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SECRETARY

## 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.

evidence adduced on behalf of respondents,”<sup>3</sup> 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  
criterial accepted in the field.”<sup>4</sup> Dr. Epstein will also provide some guidance on nationwide  
initiatives to improve hospital quality of care in the health care industry.

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,

## 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.

authoritative medical journals, such as the *New England Journal of Medicine*. Dr. Epstein

period, which places the quality claims in context.<sup>8</sup> 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 (10<sup>th</sup> Cir. 1993) (admitting the final of three experts “who was offered to tie the evidence

cumulative because they used different tests and methodologies to support their conclusions.<sup>9</sup>

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.<sup>10</sup>

PNH relies on cases that are clearly distinguishable from this matter. In *Kendall Oil &*

*Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240 (7<sup>th</sup> Cir. 1989), the appellant's expert witness in a mining case would offer similar testimony from the same viewpoint as other witnesses. If, however,

Dr. Epstein will not only present testimony from a different perspective, but will testify about

**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.<sup>13</sup> 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 a oncoming train, could be summed up as

Respondents also rely on a number of decisions by the Court in earlier administrative proceedings before the Commission.<sup>15</sup> 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



### 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 JDRH's quality of care before and

after the merger, and what impact the merger had on quality of care.

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."<sup>17</sup> 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

to present the same data on each of the specific areas of quality improvement at UDI

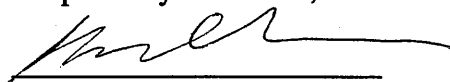
and the "administrative data" he criticizes. Moreover, ENH can challenge Dr. Epstein through cross-examination. A last minute fourth expert is unnecessary.

**CONCLUSION**

Complaint counsel requests for the reasons discussed above ENH's motion should be

denied in its entirety.

Respectfully submitted,



Thomas Brock  
John Martin  
Nancy Park  
Steve Vieux

Counsel Supporting the Complainant

**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

600 Pennsylvania Ave NW (H-106)

Washington, DC 20580

**EXHIBIT 1  
(REDACTED)**

**[REDACTED]**

**[REDACTED]**

**[REDACTED]**

**(REDACTED)**