UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of	)	
	)	Docket No. 9315
Evanston Northwestern Healthcare Corporation,	)	**Public Record**
a corporation.	)	

MEMORANDUM IN SUPPORT OF
RESPONDENT'S ANTICIPATED OBJECTIONS TO THE TESTIMONY OF
DR. KENNETH G. ELZINGA AND/OR MOTION TO PRECLUDE HIS TESTIMONY

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") objects to the testimony of Dr. Kenneth G. Elzinga, one of Complaint Counsel's economic experts in this case. Dr. Elzinga's expert report is attached hereto as Exhibit 1.

INTRODUCTION

Respondent is providing this Memorandum of Law to the Court in order to facilitate the Court's decision with respect to objections Respondent anticipates asserting to Dr. Elzinga's expected testimony. These objections are so fundamental to Dr. Elzinga's testimony that the Court may wish to consider precluding Dr. Elzinga from testifying in this proceeding altogether. Although Dr. Elzinga was on Complaint Counsel's final trial witness list, for the reasons explained below Respondent did not believe that Complaint Counsel would call Dr. Elzinga to testify at trial. Now that Complaint Counsel has provided notice that it plans on calling Dr. Elzinga to testify this Friday, Respondent is providing the Memorandum of Law to

give Complaint Counsel adequate time to respond to Respondent's objections to Dr. Elzinga's proposed testimony..

Dr. Elzinga is being called primarily to testify that an economic test with which he is associated -- the so called "Elzinga-Hogarty" test ("E-H test") -- should not be applied to determine the relevant geographic market in this case. Complaint Counsel named Dr. Elzinga as an expert in anticipation that Respondent's experts would rely upon this test in arguing that Complaint Counsel's proffered geographic market is incorrect. While Respondent vigorously disputes the geographic market alleged by Complaint Counsel in this matter, Respondent's experts do not utilize the E-H test in any way, shape or form. Indeed, Dr. Noether's expert report states that she agrees that the E-H test is not appropriate in this case. Nevertheless, Complaint Counsel plans to call Dr. Elzinga primarily to make a record for purposes wholly unrelated to this case -- namely, to establish that the Commission disagrees with numerous court decisions applying the E-H test. The future of the ENH hospitals should not be embroiled in this academic dispute, which bears no relationship to this case.

The only other opinion expressed by Dr. Elzinga in his expert report, and the only other opinion which he may be permitted to testify to at trial, is cumulative, irrelevant, and unrelated to the facts of this case. In addition to Complaint Counsel's primary economic expert, Dr. Haas-Wilson, Dr. Elzinga will testify during Complaint Counsel's case-in-chief that there is no need to define a relevant market in this case. Complaint Counsel also plans on calling an additional economic expert in its rebuttal case to testify on this exact same point. Given that Complaint Counsel's primary economic expert will already be offering this exact opinion just a few days later, there is no need to hear this same opinion from Dr. Elzinga. Such repetitive testimony is unduly cumulative and would needlessly waste judicial resources.

Finally, Dr. Elzinga's proffered testimony is inadmissible because it is wholly unrelated to the facts of this case. Both of his opinions address only generic academic issues. The only case-specific materials that Dr. Elzinga reviewed to render his opinions are a handful of investigational-hearing transcripts and the Complaint. Remarkably, he has not reviewed any of the discovery material in this case -- not one deposition transcript or document -- nor does he cite a single case-specific fact in his report. Therefore, his testimony, having no connection to the facts of this case, should be excluded.

ANALYSIS

I. DR. ELZINGA'S PROFFERED TESTIMONY ABOUT THE APPLICABILITY OF THE E-H TEST IS IRRELEVANT BECAUSE THE APPLICABILITY OF THE E-H TEST IS NOT AN ISSUE IN THIS CASE

Complaint Counsel is primarily calling Dr. Elzinga to testify

[REDACTED] Elzinga Rep. at 2 (Ex. 1).[1] Indeed, the majority of Dr. Elzinga's expert report, 15-19 of 26 pages, is devoted to this subject. This Court, however, has already warned the parties that, under Rule 3.43(b)(1), "'irrelevant, immaterial, and unreliable evidence shall be excluded.'" Jan. 13 Order at 4 (*quoting* 16 C.F.R. § 3.43(b)(1)). Expert testimony is irrelevant when it "'will [not] assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Id.* at 3 (*quoting* Fed. R. Evid. 702).[2] Under these standards, Dr. Elzinga's testimony is irrelevant.

Dr. Elzinga's proposed testimony about the inappropriateness of the E-H test to define a geographic market in a hospital-merger case is shared by *every* expert in this case.

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[1] *See also* Complaint Counsel's Pretrial Brief at 34 ("Dr. Elzinga will testify that the Elzinga-Hogarty test cannot be used in accurately defining the geographic market in a hospital case. . . . It is fundamentally erroneous to use the Elzinga-Hogarty test in defining geographic markets in hospital merger cases.").

[2] The proponent [of expert testimony] has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." Fed. R. Evid. 702 Advisory Committee's Note; *see also* 16 F.T.C. §

[REDACTED]

Therefore, as there is no disagreement among the parties or their experts about the E-H test, **[REDACTED]** Such testimony is therefore irrelevant and should be precluded.

Indeed, given that Complaint Counsel and Respondent are in complete agreement that the E-H test is not relevant to this proceeding, Respondent did not expect Complaint Counsel to actually call Dr. Elzinga to testify at trial. However, in its pre-trial brief, Complaint Counsel asserted for the very first time that Dr. Elzinga's testimony is "relevant" because Dr. Noether purportedly relies on patient-flow data to define the geographic market. Complaint Counsel's Pretrial Brief at 35 n.27. Complaint Counsel is attempting to manufacture a disagreement between its experts and Respondent's experts and then use Dr. Elzinga to "rebut" the expected testimony of Dr. Noether. Complaint Counsel's attempt to manufacture relevance for Dr. Elzinga's testimony should fail for two reasons.

First, as described above, there is simply no testimony for Dr. Elzinga to rebut. In his report, Dr. Elzinga only discusses the problems of applying the *E-H test* to a hospital-merger case. Such an opinion would merely confirm that *all* of the experts in this case agree that the use of the E-H test here is inappropriate. Dr. Elzinga's report does not state that consideration of patient travel patterns is irrelevant to defining a relevant geographic market. Accordingly, even

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3.43(a) ("[T]he proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.").

if Dr. Elzinga were prepared to testify that patient preferences and travel patterns were irrelevant to determination of the appropriate geographic market in a hospital merger case, he may not so testify here because that opinion is not included in his expert report. As an expert, Dr. Elzinga's trial testimony is limited to those opinions that are expressed in his expert report. *See Walsh v. McCain Foods Ltd.*, 81 F.3d 722, 727 (7th Cir. 1996) (holding that a party "cannot legitimately argue" that its expert should be allowed to testify about matters that are not disclosed in its expert's report); *Salgado v. General Motors, Inc.,* 150 F.3d 735, 742 (7th Cir. 1998) ("The test of a report is whether it [is] sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced.").

Moreover, even if Dr. Elzinga were not precluded from testifying at trial that patient-travel patterns are irrelevant, it is inconceivable that he would give such testimony. Dr. Elzinga expressly states that patient-travel patterns are relevant to defining the geographic market:

[REDACTED]

[REDACTED]

Second, Dr. Elzinga's proposed testimony would be improper preemptive "rebuttal." Dr. Elzinga is being called as an expert in Complaint Counsel's case-in-chief. Dr. Elzinga's expert report was submitted before any of ENH's expert reports were due. Complaint Counsel never identified Dr. Elzinga as a rebuttal witness or produced a rebuttal report written by him that addressed Dr. Noether's, or any other expert's, proposed testimony.

Consequently, Dr. Elzinga's testimony on the use of the E-H test would not rebut any testimony offered by ENH. Such testimony is "irrelevant" and should not be allowed. Additionally, because Dr. Elzinga was never identified as a rebuttal expert, his testimony during Complaint Counsel's case-in-chief would constitute improper preemptive "rebuttal" testimony.

II. DR. ELZINGA'S PROFFERED TESTIMONY ABOUT THE NECESSITY OF MARKET DEFINITION IS UNDULY CUMULATIVE

As described above, Dr. Elzinga's proposed testimony concerning the need to define the relevant market in this case will be cumulative and redundant. This Court has recognized that Rule 3.43(b) excludes otherwise relevant evidence if its "'probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" Order On Complaint Counsel's Motion *In Limine* And Respondent's Motion To Strike, Jan. 13, 2005 ("Jan. 13 Order") at 4 (*quoting* 16 C.F.R. § 3.43(b)(1)). As this Court noted, Rule 3.43(b) empowers the Court "'to exclude unduly repetitious, cumulative, and marginally relevant materials that merely burden the record and delay trial. This [Rule] is intended to enhance the ALJ's ability to assemble a concise and manageable record.'" *Id.* (*quoting* 61 F.R. 50640, 50644 (Sept. 26, 1996)). Accordingly, 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) (construing Rule 403 of the Federal Rules of Evidence).[3] As one court bluntly stated, "[m]ultiple 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. 4).

Complaint Counsel will obviously be calling its primary economic expert, Dr. Haas-Wilson, to testify about the purported direct evidence that the ENH merger was anticompetitive. As stated in her expert report, Dr. Haas-Wilson will also testify at trial about the necessity of defining the relevant market in this case. Additionally, Complaint Counsel plans on calling a rebuttal expert, Dr. Werden, to testify on this exact same point. All these witnesses will testify on the exact same point:

[REDACTED]

[4]

[3] Rule 3.43 tracks 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." FTC Administrative Law Judges have 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) (Ex. 2); *In re Herbert R. Gibson, Sr.*, 1978 FTC LEXIS 375, at *2, n.1 (May 3, 1978) (Ex. 3).

[4] Like Dr. Elzinga, Dr. Haas-Wilson devotes an entire section of her report to discussing the necessity of defining a market in this case. Haas-Wilson Rep. at 16-20 (Ex. 6).

Thus, even though Dr. Elzinga is scheduled to testify before Dr. Haas-Wilson, given that Dr. Haas-Wilson will definitely testify at trial, Dr. Elzinga's proffered testimony about the necessity of defining a relevant market would be "a waste of time and needlessly cumulative." 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* Jan. 13 Opinion at 5 (precluding Dr. Epstein from testifying about "the same issues addressed by Romano"); *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).

Moreover, as addressed in ENH's pretrial brief, none of this proffered expert testimony is relevant given that the language of Section 7 and binding Supreme Court precedent require proof of a relevant market, even in a post-consummation case. *As a matter of law*, Complaint Counsel carries the burden of pleading and proving relevant product and geographic markets in this case -- regardless of how economists view the matter. As this Court has expressly stated, "[q]uestions of law, of course are determined by the Court and are not to be the subject of expert testimony." *In the Matter of Rambus Inc.*, Order on Motion In Limine, April 21, 2003, at 5 (citations omitted) (Ex. 5).

Allowing Dr. Elzinga to testify would therefore waste judicial resources, unduly prolong the hearing and require ENH to waste time and money in preparing for his testimony. Complaint Counsel would not suffer any prejudice if the Court were to preclude Dr. Elzinga from testifying; Complaint Counsel would be left with *two* other witnesses to testify on the

subject -- Dr. Haas-Wilson during its case-in-chief and Dr. Werden in its rebuttal case.[5] Dr. Elzinga should thus be precluded from presenting his cumulative testimony on the necessity of defining the relevant market.

III. THE COURT SHOULD PRECLUDE DR. ELZINGA FROM TESTIFYING BECAUSE HE HAS NOT BASED HIS OPINIONS UPON SUFFICIENT FACTS OR DATA, OR APPLIED HIS EXPERTISE TO THE FACTS OF THE CASE

As this Court has made clear, even if expert testimony will assist the trier-of-fact to understand the evidence or decide a fact issue, such testimony is inadmissible unless: "'(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.'" Jan. 13 Opinion at 3 (*quoting* Fed. R. Evid. 702). In other words, to be admissible, expert testimony must be founded on, and applied to, the facts of the case. *See Bourelle v. Crown Equip. Corp.*, 220 F.3d 532, 539 (7th Cir. 2000).

Dr. Elzinga's proffered testimony has no relationship whatsoever to the facts of this case. His opinions address an academic issue of law (whether a market must be defined in a post-merger case when there is allegedly direct evidence of anticompetitive effects) and an issue that is not in controversy (whether the E-H test applies in a hospital-merger case). He has not reviewed any of the depositions that were taken, or the materials that were exchanged, during discovery in this proceeding. Elzinga Rep., Attach C (Ex. 1). Nor has he cited a single piece of case-specific data to support his conclusions. There simply is nothing in Dr. Elzinga's report to suggest that his opinions are based "upon sufficient facts or data," or that he applied his expertise "to the facts of th[e] case." *See* Fed. R. Evid. 702. Therefore, Dr. Elzinga's testimony would fail

[5] ENH reserves the right to challenge at the hearing any testimony of Dr. Haas-Wilson or Dr. Werden on the necessity of market definition.

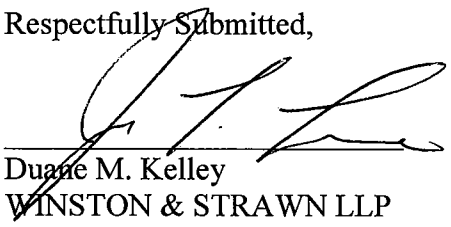
under Federal Rule of Evidence 702 and the Court should preclude him from testifying at the hearing.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court preclude Dr. Elzinga from testifying at the hearing.

Dated: February 24, 2005

Respectfully Submitted,



Duane M. Kelley
WINSTON & STRAWN LLP
35 West Wacker Dr.
Chicago, IL 60601-9703
(312) 558-5764
Fax: (312) 558-5700
Email: dkelley@winston.com

Michael L. Sibarium
Jay L. Levine
Charles B. Klein
WINSTON & STRAWN LLP
1400 L Street, NW
Washington, DC 20005
(202) 371-5700
Fax: (202) 371-5950
Email: msibarium@winston.com
Email: jlevine@winston.com
Email: cklein@winston.com

Counsel for Respondent

CERTIFICATE OF SERVICE

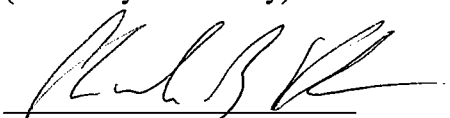
I hereby certify that on February 24, 2005, copies of the foregoing **Memorandum in Support of Respondent's Anticipated Objections To The Testimony Of Dr. Kenneth G. Elzinga And/Or Motion To Preclude His Testimony** were served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW (H-106)
Washington, DC 20580
(two courtesy copies delivered by messenger only)

Thomas H. Brock, Esq.
Federal Trade Commission
600 Pennsylvania, Ave. NW (H-374)
Washington, DC 20580
tbrock@ftc.gov

Philip M. Eisenstat, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
Room NJ-5235
Washington, DC 20580
peisenstat@ftc.gov

Chul Pak, Esq.
Assistant Director Mergers IV
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20580
cpak@ftc.gov
(served by email only)



Charles B. Klein, Esq.