UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
Evanston Northwestern Healthcare Corporation, a corporation, and	)	Docket No. 9315
ENH Medical Group, Inc., a corporation.	)	

COMPLAINT COUNSEL'S MOTION IN LIMINE TO EXCLUDE CERTAIN TESTIMONY OF DR. MARK CHASSIN

Pursuant to the Federal Rules of Evidence ("F.R.E.") 702 and 703, Complaint Counsel moves for an order excluding certain portions of Dr. Mark Chassin's Expert Report. Specifically, Complain Counsel moves to exclude paragraphs 8-12, 13 53-61, 64-95, 98-123, 125-32, 140-47, 153-55, 178-82, 185, 186-94, 196-202, 204, 208-210, 211-17, 220-24, 226, 228-35, 236-40, 241-43, 244-47, 248-54, 264-66 of Dr. Chassin's Report. Also, Complaint Counsel moves for an order requiring the Parties to meet and confer to narrowly tailor any testimony from Dr. Chassin to F.R.E 702 and 703 principles.

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FEDERAL TRADE COMMISSION

In the Matter of	)	
Evanston Northwestern Healthcare Corporation, a corporation, and	)	Docket No. 9315
ENH Medical Group, Inc., a corporation.	)	**PUBLIC VERSION**

MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO EXCLUDE CERTAIN TESTIMONY OF DR. MARK CHASSIN

Pursuant to the Federal Rules of Evidence ("F.R.E.") 702 and 703, Complaint Counsel seeks to preclude Respondents' expert, Dr. Chassin, from serving as an evidentiary conduit for extensive hearsay statements. Much of Dr. Chassin's 124 page report consists of a factual narrative of hearsay information as to which Dr. Chassin has no personal knowledge. And rather than conduct an analysis of those facts using any type of peer reviewed objective methodology, Dr. Chassin simply relies on this factual narration as the output, as well as the source, of his work.

Federal Rule of Evidence ("F.R.E.") 702, as explicated by the familiar *Daubert* line of cases, requires that, to be admissible, expert testimony must be the product of reliable principles and methods (It must also be based upon sufficient facts or data and apply the principles and methods reliably to those facts). Here, there simply is no such method; the analysis is merely the "ipse dixit of the expert." *Kumho Tire Co., Ltd., v. CarMichael, etc.,* 526 U.S. 137, 141 (1999).

For similar reasons, much of Dr. Chassin's report violates F.R.E. 703. That rule provides that, regardless of the expert's methodology, admissibility of hearsay evidence purporting to support expert testimony is limited. The probative value the of the hearsay testimony must substantially outweigh the danger that the Court will use the hearsay for its truth. Here, there is little to no bona fide expert opinion to begin with, so there is no legitimate need to admit the hearsay testimony to support the opinion.

By this motion, therefore, Complaint Counsel respectfully moves the Court for an order that excludes delineated portions of Dr. Mark Chassin's testimony on the grounds described herein. Using that order as guidance, the parties should then discuss the specific additional provisions of the report to be excluded, with remaining disputes to be resolved during Dr. Chassin's testimony at trial.

BACKGROUND

In January 2000, Evanston Northwestern Healthcare Corporation ("ENH") merged with Highland Park Hospital ("HPH"). As a result, the merged corporation immediately imposed price increases of up to 190 percent on insurers. Based on these allegations and others set forth in the Complaint, Counts I, II, and III allege that the merger of the two companies violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Pursuant to Your Honor's Third Revised Scheduling Order, Respondents submitted their experts' reports to Complaint Counsel on November 2, 2004. As part of its submission, Respondents submitted the report of Dr. Mark Chassin, its expert on "quality of care." In his report, Dr. Chassin strongly criticizes the pre merger quality of care at HPH and claims that

extensive quality problems at HPH were fixed as a result of the merger.

Dr. Chassin's "analysis" amounts to a lengthy recitation of 1) the pre merger situation at HPH, followed by 2) some action taken by ENH to "remedy" the problem. Paragraph 55 of Dr. Chassin's report purports to summarize some of the pre merger problems:

"[redacted]" (The Expert Report of Dr. Chassin ("Chassin Report") ¶ 55 at 27.) (Emphasis added)

Dr. Chassin then goes on to "analyze" the effect of the merger on each of these alleged problems, but his "analysis," like his initial statement of the problem, consists mainly of a mere factual recitation. For example, he claims that the "[redacted]" (Chassin Report ¶ 79 at 37-38.) The "[redacted]" (Chassin Report ¶ 99 at 37-38.)

In many, but far from all, instances the hearsay facts which form both the input and result of Dr. Chassin's analysis duplicate facts to be offered directly at trial. For example, one of the "[redacted]" Heidi Krasner, (who in fact was hired pre-merger) appears on respondent's final witness list and presumably will speak for herself at trial. Additionally, roughly 12 or so other witnesses are described as testifying on quality of care issues.

In other, quite striking, instances Dr. Chassin does not duplicate trial testimony but forms the sole – hearsay – source for evidence that is readily available to Respondents. For example, the employees responsible for quality programs at ENH pre-merger, Peggy King and Lois

Huminiak, have been removed from the latest version of respondent's witness list. And most striking of all, the personnel best able to articulate firsthand pre merger quality problems at HPH – the HPH quality assurance staff – have never appeared on respondent's witness lists.

Respondents should not be permitted to use the testimony of Dr. Chassin to introduce hearsay evidence. Because his analysis applied little to no verifiable methodology, it adds nothing to the firsthand fact testimony and marshalling of the facts by counsel in briefs and argument. And if Dr. Chassin – rather than witnesses with firsthand knowledge – is allowed to become the sole source of fact testimony, Complaint Counsel will have no opportunity to cross-examine the witnesses excluded as a result. Therefore, Complaint Counsel respectfully moves the Court for an order precluding Dr. Chassin from testifying about facts or data he learned during interviews with ENH employees and associated physicians.

ARGUMENT

I. Dr. Chassin's Report and His Anticipated Testimony Fail to Meet the Expert Opinion Standards Set Forth in F.R.E. 702 and Related Legal Doctrine.

In deciding the admissibility of expert testimony, courts have a "gatekeeping obligation" to ensure expert testimony is reliable. *Kumho Tire Co., Ltd., v. CarMichael, etc.*, 526 U.S. 137, 141 (1999). F.R.E. 702 requires that such testimony satisfy three separate relevance and reliability standards: (1) expert testimony must be based upon sufficient facts or data, (2) expert testimony must be the product of reliable principles and methods, and (3) the expert witness must have applied the principles and methods reliably to the facts of the case. (F.R.E. 702.)

Here it is the second prong that is most fundamentally at issue.[1] As explained in the notes

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[1] Complaint Counsel disputes that Dr. Chassin in fact applied any "principles and methods" to the facts – to the contrary, he got the facts quite wrong. But that is a matter for trial,

to F.R.E. 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-95 (1993) set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are:

> (1) whether the experts technique or theory can be or has been tested – that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. (F.R.E. 702 Advisory Committee Notes.)

Additionally, Congress noted several other factors that may bear on the reliability and admissibility of expert testimony, including:

> - Whether the expert's opinion grew "naturally and directly out of research" that an expert "conducted independent of the litigation, or whether [he has] developed [his] opinions expressly for purposes of testifying," (F.R.E. 702 Advisory Committee Notes (*quoting Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)), and
>
> - Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion," (*Id. citing General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).[2]

Dr. Chassin's report and anticipated testimony at trial fall woefully short of those standards. Instead of developing an opinion based on tested scientific methodology or even

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not a pre-trial motion *in limine*.

[2] These *Daubert* factors are not limited by the Federal Rules or relevant case law to jury trials; these standards also apply in bench trials. *See, e.g., Bradley v. Brown,* 852 F. Supp. 690, 700 (N.D. Ind. 1994) ("The court has found no authority that suggests this gate-keeping function [under *Daubert*] is inapposite at a bench-trial and, indeed, the requirement that a scientific expert base his or her testimony upon scientific knowledge is equally *apropos* regardless of the identify of the fact finder").

factual analysis, Dr. Chassin merely relates hearsay information to form his "expert opinions." In fact, Dr. Chassin virtually repeats the information he learned during interviews with ENH employees and associated physicians and offers limited expert analysis.

For example, Dr. Chassin claims that, "[redacted]" (Chassin Report ¶¶ 187, 188 at 91, 92.) And, as a result of the merger with ENH, Dr. Chassin asserts that physician staffing increased and quality of care improved at HPH. (Chassin Report ¶ 193 at 92-93.). If in fact the merger improved physician staffing, respondent need only bring in a fact witness to explain staffing pre merger, and another (or the same) to explain it post merger. It does us no good to funnel that information through the mouthpiece of Dr. Chassin.

To be sure, it might be useful for Dr. Chassin to apply his expertise to explain the levels of staffing accepted in the industry, or how improved staffing might actually affect patient outcomes, but he explicitly declines to do so. Indeed, Dr. Chassin admits that he is "[redacted]" (Chassin Report ¶ 193 at 94.).

Complaint Counsel's expert on quality, Dr. Patrick Romano, confirms that Dr. Chassin's approach relies primarily on descriptions of purported improvements in the quality of care at HPH. (The Expert Rebuttal Report of Dr. Patrick S. Romano, "Romano Rebuttal Report" ¶ 6 at 2.) While this approach has gained wide acceptance, certain parameters must be followed to ensure the reliability and validity of such work. (Romano Rebuttal Report ¶¶ 6-7, 2-3.) According to Dr. Romano's study, Dr. Chassin's work falls short. (Romano Rebuttal Report ¶¶

7-8, 3.) This is yet another example of how Dr. Chassin fails to use any proven scientific methodology to justify his conclusions.

Because Dr. Chassin does not follow the clear standards set forth in F.R.E. 702 and its complimentary case law, portions of Dr. Chassin 's report and anticipated testimony at trial should be precluded from evidence.

II. Dr. Chassin Should Be Precluded from Testifying to Statements Made Known to Him Through Interviews with ENH Employees and Associated Physicians.

The wholly separate provisions of F.R.E. 703 lead to a very similar result. Even if the Court were to find some kernel of an expert analysis contained in Dr. Chassin's factual recitation, Rule 703 clearly provides that an expert may not merely relate hearsay to the finder of fact. *See Paddack v. Christensen,* 745 F.2d 1254, 1262 (9th Cir. 1984); *See U.S. v. Lundy,* 809 F.2d 392, 395 (7th Cir. 1987) (A court must insure that an expert witness is testifying as an expert and not merely a conduit through which hearsay is brought before the jury); and *See Wantanabe Realty Corp., v. City of New York,* 2004 WL 188088, 2 (S.D.N.Y) (An expert may not act as a "mere conduit" for the hearsay of another.) This is supported by the 2000 Advisory Committee Note to F.R.E. 703, which stipulates that "[r]ule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted."

Rule 703 compels the use of a balancing test to determine whether the evidence is admissible, providing in part that:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

See also Turner v. Burlington N. Santa Fe R.R. Co., 338 F.3d 1058, 1061-62 (9th Cir. 20003) and *Rambus, Inc. v. Infineon Technologies AG,* 222 F.R.D. 101, 111 (E.D.Va. 2004). This balancing test is weighted against the admission of such evidence. The 2000 Advisory Committee Note to F.R.E. 703, states that "[t]he amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." *Turner,* 338 F.3d 1058, 1062.

Numerous courts have applied these provisions to exclude expert testimony. In *Paddack.* 745 F.2d 1254, 1262 (9th Cir. 1984), for example, the court found that audit reports were hearsay and that the expert could not rely on such evidence to establish the truth of what they assert. In *Turner,* 338 F.3d 1058, 1062, the court found that because the probative value that would result from the admission of a lab report relied upon by the expert did not substantially outweigh its prejudicial effect, the expert was not allowed to testify about the report. In *Rambus,* 222 F.R.D. 101, 111-12, the court found that Rambus' expert witnesses could not testify to the Initial Decision of the ALJ in the FTC's case against Rambus because "the probative value of the Initial Decision in assisting the jury to evaluate Rambus' experts' opinions would not substantially outweigh the prejudicial effect that the introduction of the Initial Decision would engender."

In this case, as in those cited above, Complaint Counsel believes the Respondents – having failed to call the many of the most knowledgeable HPH personnel – will attempt to use Dr. Chassin as a conduit for the hearsay of ENH employees and associated physicians to show that Highland Park lacked quality of care before its merger with ENH. To allow such evidence,

particularly when it does not form the basis for any real expert opinion, will deprive Complaint Counsel of the right of cross-examination and restrict the Court's ability to judge the credibility of the declarant.

III. Three Sections of Dr. Chassin's Report Highlight the Methodological and Hearsay Problems with his Work.

Complaint counsel believes that the vast majority of Dr. Chassin's report suffers from the problems described above. But because the report is 124 pages, and the trial is set to begin shortly, Complaint Counsel believes the Court's time is most effectively used by ruling on certain paragraphs of the report – some of the most egregious are cited below. The parties may then use that ruling as guidance for pretrial negotiations concerning the scope of Dr. Chassin's testimony, and any disputes about particular sections may be resolved during Dr. Chassin's testimony, or at another appropriate time at trial.

Below Complaint Counsel explains why certain paragraphs of Dr. Chassin's report should excluded.

A. References to Alleged Problems in HPH's Obstetrics and Gynecology Department are Highly Prejudicial and Offer Limited Probative Value.

Dr. Chassin cites to several interviews regarding alleged problems in HPH's obstetrics and gynecology ("Ob/Gyn") department. Portions of this section of Dr. Chassin's report, paragraphs 58, 64-72 should be excluded. For instance, Dr. Chassin states, "[redacted]" (Chassin Report ¶ 58 at 28.) In addition, Dr. Chassin cites in his report a "lack of leadership" in HPH's Ob/Gyn department per-

merger. Specifically he states,

"[redacted]" (Chassin Report ¶ 64 at 30.)

These sweeping statements and others like them are highly prejudicial and useless coming from a witness without firsthand knowledge. Dr. Chassin does not identify the "physicians" who had "[redacted]" He does not explain what methodology of health care analysis defines the pre-merger "poor culture" or post merger "strong leadership."

These statements, which Complaint Counsel believes are largely wrong as a factual matter are prejudicial. If the case hinges on the existence or non-existence of "poor culture" then the fact witnesses should state what the problem was, rather than have that vague state of affairs be no more than the conclusion of a third party witness.

B. References to an Alleged Problematic Nursing Culture at HPH are Highly Prejudicial and Offer Limited Probative Value.

Dr. Chassin makes similarly vague statements about the nursing "culture" at HPH pre-merger. These references are also highly prejudicial and offer limited probative value. Segments of this section of Dr. Chassin's report, paragraphs 89-91 should be excluded. For instance, he states that "[redacted]"

[redacted]" (Chassin Report ¶ 90 at 42)

Similarly, Dr. Chassin states that a "[redacted]" (Chassin Report ¶ 95at 44.) In addition, he states, "[redacted]" (Chassin Report ¶ 95at 44.) Likewise, Dr. Chassin cites to interviews suggesting that the [punitive and passive nursing culture at HPH, pre-merger, caused the suppressed reporting of medication errors.] (Chassin Report ¶ 114 at 54.)

Lastly, in describing the pre-merger nursing culture as being "dysfunctional," Dr. Chassin states that, "[redacted]" (Chassin Report ¶¶ 89-90 at 42.

Such testimony, if permitted at trial, has the potential to be very misleading. How does he know that "medical errors were not reported"? What makes a nursing culture "punitive"? And, regardless, these issues are, at bottom, issues of fact, not expert opinion.

C. References to HPH's Quality Assurance Program Pre-Merger are Highly Prejudicial and Offer Limited Probative Value.

In his report Dr. Chassin cites to several interviews regarding HPH's quality assurance program pre-merger. Notably, while several "quality of care" fact witnesses appear on respondents witness list, the pre merger HPH quality staff is notably absent. Parts of this section of Dr. Chassin's report, paragraphs 106, 114, and 117 should be excluded.

Dr. Chassin's factual recitation on this issue is also highly prejudicial and offers little

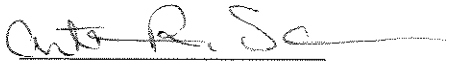
probative value. For example, Dr. Chassin states, "[redacted]" This is an expert "ipse dixit" and nothing more.

Dr. Chassin also cites to interviews relating to physician disciplinary actions at ENH (all three sites) during 2000 to 2003 and states that, "[redacted]" (Chassin Report ¶ 117 at 56.) At trial, Dr. Chassin should be precluded from testifying to this statement because it is very misleading, as these disciplinary actions took place after the merger was effectuated. Furthermore, it is unclear if the physicians in question were on the HPH medical pre-merger.

CONCLUSION

For the reasons mentioned above, the Court should grant Complaint Counsel's motion *in limine* to exclude paragraphs 8-12, 13 53-61, 64-95, 98-123, 125-32, 140-47, 153-55, 178-82, 185, 186-94, 196-202, 204, 208-210, 211-17, 220-24, 226, 228-35, 236-40, 241-43, 244-47, 248-54, 264-66 Chassin's Report. The parties should then be ordered to use the Court's conclusion on those sections to narrowly tailor any testimony from Dr. Chassin to Rule 702 and 703 principles, with any remaining disputes to be resolved at trial.

Respectfully submitted,



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Dated: December 21, 2004

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
Evanston Northwestern Healthcare Corporation, a corporation, and	)	Docket No. 9315
ENH Medical Group, Inc., a corporation.	)	

ORDER

IT IS HEREBY ORDERED THAT

1. Paragraphs 8-12, 13 53-61, 64-95, 98-123, 125-32, 140-47, 153-55, 178-82, 185, 186-94, 196-202, 204, 208-210, 211-17, 220-24, 226, 228-35, 236-40, 241-43, 244-47, 248-54, 264-66 of Respondents' expert, Dr. Chassin, report are excluded from evidence, AND

2. The Parties shall meet and confer to narrowly tailor any testimony from Dr. Chassin to Rule 702 and 703 principles.

ORDERED:

Hon. Stephen J. McGuire
Chief Administrative Law Judge

Dated January __, 2005

CERTIFICATE OF SERVICE

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

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
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12/21/04
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Attachment A
Redacted

Attachment B
Redacted