



**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

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO
PRECLUDE EXPERT TESTIMONY OF DR. ARNOLD EPSTEIN**
(Public Version)

On November 23, 2004, Complaint Counsel served on Respondents the rebuttal expert report of Dr. Arnold Epstein, a nationally-known expert in the field of health care quality of care. Dr. Epstein addresses several questions placed directly in issue by the analysis of Respondents' expert, Dr. Mark R. Chassin, regarding the changes in the health care delivery system at Respondents' hospitals after the merger challenged in this case. Because Dr. Epstein effectively rebuts Dr. Chassin's attempt to rationalize Respondents' post-merger price increases, Respondents have sought to preclude Dr. Epstein from testifying at trial. Alternatively, in an unprecedented move, Respondents ask the Court for leave to file a sur-rebuttal expert report, which would open the Court to a mountain of expert testimony and the likely delay of trial. Respondents' motion to strike should be denied.

BACKGROUND

In this case Complaint Counsel challenge the January 2000 merger of Evanston Northwestern Healthcare Corporation and Highland Park Hospital, which are located in the Evanston, Illinois, area. In their case in chief, Complaint Counsel will demonstrate that, after the merger, Respondents significantly increased their prices for acute care hospital services after the merger and that this price increase was attributable to the merger. As part of its case, Complaint Counsel will demonstrate that the price increases are not properly attributable to other causes, such as the changes in the services that the hospitals rendered after the merger.

Respondents have attempted to rationalize their price increases by attributing it to the changes in the health care services that were rendered by Respondents' hospitals. Therefore, Complaint Counsel will call as an expert witness Dr. Patrick S. Romano, a Professor of Medicine and Pediatrics at the University of California, Davis, School of Medicine in Sacramento as an expert witness. In turn, Respondents have indicated that they will call Dr. Mark R. Chassin, to discuss the purported changes in the services rendered at Respondents' hospitals that purportedly justified the massive post-merger price increases that Respondents imposed on health care consumers.

In his own expert report, Dr. Chassin attacked the data and methodology used by Dr. Romano in his expert report.¹ Dr. Chassin will muddle the record with unsubstantiated conclusions based on a subjective and biased methodology.² Exercising their discretion "to rebut

¹ See Expert Report of Mark R. Chassin, M.D., M.P.P., M.P.H. at ¶¶ 34-48 (criticizing the flaws in administrative data used in Dr. Romano's expert report).

² Complaint Counsel's Motion In Limine to Exclude Certain Testimony of Dr. Mark Chassin (Dec. 17, 2004) (Ex. 1).

evidence adduced on behalf of respondents,”³ Complaint Counsel called Dr. Arnold Epstein as a rebuttal witness.

Dr. Epstein will provide objective and industry-wide accepted observations on the methodology Dr. Chassin uses both to attack Dr. Romano’s proffered testimony and to justify his own conclusions on the effect ENH’s anticompetitive acquisition of HPH had on HPH’s quality of care. For example, Dr. Epstein will testify that “-----
-----“ which is “-----” whereas Dr. Chassin relied upon “-----
-----” and a “-----” which did not comply with methodological criteria accepted in the field.”⁴ Dr. Epstein will also provide some guidance on nationwide initiatives to improve hospital quality of care in the health care industry during the time of the merger, and directly rebut Dr. Chassin’s criticism of the use of so called “administrative data” (e.g. data collected from ENH by various monitoring agencies).

ENH also seeks, in the alternative, leave to submit a sur-rebuttal report of Dr. Kenneth Kizer to simply appraise the methodologies and findings of the competing experts. This is clearly inappropriate. First, the Court’s Scheduling Order of March 24, 2004, as amended, clearly anticipated that Respondents’ experts would have “one-bite-of-the-apple.” Moreover, Respondents have long been on notice that Complaint counsel planned to call both Dr. Romano and Dr. Epstein and elected to forego any testimony from Dr. Kizer.

³ *In re Foster-Milburn Co. and Street & Finney*, 51 F.T.C. 369, 371 (1954). See also *United States v. Tejada*, 956 F.2d 1256, 1266 (2d Cir. 1992); *United States v. Neary*, 733 F.2d 210, 220 (2d Cir. 1984)

⁴ Expert Report of Arnold M. Epstein, M.D., at p. 8.

ARGUMENT

I. Dr. Epstein's Proffered Expert Testimony Should not be Excluded as Cumulative or Duplicative.

At the outset, it is important to highlight the expertise that Dr. Epstein can bring to this case to assist the Court in its evaluation of the parties' arguments. Dr. Epstein is one of the nation's preeminent experts in the area of health care quality. Dr. Epstein is an academic chair at Harvard University's School of Public Health. As an editor for nationally respected and authoritative medical journals, such as the *New England Journal of Medicine*, Dr. Epstein regularly evaluates the methodologies used in medical papers, and approve them for publication. Dr. Epstein has participated in numerous studies assessing hospital quality of care, and even comparing quality of care among differing hospitals.⁵

Here, Dr. Epstein's analysis will be concise, useful, and is directly placed in issue by Dr. Chassin's work. For example, Dr. Chassin conducted what is known in the industry as a "-----" analysis. Dr. Epstein will explain the accepted methodology for such analysis and evaluate Dr. Chassin's noncompliance therewith.⁶

Similarly, Dr. Chassin criticizes Dr. Romano's use of "-----" data, and Dr. Epstein will explain why it is appropriate in this case.⁷ Dr. Epstein will also discuss the quality improvements that have taken place in the health care industry as a whole during the relevant

⁵ Curriculum Vitae for Dr. Arnold M. Epstein, M.D. (Ex. 2).

⁶ Report, *supra* note 4 at p. 6.

⁷ *Id.* at p. 7.

period, which places the quality claims in context.⁸ Complaint counsel submits that with expert testimony in a complex area, the Court will be aided by the testimony of one who is in the business of evaluating health care research for publication in the *Harvard Journal of Public Health*.

The law is clear that the mere number of expert witnesses does not mean that the witnesses will be unduly cumulative and thus inadmissible. See *Colon v. BIC USA, Inc.*, 199 F. Supp. 2d 53 (S.D.N.Y. 2001); *Green Const. Co., v. Kansas Power & Light Co.*, 1 F.3d 1005, 1014 (10th Cir. 1993) (admitting the final of three experts “who was offered to tie the evidence together”). While experts reached the same conclusions on a defect in the product, they were not cumulative because they used different tests and methodologies to support their conclusions.⁹

Similarly, in *Industrial Hard Chrome v. Hetran, Inc.*, 92 F. Supp. 2d 786 (N.D. Ill. 2000), multiple experts were permitted to testify on “separate issues which plaintiffs themselves raised.” Here, both Dr. Romano and Dr. Epstein will testify regarding the defects in Dr. Chassin’s testimony about the quality of care at Respondents’ hospitals, both pre-merger and post-merger. However, while Dr. Romano’s testimony will demonstrate that the purported changes at Respondents’ own hospitals did not justify the significant post-merger price increase, Dr. Epstein’s testimony will compare the operations of Respondents’ hospitals to the industry as a whole. Furthermore, unlike Dr. Romano, Dr. Epstein will comment on the trends in hospital

⁸ *Id.*

⁹ See also *Coles v. Jenkins*, 34 F. Supp. 2d 381 (W.D. Va. 1998). In *Coles v. Jenkins*, the plaintiffs sought to exclude the defendant’s three expert witnesses on the basis that it was unduly cumulative. Since each of the experts has a “slightly different area of expertise”, they would be allowed to testify as long as their testimony is not duplicative. *Id.*

quality to show that some of the improvements at HPH were not due solely to the merger. Any duplication can be addressed at trial with cross-examination.¹⁰

ENH relies on cases that are clearly distinguishable from this matter. In *Kendra Oil & Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240 (7th Cir. 1989), the appellant's expert witness in a mining case would offer similar testimony from the same viewpoint as other witnesses.¹¹ Here, however, Dr. Epstein will not only present testimony from a different perspective, but will testify about different issues. Again, Dr. Romano will provide objective analysis on the quality of care provided at HPH and ENH both before the merger and after, and the effect of the merger; Dr. Epstein will comment on the overall national trends in hospital care and the different methodologies Dr. Chassin and Dr. Romano used.¹²

ENH also cited to dicta in *Sunstar, Inc. v. Alberto-Culver Co., Inc.*, 2004 WL 1899927, at *25 (N.D. Ill. 2004), that correctly observes that “[m]ultiple expert witnesses expressing the same opinions on a subject is a waste of time and needlessly cumulative.” In *Sunstar*, however, the court admitted both experts on Japanese law because they would be testifying on different subjects of Japanese law. Likewise, Dr. Epstein's testimony here will assist the Court in comparing the different methodologies in assessing quality and overall trends in quality, two

¹⁰ See *Robinson v. Thomas*, 1995 U.S. Dist. LEXIS 15078 (N.D. Ill. 1995); *Pacific Employers Ins. Co. v. P.B. Hoidale Co., Inc.*, 782 F. Supp. 564 (D. Kan. 1992).

¹¹ See 879 F.2d at 243 (excluded witness that would only offer testimony from the perspective of a geologist, similar to other geologist witnesses).

¹² Thus, Respondents' reliance on *Leefe v. Air Logistics*, 876 F. 2d 409, 411 (5th Cir. 1989), is similarly misplaced: there, the court excluded two physician expert witnesses who were going to testify on the same exact issue, the plaintiff's disability and future illness due to injury, with no clear compartmentalization of issues or differing perspectives.

issues that will supplement Dr. Romano's analysis.

II. Dr. Epstein's Testimony is Proper Expert Testimony that will Assist the Court in Understanding the Evidence and Determining the Facts in Issue

Respondents' also challenge Dr. Epstein's testimony on a variety of other grounds, none of which are applicable here. Dr. Epstein's testimony fits the textbook definition of admissible expert testimony.¹³ His testimony is based on sufficient facts and data; it is based on reliable principles and methods that are accepted in the field. And he applies those principles and methods to the case.

Again, the cases relied on by Respondents are distinguishable from this matter. In *Andrews v. Metro N. Commuter R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989), the stricken "expert" testimony in a case involving an individual struck by an oncoming train, could be summed up as stating that the lights on an oncoming train are blinding. In this matter, we are dealing with complicated issues concerning the assessment of hospital quality of care and the competing methodologies in doing so.

In *Kumho v. Carmichael*, 526 US 137, 150-151 (1999), the court excluded an expert's testimony because his methodology was not accepted by other experts in the field, and there were no references to any support for his approach. That is not the case here. In fact, Dr. Epstein's criticisms of Dr. Chassin's assessment of quality are supported by reputable experts and organizations of authority in the health care field, as he points out in his report.¹⁴

¹³ 16 C.F.R. § 3.43 (b)(1); Fed. R. Evid. 702.

¹⁴ The other cases cited by ENH are also inapposite to the facts in this matter. The proffered testimony in all of those cases was not supported by an objective methodology widely supported in the relevant field. See, e.g., *O'Connor v. Commonwealth Edison*, 13 F.3d 1090, 1106 (7th Cir. 1994) (finding that the proposed expert's testimony was not supported by the

Respondents also rely on a number of decisions by the Court in earlier administrative proceedings before the Commission.¹⁵ In the *Rambus* motion, Complaint counsel was attempting to exclude an expert who could not identify any independent or authoritative source of a data to support his conclusions. Part of Dr. Epstein's function will be to enlighten the trier of fact in this matter as to the authoritative and widely recognized data sources used in the complicated field of measuring health care quality. In the *Rambus* motion, Complaint counsel also sought to exclude a witness that did nothing more but review the facts in evidence in that matter, such as deposition testimony. As detailed in his expert report, Dr. Epstein's proposed testimony reflects authoritative research in the field, independent of this litigation, and application of that research to this matter.¹⁶

sources he cited); *Bourelle v. Crown Equip. Corp.*, 220 F.3d 532, 539 (7th Cir. 2000) (excluding expert's alternative design which wasn't supported by any industry experts or any testing performed by the expert); *Clark v. Takota Corp.*, 192 F.3d 750, 759 (7th Cir. 1999) (excluding an expert witness's testimony and affidavit because it offered ultimate conclusions without any stated methodology or any support from other experts in the field); *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997) (former banker providing expert testimony did not substantiate any of his opinions with data or support from published literature). Here, in their motion, Respondents do not contend that Dr. Epstein's testimony is not supported by an objective methodology.

¹⁵ See, e.g., *In re Rambus Inc.*, Dkt. 9302, Complaint Counsel's Mem. in Support of Motion In Limine to Preclude Report and Testimony of William Kefauver, 2003 WL 21277343 (Mar. 26, 2003). It should be noted, however, that ENH included this decision, as well as other FTC decisions and motions, to support its view that the Commission has viewed the Federal Rules of Evidence as persuasive authority.

¹⁶ See also *In re North Texas Specialty Physicians*, Dkt. 9312, Complaint Counsel's Mem. in Support of Motion In Limine to Preclude Report and Testimony of Gail R. Wilensky (Mar. 31, 2004)(calling for the exclusion of testimony from expert witness that has not provided any authoritative support or analysis to justify her opinion).

III. Dr. Epstein Does Not Attempt to Usurp the Role of the Fact-Finder

ENH also attacks Dr. Epstein's testimony on the methodologies used by Drs. Romano and Chassin as addressing lay matters, improper for an expert. Measuring hospital quality of care is a complicated a field of medical science that has been the subject of much research and study. Unfortunately, ENH's expert on this issue, Dr. Chassin, has perhaps muddied the waters and added confusion by using a subjective methodology that cannot be verified and is not supported by authoritative sources. Part of Dr. Epstein's testimony will assist the Court in determining what is the appropriate methodology to measure ENH's and HPH's quality of care before and after the merger, and what impact the merger had on quality of care.

ENH's use of *SEC v. Lipson*, 46 F. Supp. 2d 758 (N.D. Ill. 1999), in making this argument is ironic considering that the weaknesses in the excluded expert's proffered testimony in that case are somewhat analogous to those of Dr. Chassin. In *Lipson*, the excluded expert's conclusions were based on subjective interviews he made of interested persons' impressions of financial reports. As Dr. Epstein points out succinctly, Dr. Chassin's similar use of subjective interviewing is highly unreliable, and cannot back up his rather strong conclusions. In *Lincko, Inc. v. Fujitsu Inc.*, No 00 Civ. 7242, 2002 WL 1585551 (S.D.N.Y. July 16, 2002), one of the excluded experts only offered opinions on issues of law. Dr. Epstein does not do that in this case; his opinions are limited to non-legal discussions of hospital quality of care and the appropriate methodologies in assessing quality of care.

Another inapposite case ENH relies on in its pleading is *Tunis Bros. Co., Inc., v. Ford Motor Co.*, 124 F.R.D. 95 (E.D. Pa. 1989). In that case, the court's main reasoning for excluding the plaintiff's economics expert in the damages phase of an antitrust case was the prejudice

caused to the defendant by the plaintiff's late identification of the expert witness and "offer of proof describing the subject matter of his testimony."¹⁷ Where the court did find the proposed expert testimony to be inappropriate because of its cumulative nature, the witness was going to offer not only the same conclusions to the jury presented by an accountant expert witness at the liability phase, but the same calculations from the perspective as an economist. Dr. Epstein does not propose to present the same data on each of the specific areas of quality improvement at HPH that Dr. Chassin has identified in his expert report; he will leave that to Dr. Romano. Instead, Dr. Epstein will briefly respond to Dr. Chassin's criticism of the underlying methodology and data sources used by Dr. Romano, as well as comment on general trends in hospital quality of care.

IV. ENH Should not be Allowed Leave to File a Sur-Rebuttal Report

ENH's alternative request exposes their real motive of their pleading: They recognize the defects in Dr. Chassin's report and, therefore, they seek to submit a sur-rebuttal report from Dr. Kizer. But Respondents had their opportunity to address the expert testimony proffered by Complaint counsel. Respondents elected to do solely through the testimony of Dr. Chassin, knowing full well that Complaint counsel had served notice of their intent to call both doctors Drs. Romano and Epstein. To permit Respondents, one month before trial, to serve a sur-rebuttal would upset the clearly contemplated "rules of the game," divert the parties attention from their trial preparation and reward Respondents for their failure to follow the contemplated schedule.

The solution to a supposedly cumulative expert is hardly adding a fourth expert. Dr. Chassin is fully capable of addressing the key issues – his own and Dr. Romano's methodology,

¹⁷ 124 F.R.D. at 96 (identifying the expert witness and submitting his proffer more than five months after the deadline set in a pre-trial order and after opening arguments in the damages phase of the trial).

and the "administrative data" he criticizes. Moreover, ENH can challenge Dr. Epstein through cross-examination. A last minute fourth expert is unnecessary.

CONCLUSION

Complaint counsel requests, for the reasons discussed above, ENH's motion should be denied in its entirety.

Respectfully submitted,



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Counsel Supporting the Complaint

Dated: January 7, 2005

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing documents was hand delivered to

The Honorable Stephen J. McGuire
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**EXHIBIT 1
(REDACTED)**

**EXHIBIT 2
(REDACTED)**

