | No Foundation Re JEDEC Patent Policy | Sustained |
| 354:23-356:11 | No Foundation Re License Agree- ment With Rambus. Calls for Speculation and is Leading | Sustained |
| 356:12-357:13 | Leading | Sustained |

[*8]

ORDERED:

Stephen J. McGuire

Chief Administrative Law Judge

In the Matter of HERBERT R. GIBSON, SR., et al.

DOCKET No. 9016

Federal Trade Commission

1978 FTC LEXIS 375

ORDER TAKING OFFICIAL NOTICE OF
CERTAIN TELEPHONE DIRECTORY LISTINGS

May 3, 1978

ALJ: [*1]

Theodor P. von Brand, Administrative Law Judge

ORDER: Complaint counsel move pursuant to Rule 3.43(d) of the Rules of Practice that official notice be taken of certain listings in the Dallas, Texas telephone directories in the period 1969-77. Respondents have filed an answer in opposition.

At the outset it may be noted the authenticity of the directories is not in dispute. Nor can there be any question that the listings which complaint counsel request be noticed in fact appeared in the directories in question.

Respondents urge that the Commission's Rules of Practice do not provide for the taking of official notice of adjudicative facts. The short answer is that 3.43(d) of the Commission's Rules does provide that initial or Commission decisions may rest upon facts officially noticed provided there is opportunity to disprove the noticed facts. Respondents further argue that official notice should not be taken because they would be deprived of cross-examination of the telephone company employees preparing the directories, and further that this procedure would unfairly shift the burden of proof. In addition, they urge that the motion should be denied because if such official notice [*2] were granted their defense would require time consuming discovery leading to delay.

Rule 803 of the Federal Rules of Evidence entitled "Hearsay Exceptions; Availability of Declarant Immaterial" n1/ provides that certain materials are not excluded by the hearsay rule even though the declarant is available as a witness. Among the exceptions are:

n1/ The Federal Rules of Evidence while not controlling in FTC proceedings frequently provide a useful guide to the resolution of evidentiary problems.

"(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations."

The basis of trustworthiness underlying the rule is general reliance by the public or by a particular segment of it on such publications and the motivation of the compiler to foster reliance by being accurate. Weinstein's Evidence 803-49. The public generally uses and relies upon such directories in making use of the telephone. n2/ The material is accordingly within the exception of Rule 803(17) and the taking of official notice of such facts does not [*3] deprive respondents of their right to cross-examine.

n2/ Courts admitting such evidence have noted that "Telephone directories... are semipublic documents" and that such directories are constantly consulted [with] "Reliance... generally placed thereon" State v. McInerney, 182 P.2d 28, 34 (Wyo. 1947); see also In re Gilbert's Estate, 15 A.2d 111, 115 (N.J. 1940); Peoples Nat. Bank v. Manos Brothers, 84 S.E.2d 857 (S.C. 1954); Williams v. Campbell Soup Co., 80 F. Supp. 865, 868 (W.D. Mo. 1948); Harris v. Beech Aircraft Corporation, 248 F. Supp. 599, 601 (E.D. Tenn. 1965).

Nor does this procedure unfairly shift the burden of proof. Respondents are in the best position to rebut the facts noticed or the inferences which may be drawn therefrom. If, in fact, some of the listings were in error, respondents should be able to demonstrate that fact. Moreover, respondents, not telephone company officials, have command of the facts which may be introduced to rebut the inferences to be drawn from such listings. Finally, if, in fact, the listings in question did contain errors then respondents should be able to document their efforts to obtain corrections [*4] if such efforts were made. Under the circumstances, there is no need for time consuming discovery from telephone company officials or employees as respondents contend. Accordingly.

IT IS ORDERED that complaint counsel's motion to take official notice filed April 17, 1978, be, and it hereby is, granted.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

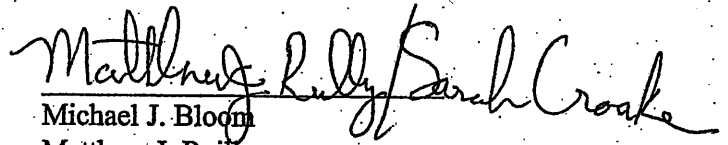
DOCKET NO. 9312

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,


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Matthew J. Reilly

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(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 SPECIALTY PHYSICIANS,
a corporation.

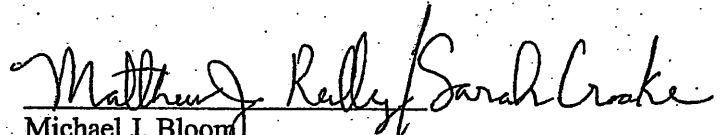
DOCKET NO. 9312

**COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE REPORT AND
TESTIMONY OF GAIL R. WILENSKY**

Respondent North Texas Specialty Physicians ("NTSP") has proffered Gail R. Wilensky to testify to the alleged efficiencies that NTSP achieves in its risk-sharing and non-risk sharing practices. Complaint Counsel respectfully submits this motion *in limine* to exclude the report and testimony of Dr. Wilensky.

As described more fully in the attached Memorandum in Support of this Motion, Dr. Wilensky's opinions are unreliable because she conducted no independent analysis and her opinions are based on insufficient data, unverified assumptions, and are little more than guesswork. Dr. Wilensky simply does not propose a method to evaluate whether efficiencies in NTSP's non-risk sharing practice exist, let alone provide any quantitative valuation of these efficiencies. Moreover, Dr. Wilensky's opinions are based on speculation regarding NTSP's future plans, which are wholly irrelevant to this matter. Because Dr. Wilensky's opinions are not based on any reliable principles or methods but rather on unsupported and conclusory opinions relating to uncertain future events which do not assist the court, her expert report and testimony should be excluded.

Respectfully submitted,


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Dated: March 31, 2004

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 REPORT
AND TESTIMONY OF GAIL R. WILENSKY**

Complaint Counsel moves *in limine* to bar in whole or in part Respondent North Texas Specialty Physicians ("NTSP") from proffering testimony and making arguments at trial based upon the opinions of one of its experts, Gail R. Wilensky. Dr. Wilensky's opinions have no factual basis, are inherently unreliable, and will not assist this Court's review of the evidence. Thus, Dr. Wilensky's 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).

Your Honor should preclude NTSP from offering Dr. Wilensky's testimony for a number of reasons. First, Dr. Wilensky's opinions are unreliable because she conducted no independent analysis and her opinions are based on insufficient data and unverifiable assumptions. In essence, her opinions are impossible to test because they are not based on any science or methodology but instead are based upon her personal intuition and common sense. Second, her report and testimony will not help Your Honor to understand the evidence because her opinions are based on speculation regarding NTSP's future plan to change one of its practices. Because Dr. Wilensky's opinions are not based on any reliable principles or methods but rather on

unsupported and conclusory opinions relating to uncertain future events which do not assist the court, her expert report and testimony 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.

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); 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." The party offering expert testimony 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. Wilensky is a senior fellow at Project HOPE, an international health education foundation. She has held a variety of positions in the public and private sectors relating to health policy and the various aspects of the economics of health care. Dr. Wilensky has been retained by NTSP to analyze the effects of its policies and procedures on the efficiency of its physicians' practices. In her report and testimony, Dr. Wilensky focuses largely on NTSP's risk-sharing practices and asserts that risk-sharing has resulted in significant efficiencies. Dr. Wilensky also attempts to demonstrate that NTSP achieved "spillover" efficiencies by linking efficiencies in the risk-sharing arrangements to the practices and performance of NTSP's non-risk-sharing physicians.

III. Dr. Wilensky's Opinions Regarding "Spillover" Efficiencies are Unreliable Because They are Based on Insufficient Data, Untested Facts, and Guesswork

- A. Dr. Wilensky's opinions are unreliable and irrelevant because they are based on speculation regarding NTSP's future plans.**

An important issue in this matter is whether efficiencies from NTSP's risk-sharing arrangements impacted its non-risk-sharing practices. Dr. Wilensky's testimony on this matter is wholly speculative and irrelevant. Even assuming that NTSP is able to achieve efficiencies in its risk-sharing contracts, the absence of efficiencies in 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. In her expert report, Dr. Wilensky asserts that NTSP has achieved spillover effects by leveraging the efficiencies from NTSP's risk-sharing business to non-risk-sharing practices:

If the physicians in the risk contracts were only casual colleagues with physicians in a larger, loosely defined network that does not provide risk, there is some indication that there might have been small but favorable spillovers from the risk physicians to the non-risk physicians. However, this is not a relationship that exists in NTSP. The physicians who take risk in NTSP have been the dominant group of physicians in the network¹ and in the near future, all physicians in the network, who are eligible to take risk, will be doing so.

Expert Report of Gail R. Wilensky ("Report") at 14-15 (February 13, 2004), included in Appendix as Exhibit A.

As evidenced by her report and testimony, Dr. Wilensky is a strong proponent for physicians entering into risk-sharing contracts. In her report, she asserts that risk contracts reduce medical costs, improve quality, increase patient satisfaction, represent an "important way to promote the provision of cost-conscious health care." Report at 11-12, 9. She also espouses the benefits of risk-sharing arrangements by stating categorically that physicians do "the right thing" in risk-sharing arrangements because they have to report their risk procedures. Wilensky Deposition Transcript ("Tr") at 88 (March 4, 2004), a copy of which is included in Appendix as

¹ Approximately half of NTSP's members do not participate in risk-sharing contracts.

Exhibit B. Dr. Wilensky also testifies that, while a risk-sharing arrangement results in "a lot of desirable behavior," an IPA can improve physician performance by moving all of its physicians to risk-based contracts. Tr. at 66-67.

For these reasons, Dr. Wilensky advocates policies and procedures that result in more physicians entering into risk-sharing arrangements. Thus, not surprisingly, Dr. Wilensky is a firm advocate for NTSP's "excellent" policy in *January 2004* to require all members to express a willingness by 2005 to participate in a risk-sharing arrangement because "[i]t indicates -- both in a signal and in reality, it indicates the seriousness and importance with which NTSP as an organization regards the risk contracts. It is a signal to physicians that the kind of care management strategies that are part of the risk contract are strategies they want all of their physicians to be involved in."² Tr. at 68-69.

It appears that her decision to support NTSP in this matter was made in part as a result of NTSP's January 2004 resolution:

So it's a two-way decision, and either agree to participate in risk contracts or not be a part of NTSP, which I thought was -- this for me was part of the -- for me part of the decision making of my desire to be involved in what they were doing.

Tr. at 66-67.

Dr. Wilensky reiterates her opinion regarding the benefits and importance of this resolution at several points in the expert report and deposition. Report at 5, 10, 15. Tr at 61-62, 66, 68-70, 82, 113, 117-118.

Dr. Wilensky's testimony regarding the January 2004 resolution is irrelevant and should

² The January 2004 resolution does not require members to participate in a risk-sharing contract by 2005 but instead requires members to only express a willingness to participate in a risk-sharing arrangement.

not be admitted. NTSP adopted the January 2004 resolution some four months after Complaint Counsel filed its complaint 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. NTSP's *ex post facto* policy changes, no matter how well-intentioned, have no bearing on the issue here – whether NTSP previously conspired to fix prices.³ To the extent relevant, which it is not, the Court is just as capable of assessing NTSP's future behavior. Accordingly, expert testimony on this matter would be irrelevant and a waste of the Court's time.⁴

While we have no reason to question Dr. Wilensky's sincere support for NTSP's resolution requiring all of its members to express a willingness to participate in risk-sharing contracts, her lengthy testimony on this matter is speculative and irrelevant. NTSP's intent to possibly enroll all of its physicians into risk-sharing contracts pertains directly to NTSP's state of mind and future intentions. Even if NTSP does in fact intend to require risk-sharing participation for all of its members, this will not occur until 2005 at the earliest. Furthermore, there is nothing in Dr. Wilensky's background or testimony that indicates that she has "knowledge, skill,

³ Moreover, if NTSP's recently enacted policy changes are deemed relevant in this matter, NTSP may have an incentive to adopt policies for purposes of litigation and thus Complaint Counsel would be required to respond to and litigate a "moving target."

⁴ Respondent may claim that the January 2004 resolution is relevant to the issue of remedy. That argument must fail. If Your Honor determines that NTSP conspired to fix prices, a non-binding promise by that same organization to "do better" in the future is not relevant to the issue of remedy. If it were, one could imagine every group faced with a price-fixing complaint to pass a similar promise to behave better in the future. See In re Zale Corp., 78 F.T.C. 1195, 1240 (1971); United States v. W.T. Grant Co., 345 U.S. 629, 632 n.5 (1953), In re Coca-Cola Co., 117 F.T.C. 795, 917 (1994).

experience, training, or education” necessary to provide “specialized knowledge” about NTSP’s state of mind. Fed. R. Evid. 702. Indeed, considering the subjective nature of guessing about the intentions or motivations of another, it is difficult to imagine credentials that would qualify her as an expert about this subject. 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”).

B. Dr. Wilensky performed no analysis and offers no specific evidence regarding spillover efficiencies and thus her opinions are not the product of “reliable principles and methods.”

Dr. Wilensky asserts that NTSP has achieved significant efficiencies in its risk-sharing practice. Complaint Counsel does not allege that NTSP engaged in inappropriate price-fixing in its risk-sharing contracts. Therefore, Dr. Wilensky’s efficiency arguments are irrelevant to this matter absent a showing that these risk-sharing efficiencies positively affected NTSP’s members who do not participate in the risk-sharing practice and to the issue of ancillarity.⁵ Dr. Wilensky, however, has failed to establish such relevance, however, because she has provided no specific evidence that NTSP has achieved spillover efficiencies.⁶ Thus, her opinions do not meet the standards set forth in Daubert and Kumho.

Dr. Wilensky admits that she did not attempt to empirically test whether the costs and outcomes from NTSP’s risk-sharing and non-risk-sharing contracts were comparable and

⁵ Again, approximately half of NTSP’s members do not participate in risk-sharing contracts.

⁶ In fact, none of the experts hired by the Respondents have been able to point to specific evidence in the record that supports NTSP’s spillover claims. Complaint Counsel’s experts also agree that NTSP’s claims have virtually no support in the record.

contributes no research of her own. Tr. at 40. Rather, she asserts that she has seen an empirical study, the XXXXXXXX cost analysis, to support her opinion. This study, conducted by another NTSP expert, Dr. Robert Maness, purportedly suggests comparable outcomes for NTSP's risk-sharing and non-risk-sharing practices.⁷ Tr. at 40. Because Dr. Wilensky neither prepared, assisted in, *nor relied on* the XXXXXXXX study to form her opinions, she should not be allowed to testify about it. Tr. at 58-59.

Dr. Wilensky's criticism of the methodology employed in the study demonstrates that the study is unreliable. Specifically, Dr. Wilensky cites additional steps that should have been undertaken by the study's author to improve the reliability of the 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 XXXXX population and she was told that there had been no adjustments. She admitted that it "would be better to make the adjustments." Tr. at 42. 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. Tr. at 43. According to Dr. Wilensky, there also was "no reason not to do a test of statistical significance." Tr. at 44.

In addition to the lack of any testable methodology, Dr. Wilensky has also failed to offer any facts or analysis demonstrating that NTSP has in fact obtained efficiencies in its non-risk-sharing practice. Under cross-examination, Dr. Wilensky admitted that the quality and cost

⁷ 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.

initiatives in NTSP's risk-sharing practice are either not available to NTSP's non-risk-sharing practice or she has no knowledge about their availability:

Q Are there any processes or formal programs for quality improvement that NTSP started in a risk context and is then brought over to apply to non-risk patients?

A Well, the main program that they started themselves that I am aware of has to do with the palliative care and trying to take seriously ill patients, perhaps end of life or not -- you know, palliative care is not only end of life, but usually associated more with end of life -- and finding ways that don't necessarily have the hospice word in them to bring some support ... It was regarded as an important way to try to improve care for their patients. *This is the kind of strategy that certainly could be attempted to be expanded to their non-risk patients.*

* * * *

Q Do you have any evidence that there are any fee for service patients in the palliative care program?

A I haven't asked the question; so I don't know. I am not aware of it, but I have not specifically asked the question. So I can just say, I don't know.

Tr. at 85- 87.

Dr. Wilensky also admitted that she has seen no evidence that a variety of other risk-sharing initiatives, such as mechanisms for identifying patients who need better management (Tr. at 75-76); informal and formal peer reviews (Tr. at 92, 94-95); triggers to identify frequently-hospitalized patients (Tr. at 100); reminder systems (Tr. at 108-109); and patient disease registries, are available to NTSP's non-risk-sharing practice. Furthermore, Dr. Wilensky admitted that she is unaware of *any* programs or processes for quality or cost improvement that were implemented in NTSP's risk-sharing contracts that have been used in the non-risk-sharing practice:

Q Other than the possibility of the palliative care program, are there any other processes or programs that NTSP has applied from the risk context to the non-risk context to improve the quality of care for patients?

A *Well, I don't know that I know what exactly they've applied and not applied.*

Tr. at 88 (emphasis added).

Responding to a question regarding the basis for her conclusion that NTSP has achieved spillover efficiencies, Dr. Wilensky made vague references to a few general studies showing slight spillover effects in a hospital and community:

Q And historically there have been some members of NTSP that have not been involved in the risk contracts at all; is that correct?

A That's correct.

Q Would we expect any of the change in practice pattern to affect these physicians?

A Yes, but not as much --

Q To what extent?

A Well, again, as I have read the -- several studies that have looked at spillover behavior, increasing the amount of at risk behavior in a community seems to indicate -- impact what is going on in the community. Now, not huge, the mechanism isn't exactly known, there is some speculation that to the extent that a significant number of the physicians in a particular hospital are part of a risk contract and it impacts how they practice, that there is some impact on how other physicians practicing in that same hospital who are not part of the risk practice behave. *One would assume it would be more likely to happen if you were part of the same group. The studies have not -- that I'm aware of have not attempted to look at this.* So there is some -- some indication of spillover to the community -- nearby community and the people who are in NTSP are in a slightly closer community than the ones who just are geographically similar. Again, it's not large. It's in a positive direction and helpful direction and the mechanism is not clearly understood.

Tr. at 95-96 (emphasis added).

Not only has Dr. Wilensky not offered any support for her opinion that NTSP has achieved spillover efficiencies, she has failed to offer any support for the proposition that IPAs *generally*

have achieved these efficiencies. As a result of having no tangible support for her opinion, Dr. Wilensky's only explanation for her conclusion that NTSP has achieved spillover efficiencies is the following: "One would assume it would be more likely to happen if you were part of the same group. The studies have not -- that I'm aware of have not attempted to look at this." Tr. at 95. Under Dr. Wilensky's faulty reasoning, one would conclude that the presence of a single risk-sharing group would justify price fixing by all other physicians.

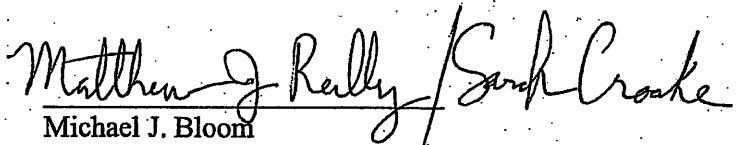
In sum, Dr. Wilensky simply does not propose a method to evaluate whether spillover efficiencies exist, let alone provide any quantitative valuation of these efficiencies.⁸ By citing only borrowed analyses and minimal facts regarding the critical issue of spillover efficiencies, Dr. Wilensky has failed to provide Your Honor with the factual or analytical basis required for admission under Rule 702. See IO 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). Based on Dr. Wilensky's glaring inability to cite to any evidence or analysis to support this opinion, her 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).

⁸ Nor has Dr. Wilensky cited any evidence whatsoever that addresses the issue of whether NTSP's collective price negotiations and other conduct is "reasonably ancillary" to the collective price negotiations and other conduct is "reasonably ancillary" to cognizable spillover efficiencies.

CONCLUSION

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

Respectfully submitted,


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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 Report and Testimony of Dr.
Gail R. Wilensky, 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 for Leave to File Motion *In Limine* Out of Time, and Complaint Counsel's Motion *In Limine* To Preclude the Report and Testimony of Gail R. Wilensky and Supporting Memorandum to be served upon the following persons:

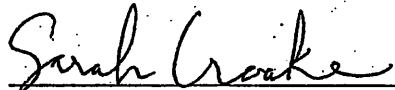
Office of the Secretary
Federal Trade Commission
Room H-159
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Hon. D. Michael Chappell
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FEDERAL TRADE COMMISSION (F.T.C.)
 In the Matter of RAMBUS INCORPORATED, a corporation.
 Docket No. 9302
 March 26, 2003

Public Version

**MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE REPORT AND
 TESTIMONY OF
 WILLIAM L. KEEFAUVER**

Complaint Counsel moves in limine to preclude and bar respondent Rambus, Inc. ("Rambus") from offering any evidence, and from making any arguments at trial, based upon the opinions of its expert, William L. Keefauver. Mr. Keefauver's opinions are inherently unreliable and do not meet the standard set forth in the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Your Honor should preclude Rambus from offering such irrelevant testimony for a number of reasons. First, the opinions of Rambus's proffered Mr. William are not helpful to Your Honor because they require no specialized knowledge and are largely based on common sense. Second, even if something more than common sense and the testimony of fact witnesses was required to interpret the JEDEC patent policy, Mr. Keefauver's opinions are unreliable because he conducted almost no independent analysis and his opinions are based on unverified assumptions and guesswork. In short, his opinions are impossible to test because they are not based on any methodology other than his own limited experiences and the factual representations of Rambus's counsel. Expert opinion that is not grounded in the facts of the case does not assist the trier of fact and, therefore, is not admissible. Finally, this is an obvious attempt to use purported expert testimony to relitigate facts decided against Rambus by the Federal Circuit in the *Infinion v. Rambus* [FN1] litigation; i.e., that the JEDEC patent policy required the disclosure of patent applications.

ARGUMENT

I. Legal Standard

Expert testimony is admissible 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. Federal Rule of Evidence 702. The party offering the expert testimony 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). This standard applies to all subjects of expert testimony, "whether it relates to areas of traditional scientific competence or whether it is founded on engineering principles or other technical or specialized expertise." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

The issue before Your Honor relates to an expert with specialized knowledge, rather than scientific expertise. Mr. Keefauver intends to offer opinions interpreting the meaning and scope of the JEDEC patent policy during Rambus's tenure as a member. For the purpose of this motion, Complaint Counsel does not challenge directly Mr. Keefauver's specialized knowledge. But even qualified experts are not permitted to testify concerning lay matters

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Exhibit 11

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which the trier of fact is able to understand without the expert's assistance. *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989). Furthermore, the expert's opinion must be based upon some recognized scientific method. *Niebur v. Town of Cicero*, 136 F. Supp.2d 915, 918-19 (N.D.Ill. 2001). Testimony that does not reflect a reliable body of genuine specialized knowledge and is nothing more than common sense is not admissible. *Id.* at 919. Mr. Keefauver's proffered testimony is flawed because the testimony addresses lay matters that Your Honor can fully comprehend through the fact witnesses, the testimony is not based on any specialized knowledge, and the underlying assumptions supporting his theory are inherently unreliable.

II. Mr. Keefauver's Opinions Are Not Helpful to the Trier of Fact Because His Opinions Require No Specialized Knowledge or Expertise

The only patent policy at issue in this case is the patent policy adopted and published by JEDEC. That policy is contained in JEDEC's Manual of Organization and Procedure. [FN2] Under the guise of expert testimony, Rambus seeks to have Your Honor consider the policies of selected other standard-setting organizations ("SSOs") in interpreting the JEDEC policy. According to Rambus, these non-JEDEC patent policies are relevant because JEDEC members would have understood the JEDEC patent policy only by reference to patent policies having nothing at all to do with JEDEC. The patent policies of unaffiliated organizations, such as ANSI, SEMI, VESA, ITU, and TIA, are plainly irrelevant. There is no evidence that JEDEC's policy is subordinate to or controlled by any of these organizations. [FN3] Nevertheless, Rambus hopes to further complicate this case by introducing evidence of the patent policies of several irrelevant SSOs. The fundamental flaw in Rambus's strategy is that it seeks to circumvent the factual findings of the Federal Circuit by introducing through an expert evidence that is nothing more than gussied up factual assertions that have been contradicted by virtually every witness. Instead of relying on an expert who formed his opinions without regard to the record, Your Honor easily could resolve these issues by considering the testimony of fact witnesses who likely are more qualified than Mr. Keefauver to render expert analysis.

In addition to the utter lack of relevance of the non-JEDEC patent policies, Mr. Keefauver's opinions are not helpful because they are based on simple common sense. Even assuming that interpretation of the JEDEC patent policy is a proper subject of expert testimony, Mr. Keefauver readily admits that some of his opinions are based on "common sense."

Q: ... What is the basis for your statement that SDOs would be loathe to undertake an effort to design around them [patent applications]?

A: Most of my conclusion is common sense.

Q: Could you explain your understanding of the term or the phrase "might be involved?"

A: ... so I think one has to apply a rule of reason and put it in context to come up with a common sense interpretation of the term.

Keefauver Dep. 3/4/03 ("Keefauver Dep.") at 61:9-62:2, In the Matter of Rambus, Inc. [Tab 2]. Complaint Counsel agrees that a common sense reading of the Jedec Manual of Procedure and the conduct of the JEDEC participants would provide an appropriate basis for Your Honor to determine Rambus's obligations under the patent policy. Common sense, however, does not require the assistance of an expert - not matter how well qualified. *Niebur*, 136 F. Supp.2d at 918- 19 ("even a supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method.") (citations omitted).

Expert testimony should be excluded when the expert offers opinions on lay matters that the trier of fact is capable of understanding without the expert's assistance. *Andrews*, 882 F.2d at 708. Mr. Keefauver's admissions during his deposition reveal that specialized knowledge or training is not required to understand the requirements of the JEDEC patent policy. The only thing Mr. Keefauver did was to read the policy, try to put it in context, and

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make a common sense judgment. Keefauver Dep. at 61:18-62:2 [Tab 2]. Although courts have recognized that sometimes it may be difficult to distinguish genuine expertise from "something that is nothing more than fancy phrases for common sense," [FN4] no such difficulty is found here. Mr. Keefauver's testified that his opinions are based on common sense and without regard to the evidence in the record.

To the extent that Mr. Keefauver's opinions are not explicitly based on common sense, they appear to be based on: (1) a simple reading of the plain language of the JEDEC patent policy and the patent policies of six other SSOs; (2) his experience as an employee of AT&T and Bell Labs; and (3) the untested factual assertions of Rambus's outside counsel. Expert Report of William L. Keefauver ("Keefauver Rep.") at par. 4 [Tab 1]; Keefauver Dep. at 55:2-8 [Tab 2]. **None of these bases require any specialized knowledge or expertise.**

Mr. Keefauver's testimony is no more helpful in interpreting the JEDEC patent policy than the dozens of engineers and JEDEC participants on Complaint Counsel's and Rambus's witness lists. When asked how one could become an expert in this field, Mr. Keefauver responded that after working for less than ten years at one of the companies involved in this area "a certain amount of knowledge rubs off after a while." Keefauver Dep. at 73:5-74:6 [Tab 2]. By his definition, Farhad Tabrizi, Tom Landgraf, Ilan Krashinsky, Dr. Betty Prince, Hans Wiggers, and many others are all experts. But they all are more qualified than Mr. Keefauver to opine on the meaning of the JEDEC patent policy because they have practical experience in interpreting and applying the policy in real life situations.

Finally, the interpretation of the JEDEC patent policy is a lay matter and is not a proper subject of expert testimony. Indeed, during the Infineon litigation Rambus agreed with the Court that interpretation of the JEDEC patent policy was not the proper subject of expert testimony. Rambus's counsel objected to witnesses giving opinion testimony regarding the meaning of the patent policy. Rambus's objection, however, was not limited to lay witnesses attempting to provide expert opinions. In fact, Rambus's attorney stated "I don't think it's [the JEDEC patent policy] a proper subject of expert testimony." Testimony of John Kelly, April 30, 2001, Trial Tr. at 251, Rambus v. Infineon [Tab 5]. The court agreed, stating "No, it isn't. That's why it wouldn't make any sense to designate him [John Kelly] as an expert." *Id.* Rambus cannot object to expert testimony in one proceeding, but then seek to admit expert testimony concerning the identical issue in another proceeding.

III. Mr. Keefauver's Opinions Are Unreliable Because They are Based on Insufficient Data and Untested Facts

The data undergirding Mr. Keefauver's opinion is unreliable and inadmissible, or what Judge Milton Shadur in the Northern District of Illinois might call, "the Rule 702 equivalent of what in early computer vocabulary bore the label 'GIGO' ('garbage in, garbage out')." *Kay v. First Continental Trading, Inc.*, 976 F.Supp. 772, 776 (N.D.Ill. 1997) (rejecting expert's opinion for using unreliable information). Mr. Keefauver's opinions are unreliable because of the glaring lack of due diligence to gather the most basic data to support his theory. While Mr. Keefauver understands that there are dozens of standard setting organizations just in the United States, his review is limited to the patent policies of only six, including JEDEC's. [FN5] This fact is significant because Mr. Keefauver's conclusion is based, in large part, on the theory that JEDEC members would have understood the requirements of the JEDEC patent policy in light of their experience in other SSOs. Keefauver Rep. at par. 2(b) (experience with other SSOs "would have set the foundation for their 'common understandings'" of the JEDEC policy). [Tab 1]. As discussed below, Mr. Keefauver performed no investigation to verify his guesses. Keefauver Dep. at 36:18-37:8 [Tab 2]. But even if he had verified whether JEDEC members also were members of ANSI or SEMI, his sampling of six or eight out of hundreds of SSOs is insufficient to produce reliable results. Thus, assuming arguendo that Mr. Keefauver's general theory is true (and it is not), he provides no reason why his selection of these five non-JEDEC SSOs is particularly relevant to the exclusion of the dozens of other SSOs operating in the United States. There is no evidence that the five non-JEDEC patent policies that he reviewed are in any way representative of the field. By sampling only a limited number of SSO patent policies and guessing at which other SSOs JEDEC members would have participated in, Mr. Keefauver does not provide Complaint Counsel or Your Honor with a sufficient factual basis upon which to test his theory. [FN6]

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As noted, Mr. Keefauver's opinion primarily is based on the fiction that JEDEC members would have understood the JEDEC patent policy in light of the policies of other SSOs to which they belonged. But there is not a scintilla of evidence in the record to support the basic assumptions underlying this theory.

Q: What is the basis for your statement that the JEDEC members were also members of these other high-tech SDOs?

A: Well, I looked at the companies who participated in JEDEC, and were members of JEDEC, and I'm personally familiar with most of them, with their technology, and most of them are companies with technology interests which impact all of these SDOs. And from the fact that they participate in JEDEC, I assume that they also participate in these other SDOs.

Q: Did you do any investigation to determine whether or not your assumption was correct?

A: No, I did not.

Keefauver Dep. at 36:18-37:8. [Tab 2]. When later asked whether his opinion that JEDEC members would "reach a corporate understanding of what the various patent policies are" is based on any evidence in the record, he replied "No, it's not." Id. at 40:12-19. In short, Rambus seeks to have Your Honor rely on an opinion that is not based on the facts of this case, but based solely on Mr. Keefauver's "common sense" reading of the JEDEC patent policy and unverified assumptions concerning JEDEC members's participation in other organizations.

Mr. Keefauver's assumptions should have been easy to verify through a minimal amount of discovery. Rambus could have asked JEDEC members about their participation in other SSOs, but it did not. A few simple questions on an issue that is fundamental to Mr. Keefauver's opinions would not have unduly complicated the discovery process. Instead of making this minimal effort, Rambus would prefer Your Honor to rely upon Mr. Keefauver's guesses and common sense.

Although Rambus did not deem it necessary to ask real witnesses about their experiences with other SSOs, Complaint Counsel did. In response to Complaint Counsel's questions, J. Reese Brown, a long-time JEDEC attendee and retired employee of UNISYS, testified concerning his experience with Mr. Keefauver's selection of SSOs:

Q: Are you familiar with an organization called TIA?

A: Vaguely.

Q: Are you a member of it -- or have you ever been a member of it?

A: I've never had any association with it at all.

Q: Have you ever read TIA's patent policy?

A: No.

Q: Have you ever read ANSI's patent policy?

A: Not that I recollect.

* * *

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Q: During the -- any of the time that you were active in IEEE, did IEEE have a patent policy?

A: They probably did, but I am unaware of any of the details of it.

Q: Are you familiar with a group called SEMI?

A: Vaguely. Semiconductor Electronic Manufacturers Association or Institute or something like that.

* * *

Q: During that time, 1991 to 1996, did you ever read SEMI's patent policy?

A: No.

Brown Dep. 1/22/03 at 53:17-55:12, In the Matter of Rambus, Inc. [Tab 6]. The record shows that not a single witness has testified that he or she interpreted the JEDEC patent policy in light of the patent policy of another SSO. [FN7] More importantly for this motion, however, is that Rambus never even bothered to ask. Because Rambus never asked such basic questions, Mr. Keefauver's opinions are not grounded in any facts.

Apparently, Mr. Keefauver defines "members" as the companies that send employees to participate in JEDEC. While this is technically accurate, it is also misleading. Even if the corporate members participate in other SSOs, there is no evidence in the record or in Mr. Keefauver's report or testimony that indicates: (1) how information regarding non-JEDEC patent policies is provided to the employees who participate in JEDEC; or (2) why a corporate member or its participating employee would disregard the plain language of the JEDEC patent policy and the course of conduct in JEDEC meetings in favor of following the patent policy of another organization.

Mr. Keefauver's opinions also are not helpful to Your Honor because he relies upon the untested factual contentions of Rambus's lawyers. For example, paragraph 26 of the Keefauver report states that the JEDEC Manual of Organization and Procedure 21-I was distributed only to committee chairpersons. When asked for the basis of that statement, Mr. Keefauver responded that he asked "Ijay Palansky [Rambus's outside counsel] what the distribution was of this manual." Keefauver Dep. at 55:2-55:8 [Tab 2]. Obviously, Mr. Palansky's "testimony" is inadmissible and speculative. Similarly, any expert opinion that relies on the factual representations of counsel is just as inadmissible and speculative. Upon further questioning, Mr. Keefauver was unable to identify the testimony of a single witness who did not receive the 21-I manual. [FN8] Of course, given that he essentially disregarded the record, it is not clear that any testimony on this issue would have influenced his opinion. Again, the lack of effort to verify basic facts renders Mr. Keefauver's opinions unreliable and, therefore, inadmissible. Rambus could have asked non-Chairman participants whether they received the 21-I Manual, but it either did not ask or it did not provide Mr. Keefauver with the answers. Now Rambus seeks to profit from its lack of diligence by offering Mr. Keefauver's musings. *Mitchell v. Gencorp, Inc.*, 165 F.3d 778, 781 (10th Cir. 1999) (rejecting expert testimony where conclusions were little more than guesswork). As Judge Posner explained in *In re James Wilson Associates*, 965 F.2d 160, 173 (7th Cir. 1992) (citation omitted),

If for example the expert witness (call him A) bases his opinion in part on a fact (call it X) that the party's lawyer told him, the lawyer cannot in closing argument tell the jury, "See, we proved X through our expert witness, A."

Likewise, Rambus cannot introduce its attorney's testimony as proof of the distribution of the JEDEC Manual of Organization and Procedure. Nor may it rely on Mr. Keefauver's opinions, which explicitly are based on attorney testimony.

Mr. Keefauver's opinions also are unreliable because he could not identify any independent or authoritative survey or other data that would be a reliable substitute for his failure to conduct his own investigation. [FN9] Mr. Keefauver's unfamiliarity with scholars in the field is not surprising given that he appears to rely only on his

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informal contacts with former colleagues in order to keep up to date. Keefauver Dep. at 68:20-69:24 [Tab 2]. Mr. Keefauver's inability to identify any literature is due to the fact that he did not conduct any research whatsoever.

Q: How would an expert in this area keep current with what's happening in the field?

A: I think you have to stay in personal contact with the engineers who participate in SDOs

Q: Anything else?

A: That's the best way that comes to mind. Again, I would look for literature, but to my knowledge, I have not made a formal search of this subject. But that's certainly a possibility. I have a new approach.

Q: When you say you haven't made a formal search, is there some lesser than formal search that you conduct?

A: No, I didn't make any search at all.

Keefauver Dep. at 69:25-70:13. [Tab 2]. Obviously, Mr. Keefauver will not find any authoritative scholarship if he refuses to take a single moment to look for it. Expert opinions should be made of sturdier stuff.

Nor does Mr. Keefauver's limited personal experience with standard setting organizations provide sufficient data upon which to form a reliable basis for expert testimony. See *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025-26 (10th Cir. 2002) (excluding testimony based, in part, on limited personal experience). Mr. Keefauver's experience is based on his time at AT&T and Bell Labs. While he did spend some time on the EIA patent committee more than thirty years ago, he has never participated in a committee that actually developed standards. Keefauver Dep. at 27:13-23 [Tab 2]. His experience is limited to advising the attorneys who advised the engineers actually participating in the standard setting process. *Id.* at 29:3-9. Thus, Mr. Keefauver's experience since the 1960's is two steps removed from the actual application of patent policies.

Interestingly, Mr. Keefauver's experience, to the extent that it is useful at all, is inconsistent with his opinions. Sometime in the 1980's, (Mr. Keefauver retired in 1989), he advised an AT&T or Bell Labs employee to disclose a patent application even though Mr. Keefauver understood that such a disclosure was not required by the SSO's patent policy. *Id.* at 31:17-34:22. Although Mr. Keefauver opines that the "costs" to the SSOs and its members and the lack of useful information in patent applications suggests that applications should not be disclosed (see Keefauver Rep. at par. 17 [Tab 1]; Keefauver Dep. at 13:13- 14:7 [Tab 2]), none of those concerns prevented the disclosure in this instance notwithstanding the fact that disclosure was not required.

In sum, Mr. Keefauver conducted no independent research or survey. He is not aware of the existence of, much less did he consult, any academic articles or texts on the subject. Indeed, his basic opinions were formed before he read any of the testimony in this matter. If all that is required is to read six patent policies and guess that JEDEC members would assume that JEDEC follows the ANSI policy, then surely Your Honor does not require expert assistance. Furthermore, Mr. Keefauver's opinions appear to be in direct conflict with his actual work experience at AT&T and Bell Labs. In sum, the work conducted by Mr. Keefauver in this matter falls far short of the requirements of Daubert.

IV. Rambus is Estopped From Arguing or Presenting Any Evidence that the JEDEC Patent Policy Did Not Apply to Patent Applications

Finally, Rambus should be precluded from offering any testimony - expert or otherwise - concerning whether the JEDEC patent policy applied to patent applications. That issue was squarely before the Federal Circuit in the Infineon litigation and was decided against Rambus. Rambus has not appealed that decision and, therefore, is bound by it. The issues concerning which Mr. Keefauver intends to testify were actually litigated in the Infineon case, were actually and necessarily determined in that proceeding, and applying estoppel against Rambus would

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not "work an unfairness." E.g., *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986); *Montana v. United States*, 440 U.S. 147, 153 (1979); accord *Mother's Restaurant, Inc. v. Mama's Pizza*, 723 F.2d 1566, 1571 (Fed. Cir. 1983); *United States v. Weems*, 49 F.3d 528, 531-32 (9th Cir. 1995).

CONCLUSION

The proffered expert testimony of William Keefauver is not admissible because Mr. Keefauver's common sense opinions essentially are lay testimony that requires no specialized knowledge, Mr. Keefauver's opinions are based upon unreliable assumptions and rank guesswork, and Rambus is estopped from contesting the fact that the JEDEC patent policy requires the disclosure of patent applications. Therefore, Your Honor should grant Complaint Counsel's motion to exclude Mr. Keefauver's report and prohibit Mr. Keefauver from testifying in this matter.

Respectfully submitted,
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Counsel Supporting the Complaint

MOTION IN LIMINE TO PRECLUDE REPORT AND TESTIMONY OF WILLIAM L. KEEFAUVER

Complaint Counsel hereby moves for entry of an order precluding the report and testimony of William L. Keefauver. Rambus intends to offer Mr. Keefauver as an expert in interpreting the duties that the JEDEC patent policy imposed on JEDEC's members. Mr. Keefauver's proffered testimony neither will be helpful to Your Honor nor is it based upon reliable methods, facts and or data. Therefore, it is irrelevant to this case. In addition, some of the matters concerning which Mr. Keefauver intends to testify were litigated and necessarily decided in *Rambus Inc. v. Infineon Technologies AG*, 155 F. Supp. 2d 668 (E.D. Va. 2001), *aff'd in part and rev'd in part*, 318 F.3d 1081 (Fed Cir. 2003), and should be given collateral estoppel effect in this proceeding. Rambus should be barred from relitigating the same factual issues here. We respectfully submit that Your Honor should grant this Motion for the reasons set forth in Complaint Counsel's Memorandum in Support of Motion In Limine to Preclude Report and Testimony of William Keefauver, filed March 26, 2003.

* * * * *

Respectfully submitted,
M. Sean Royall

Geoffrey D. Oliver

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[PROPOSED] ORDER

Upon consideration of the Motion In Limine to Preclude Report and Testimony of William Keefauver, dated March 26, 2003,

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

Stephen J. McGuire

Chief Administrative Law Judge

Date: _____

FN1. Rambus Inc. v. Infineon Technologies AG, 155 F. Supp. 2d 668 (E.D. Va. 2001), vacated in part, aff'd in part, rev'd in part, and remanded, 318 F.3d 1081 (Fed. Cir. 2003).

FN2. The Manual of Organization and Procedure has undergone various revisions over the years, none of which have altered the obligations of members under the patent policy. The revision most relevant to the current dispute is revision 21-I, which was published in October 1993 and was in effect through Rambus's resignation from JEDEC in June 1996. [Tab 3]

FN3. JEDEC was and continues to be affiliated with EIA. Nevertheless, JEDEC and other entities affiliated with EIA, was free to adopt a patent policy that fit their peculiar needs. In any event, there is no inconsistency between the JEDEC policy and the EIA policy. Kelly Dep. (2/26/03) at 41:24-42:8, In the Matter of Rambus, Inc. (he understood the EIA policy to require disclosure of patent applications since he began working at EIA in September 1990). [Tab 4]

FN4. See Niebur, 136 F. Supp.2d at 919 (quoting United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996)).

FN5. Keefauver Dep. at 24:13-18 (citing EIA, TIA, IEEE, JEDEC, VESA, and SEMI). [Tab 2]. Although his report relies upon the ANSI patent policy, Mr. Keefauver noted correctly that ANSI is not an SSO. Id. at 24:24-25:2. Mr. Keefauver also was vaguely familiar with the patent policies of two international SSOs, CCITT and ITU, but those do not appear to form the basis of his opinion and are not mentioned in his report. Id. at 29:18-30:17.

FN6. See IQ Product Co. v. Pennzoil Products Co., 305 F.3d 368, 376 (5th Cir. 2002) (excluding two

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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). Mr. Keefauver did not even know whether Rambus, his own client, participated in other SSOs. Keefauver Dep. at 38:12-13 ("Rambus, I don't know, they certainly should be [participating in IEEE].") [Tab 2]

FN7. Dr. Betty Prince testified that although she had never seen the ANSI patent policy, she understood it to be the same as the JEDEC policy. Prince Dep. 2/24/03 at 173:2-16, In the Matter of Rambus, Inc. [Tab 7]. But her understanding is directly contrary to what Rambus and Mr. Keefauver would have Your Honor assume. Dr. Prince incorrectly understood that the ANSI policy did require the disclosure of patent applications. Id. Thus, even if Mr. Keefauver's basic premise is true, his application of the theory to the facts of this case is highly suspect. Based on Dr. Prince's testimony, it is more likely that JEDEC participants would have interpreted the patent policies of other SSOs in light of JEDEC's requirements, not the converse.

FN8. Keefauver Dep. at 55:18-21 [Tab 2]. Rambus's Memorandum in Support of Summary Decision argues that Rambus did not receive the 21-I manual. (Mem. at 22). Rambus's claim is downright preposterous given that Richard Crisp admitted receiving a copy in 1995, reading it, and understanding that it applied to patent applications. Crisp Dep. 8/10/01 at 851:8-853:4, Micron v. Rambus [Tab 8]. **Your Honor can only assume that the copy Mr. Crisp received in 1995 fell victim to Rambus's document destruction program and, therefore, assertions concerning the non-receipt of the 21-I manual should viewed in light of Judge Timony's rulings on the collateral estoppel effect of Rambus's efforts to destroy documents in advance of litigation.** (See Order Granting Complaint Counsel's Motion for Collateral Estoppel, dated February 26, 2003). [Tab 9] Moreover, Rambus did produce a copy of the 21-H manual (R173484) [Tab 10], which was the predecessor of 21-I even though no Rambus employee was ever a committee chair. Complaint Counsel is entitled to an inference that Rambus received 21-I. Rambus, of course, is entitled to rebut that inference by clear and convincing evidence, which is virtually impossible in the face of Mr. Crisp's very clear testimony. Finally, any adverse inferences on this issue that Rambus is unable to rebut should be binding on Rambus's experts.

FN9. Although Mr. Keefauver could not identify any other surveys performed by scholars in the field, David Teece, one of Rambus's other experts cites a draft article by his colleague Dr. Mark Lemley for his survey of twenty-nine SSOs. Expert Report of David Teece at 28, n. 63. [Tab 11] The draft article recently was published and the survey expanded to include forty-three different SSOs. Mark A. Lemley, Intellectual Property Rights and Standard-Setting Organizations, 90 Cal. L. Rev. 1889 (2002). The fact that Rambus's economic expert relies on authorities that Mr. Keefauver has never even considered is a telling indictment of just how little help Mr. Keefauver's opinions will provide. If Mr. Keefauver's is of no help to Rambus's own experts, then how can he be of any help to Your Honor or the Commission?

FTC

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2002 WL 1585551 (S.D.N.Y.)

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
LINKCO, INC., Plaintiff,
v.
FUJITSU LTD., Defendant.
No. 00 Civ. 7242(SAS).
July 16, 2002.

Computer software manufacturer sued competitor for, inter alia, misappropriation of trade secrets and unfair competition. On parties' motions in limine, the District Court, Scheindlin, J., held that: (1) technical expert's testimony was excludable to extent it contained arguments and conclusory statements, and (2) damages expert's testimony was excludable to extent it addressed issues of law and failed to assist jury in determining fact in issue that was outside common understanding. Ordered accordingly.

[1]

- ↳ 157 Evidence
 - ↳ 157XII Opinion Evidence
 - ↳ 157XII(B) Subjects of Expert Testimony
 - ↳ 157k506 k. Matters Directly in Issue. Most Cited Cases
- ↳ 157 Evidence
 - ↳ 157XII Opinion Evidence
 - ↳ 157XII(D) Examination of Experts
 - ↳ 157k555 Facts Forming Basis of Opinion
 - ↳ 157k555.4 Sources of Data
 - ↳ 157k555.4(1) k. In General. Most Cited Cases

Technical expert's testimony in misappropriation of trade secrets case was excludable to extent it contained arguments and conclusory statements about questions of fact masquerading behind veneer of technical language, offered merely second hand knowledge of documents created by others, and stated legal conclusions. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[2]

- ↳ 157 Evidence
 - ↳ 157XII Opinion Evidence
 - ↳ 157XII(B) Subjects of Expert Testimony
 - ↳ 157k506 k. Matters Directly in Issue. Most Cited Cases
- ↳ 157 Evidence
 - ↳ 157XII Opinion Evidence
 - ↳ 157XII(B) Subjects of Expert Testimony
 - ↳ 157k530 Damages
 - ↳ 157k531 k. In General. Most Cited Cases

Damages expert's testimony in misappropriation of trade secrets case was excludable to extent it addressed issues of law and failed to assist jury in determining fact in issue that was outside common understanding. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

Exhibit 12

[3]

↪ 157 Evidence

↪ 157XII Opinion Evidence

↪ 157XII(B) Subjects of Expert Testimony

↪ 157k506 k. Matters Directly in Issue. Most Cited Cases

Damages expert's report, which addressed each element of theory of damages which he presumed court would apply, was impermissible opinion on issue of law. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[4]

↪ 157 Evidence

↪ 157XII Opinion Evidence

↪ 157XII(D) Examination of Experts

↪ 157k555 Facts Forming Basis of Opinion

↪ 157k555.2 k. Necessity and Sufficiency. Most Cited Cases

Experts testifying on issue of fact must provide some explanation for their conclusions, rather than referring generally to their experience. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

Irving B. Levinson, Joseph G. Finnerty, Jr., Michael R. Hepworth, Piper Rudnick LLP, New York NY, for Plaintiff.

Steven M. Bierman, Sidley Austin Brown & Wood, New York, NY, Richard J. O'Brien, Paul E. Veith, Sidley Austin Brown & Wood, Chicago, IL, for Defendant.

OPINION AND ORDER

SCHEINDLIN, J.

*1 In September 2000, LinkCo brought this action against Fujitsu for (1) misappropriation of trade secrets, (2) conversion, (3) unfair competition, (4) intentional interference with certain contractual relations, and (5) violations of Massachusetts state law. See LinkCo, Inc. v. Fujitsu Ltd., No. 00 Civ. 7242, 2002 WL 237838, at *1 (S.D.N.Y. Feb.19, 2002). After the parties conducted discovery, Fujitsu moved for summary judgment. This Court denied that motion on February 19, 2002. [FN1] See *id.*

FN1. Familiarity with the facts and allegations as discussed in that opinion is presumed.

At trial, LinkCo intends to offer the testimony of Bruce Webster as an expert witness on its claim of misappropriation of trade secrets. LinkCo also intends to offer the testimony of Aron Levko on the damages that LinkCo suffered as a result of Fujitsu's alleged misdeeds. In turn, Fujitsu seeks to rebut this testimony on damages by offering its own expert, Larry Evans. The parties now move in limine to exclude each other's witnesses from testifying.

I. LEGAL STANDARD

In our adversarial system, the judge instructs the jury on what the law is, and the jury then applies this law to the facts as it has determined them. Given this division of duties, an expert's role in this process is necessarily limited. "[E]very circuit has explicitly held that experts may not invade the court's province by testifying on issues of law." In re Initial Pub. Offering Secs. Litig., 174 F.Supp.2d 61, 64 (S.D.N.Y.2001) (collecting cases). Furthermore, expert testimony is not "admissible when it addresses 'lay matters which a jury is capable of understanding and deciding without the expert's help.'" Grdinich v. Bradlees, 187 F.R.D. 77, 82 (S.D.N.Y.1999) (quoting Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 708 (2d Cir.1989)). [FN2]

FN2. See also Media Sport & Arts s.r.l. v. Kinney Shoe Corp., No. 95 Civ. 3901, 1999 WL 946354, at *3 (S.D.N.Y. Oct.19, 1999) (excluding expert testimony as outside expert's area of expertise and "unnecessary for

the edification of the jury" when the testimony of participants in events would be "far more appropriate").

Expert testimony is only admissible if it helps the jury understand facts that are outside common understanding. Under the Federal Rules of Evidence:

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. Fed.R.Evid. 702. In addition, "a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules [under the Federal Rules of Evidence]." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). For example, even if an expert's testimony is admissible under Rule 702, it must be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed.R.Evid. 403.

II. DISCUSSION

A. Bruce Webster

[1] Webster is "a Consultant to the Dispute Analysis & Investigations group at PricewaterhouseCoopers LLP." Initial Expert Report and Disclosure of Bruce F. Webster ("Webster Report") at 7. "[His] areas of expertise include software engineering, software architecture and design, object-oriented development, IT project management and failure, and IT intellectual property." *Id.* at 8. At LinkCo's request, Webster reviewed "documents, computer documents, computer files, deposition transcripts and exhibits, and other relevant sources of information." *Id.* at 4. LinkCo has offered Webster's expert testimony to help the jury understand various technical issues in the case. Webster's testimony is excluded for three reasons.

*2 *First*, a review of the report shows that it does not address technical questions that may be difficult for a juror to comprehend. Instead, it contains arguments and conclusory statements about questions of fact masquerading behind a veneer of technical language. A few examples should suffice. Webster purports to have reviewed computer files, but his report does not appear to contain any explanation or conclusions based on that review. 10/24/01 Bruce F. Webster Deposition ("Webster Dep.") at 72-79.

Likewise, Webster's report makes assertions about the technical qualifications of the Fujitsu developers to demonstrate that they were not capable of independently developing DisclosureVision, a product that LinkCo alleges incorporates its trade secrets. Instead of contrasting the developers' technical abilities with those required to develop DisclosureVision, Webster merely cites deposition testimony from the Fujitsu employees to support generalizations regarding their lack of experience. See Webster Report at 28- 38. Nowhere does Webster seek to explain complex technical issues. An expert who "does not reveal how he has made use of his extensive qualifications [and] fails to articulate industry customs or standards for consideration by the jury has failed to establish a basis for his opinion." Primavera Familienstiftung v. Askin, 130 F.Supp.2d 450, 529 (S.D.N.Y.2001) (citations omitted).

Second, Webster's report "is based on an independent examination of documents, computer files, deposition transcripts and exhibits and other relevant sources of information." Webster Report at 4. Yet, testimony by fact witnesses familiar with those documents would "be far more appropriate ... and renders [the expert witness'] secondhand knowledge unnecessary for the edification of the jury." Media Sport, 1999 WL 946354 at *3. Webster's report "does no more than counsel for [plaintiff] will do in argument, i.e. , propound a particular interpretation of [defendant]'s conduct. This is not justification for the admission of expert testimony." Primavera, 130 F.Supp.2d at 530.

Third, Webster's report is filled with conclusions that are the exclusive province of the jury to decide. For example, Webster begins his report by stating: "Based on my investigation, it is my expert opinion that Fujitsu, Ltd. ('Fujitsu') misappropriated trade secrets that originated at LinkCo, Inc. ('LinkCo')." [FN3] Webster Report at 4. "While an expert may provide an opinion to help a jury or a judge understand a particular fact, 'he may not give testimony stating ultimate legal conclusions based on those facts.'" In re Initial Pub. Offering Secs. Litig., 174 F.Supp.2d at 64 (quoting United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir.1991)). It is also inappropriate for Webster to opine on the credibility of evidence. It may (or may not) be true that "[s]worn testimony by key Fujitsu personnel as to who within Fujitsu actually originated these concepts, technologies, and strategies is

unclear and at times contradictory," but this is not a topic for expert testimony. Webster Report at 6.

FN3. See, also Webster Report at 5 ("I reached my conclusion that Fujitsu relied upon trade secrets, rather than having conceived its own intellectual property independently based on the following observations....").

B. Aron Levko

*3 [2] Levko is the "Leader of [PricewaterhouseCoopers'] Intellectual Asset Management Practice in the Americas Theatre." Initial Expert Report and Disclosure of Aron Levko ("Levko Report") at 1. He has "assisted in numerous licensing negotiations" and "analyzed in detail numerous issues including valuation of intellectual property, reasonable royalties and licensing practices." *Id.* LinkCo offers Levko's opinion about how to properly apply the "reasonable royalty" approach in calculating damages. Having reviewed Levko's report, I conclude that his testimony is inadmissible because (1) it addresses issues of law and because (2) it fails to assist the jury "to determine a fact in issue" that is outside common understanding.

[3] "Although the amount of recoverable damages also is a question of fact, the *measure of damages* upon which the factual computation is based is a question of law." *U.S. for Use of N. Maltese and Sons, Inc. v. Juno Const. Corp.*, 759 F.2d 253, 255 (2d Cir.1985) (emphasis added). LinkCo proposes a theory of "reasonable royalty" damages, "a common form of award in both trade secret and patent cases." *Vermont Microsystems, Inc. v. Autodesk, Inc.*, 138 F.3d 449, 450 (2d Cir.1998). "A reasonable royalty award attempts to measure a hypothetically agreed value of what the defendant wrongfully obtained from the plaintiff. By means of a 'suppositious meeting' between the parties, the court calculates what the parties would have agreed to as a fair licensing price at the time that the misappropriation occurred." *Vermont Microsystems, Inc. v. Autodesk, Inc.*, 88 F.3d 142, 151 (2d Cir.1996). [FN4]

FN4. "In fashioning a reasonable royalty, 'most courts adjust the measure of damages to accord with the commercial setting of the injury, the likely future consequences of the misappropriation, and the nature and

extent of the use the defendant put the trade secret to after misappropriation." ' *Vermont Microsystems*, 88 F.3d at 151 (quoting *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 538 (5th Cir.1974)).

Levko presumes that the Court will charge the reasonable royalty theory of damages and addresses each element of such damages in his report. In essence, Levko anticipates the Court's instructions on matters of law. Regardless of whether he correctly anticipates the Court's instructions, Levko gives impermissible opinions on issues of law. [FN5]

FN5. For examples of conclusions in Levko's report that instruct jurors on how to decide an issue of law, see Levko Report at 10 (characterizing the measure of damages under the reasonable royalty as "lump-sum fair market value"); Levko Report at 11 (stating that a "hypothetical negotiation assumes that LinkCo and Fujitsu ... each [had] reasonable knowledge of all relevant facts.").

Levko's testimony is also inadmissible because he fails to assist the jury "to determine a fact in issue" that is outside common understanding. In particular, Levko's opinions are inadmissible because they (1) address evidence and issues that are within the understanding of the jury, or (2) address issues requiring specialized knowledge which may assist the jury, but are based on unsubstantiated references to Levko's experience, "without benefit of citation to research, studies, or other generally

accepted support for expert testimony." *Primavera*, 130 F.Supp.2d at 529.

Two examples demonstrate the expert's proffer of opinions in areas where the jury needs no expert assistance. Levko concludes that "Fujitsu recognized the importance of entering the electronic disclosure market" based on his review of the deposition testimony and a timeline he constructed by reviewing documents produced during discovery. See Levko Report at 4-7. Levko also concludes that Fujitsu would have reaped significant profits by being the first in the Japanese market to use the technology found in LinkCo's alleged trade secrets. But this conclusion is only supported by the testimony of Fujitsu executives. See *id.* at 17. [FN6]

FN6. One further example addressing an issue clearly within the common understanding of jurors is Levko's recommendation of a term for a hypothetical license agreement. His recommended term is based solely on documents in the record. See Levko Report at 11.

Of course, counsel may present the testimony of Fujitsu executives as well as the documents Levko reviewed to the jury, which will then determine how

much weight, if any, to give them.

*4 When Levko addresses issues of fact where his specialized knowledge could help the jury, he supports his opinions with references to his "experience" but without explaining how he reached his conclusions. For instance, Levko supports his conclusion that "the 25% profit split, as a starting point for negotiations ... should be increased to 30%" for calculating LinkCo's damages with "[his] prior experience in intellectual property matters," but neglects to explain how his experience supports his conclusion. *Id.* at 22. Likewise, Levko asserts that using the average annual prime rates to calculate LinkCo's lost opportunity costs is "a very conservative view," but offers no justification for this conclusion. *Id.* at 26. [FN7] In short, Levko's report does not employ actual licensing agreements for comparison, articles, studies or anecdotal evidence to support or explain his conclusions. "While it is permissible for [an expert] to base his opinion on his own experience, he must do more than aver conclusorily that his experience led to his opinion." *Primavera*, 130 F.Supp.2d at 530.

FN7. For further examples of instances where Levko's specialized knowledge could help the jury if he were to explain how he reached his conclusions, see Levko Report at 13 (multiplying expected profit rate by

25%, "an accepted profit split method," without explaining the method); *id.* at 16 (concluding without explanation that the hypothetical agreement would be for a co-exclusive agreement).

The Supreme Court has explained that the relaxation of the common law requirement of firsthand knowledge for expert witnesses is "premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert*, 509 U.S. at 592 (citations omitted). Relevant experience can qualify a witness to testify but:

[i]f the witness is relying solely or primarily on experience, then [he] must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it."

Fed.R.Evid. 702 Advisory Committee's Note.

[4] Thus, a court cannot permit experts to "offer credentials rather than analysis." *Primavera*, 130 F.Supp.2d at 529 (quoting *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir.1997) (citations omitted)). If experts are permitted to testify on an issue of fact, they must provide some explanation for their conclusions, rather than referring generally to their experience.

Without good explanations, courts cannot assess the reliability of any conclusion drawn by an expert, even if he possesses relevant experience. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). Levko has not supported his opinion with references to his experience and explained how the specifics of that experience led to his conclusions.

C. Larry Evans

Fujitsu has offered Larry Evans, a technology licensing expert, to rebut Levko's testimony. Evans' testimony is inadmissible for many of the same reasons that require the exclusion of Levko's testimony. [FN8]

[FN8]. For an example of an opinion on an issue of law, see Evans Report ¶ 36 (arguing that the jury should not be able to consider certain information).

For an example of an opinion within the common understanding of jurors, see Evans Report ¶¶ 25, 30, 35 (reciting facts Evans believes Levko overlooked in reaching his conclusions).

For an example of an opinion requiring specialized knowledge which may assist the jury, but based on unsubstantiated references to Evans's experience, see Evans Report ¶ 32 (discussing a proposed royalty rate and a

cap on that royalty based on the commercial circumstances of the parties without discussing standard industry practice that might justify his conclusion).

D. Further Proceedings

*5 The parties should brief the issue of the appropriate measure of damages prior to trial. In those submissions, the parties may rely on the reports of their respective experts or seek a hearing at which their experts may testify. See *In re Initial Pub. Offering Secs. Litig.*, 174 F.Supp.2d at 69 ("[Experts] are free to consult with the moving defendants, sign their brief, or both. They may attend the conferences and argue on their behalf."). At the end of the day, however, this Court must decide how to instruct the jury on the measure of damages.

When the parties submit briefs on the appropriate measure of damages, they should carefully distinguish those elements of the damages calculation that are questions of law from factual issues to be decided by the jury. Moreover, in their expert reports, they must distinguish those factual issues that are within the understanding of the jury from issues about which "specialized knowledge will assist the trier of fact." *Fed.R.Evid. 702*. An attorney can explain ordinary factual issues; an expert witness should be used to help the jury with issues that go beyond common understanding.

For example, on the issue of damages, expert knowledge of *industry practice* may prove indispensable to the jury in deciding a number of questions of fact necessary to calculating damages, including (1) whether a company in Fujitsu's position would have agreed to an upfront, lump-sum payment for LinkCo's technology; (2) the relevance of LinkCo's financial situation to these negotiations; (3) the duration of a technology license negotiated under these circumstances; (4) the appropriate royalty rate to apply to profits; (5) the future profit margins; and (6) the future revenue growth rates. Expert testimony on these issues may be helpful to the jury, but experts must provide this help based on their expertise and analysis, not on their qualifications and review of the record.

III. CONCLUSION

For the reasons discussed above, defendant's motion to exclude the expert testimony of Bruce Webster is granted. The parties' motions to exclude the testimony of each other's damages experts, in their current form, are granted.

Both parties are ordered to submit briefs on how the Court should instruct the jury on the measure of damages. Plaintiff's brief is due on July 29, 2002; defendant's brief in response is due August 9, 2002; and plaintiff's reply brief is due August 16, 2002.

The parties are further ordered to revise Levko and Evans's expert reports in accordance with this opinion and the Court's decision on the measure of damages, and to resubmit those reports two weeks after this Court has issued its decision on the measure of damages.

S.D.N.Y., 2002.

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Motions, Pleadings and Filings (Back to top)

- [2002 WL 32595405](#) (Trial Motion, Memorandum and Affidavit) Reply Memorandum in Support of Fujitsu's Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(a) (Oct. 23, 2002)
- [2002 WL 32595718](#) (Trial Motion, Memorandum and Affidavit) LinkCo's Memorandum of Law in Opposition to Fujitsu's Motion for Judgment as a Matter of Law (Oct. 22, 2002)
- [2002 WL 32595714](#) (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Fujitsu's Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(a) (Oct. 21, 2002)
- [2002 WL 32595711](#) (Trial Motion, Memorandum and Affidavit) Plaintiff Linkco, Inc's Trial Memorandum of Law (Sep. 02, 2002)
- [2002 WL 32595709](#) (Trial Motion, Memorandum and Affidavit) LinkCo's Reply Memorandum of Law on the Appropriate Measure of Damages for Trade Secret Misappropriation and Other Claims in This Case (Aug. 16, 2002)
- [2002 WL 32595707](#) (Trial Motion, Memorandum and Affidavit) Linkco's Memorandum of Law on the Appropriate Measure of Damages for Trade Secret Misappropriation and Other Claims in this Case (Jul. 29, 2002)
- [2002 WL 32595703](#) (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Support of Motion in Limine to Exclude the Testimony of Larry W. Evans as a Damages Expert or, in the Alternative, Limit Defendant to One Damages Expert (May. 14, 2002)
- [2002 WL 32595705](#) (Trial Motion, Memorandum and Affidavit) Plaintiff's Reply Memorandum of Law in Support of Motion in Limine to Exclude the Testimony of Larry W. Evans as a Damages Expert or, in the Alternative, Limit Defendant to One Damages Expert (May. 14, 2002)
- [2002 WL 32595697](#) (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Defendant's Motion in Limine to Exclude Expert Testimony of Bruce Webster (May. 13, 2002)
- [2002 WL 32595700](#) (Trial Motion, Memorandum and Affidavit) Reply Memorandum in Support of Defendant's Motion in Limine to Exclude Expert Testimony of Bruce Webster (May. 13, 2002)
- [2002 WL 32595702](#) (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Exclude Expert Testimony of Aron Levko (May. 13, 2002)
- [2002 WL 32595692](#) (Trial Motion, Memorandum and Affidavit) Reply Memorandum in Support of Motion to Strike Plaintiff's Request for Punitive Damages (May. 03, 2002)
- [2002 WL 32595695](#) (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Strike LinkCo's Claim for Punitive Damages (May 2002)
- [2002 WL 32595701](#) (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Exclude Expert Testimony of Bruce Webster (May 2002)
- [2001 WL 34611614](#) (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Defendant's Motion for Partial Summary Judgment (Dec. 17, 2001)
- [2001 WL 34611615](#) (Trial Motion, Memorandum and Affidavit) Reply Memorandum in Support of Defendant's Motion for Partial Summary Judgment (Dec. 17, 2001)
- [2001 WL 34611616](#) (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Opposition to Motion for Partial Summary Judgment (Dec. 17, 2001)
- [1:00CV07242](#) (Docket) (Sep. 25, 2000)

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