

UNITED STATES OF AMERICA

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of )  
)  
)

**Evanston Northwestern Healthcare** )  
**Corporation,** )  
a corporation. )

Docket No. 9315

**Public Record**

**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

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

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

an expert in anticipation that Respondent's experts would rely upon this test in arguing that

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 provided to render his opinions are a handful of

[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 reportedly relies on patient flow data to define the geographic market. Complaint Counsel

[REDACTED]

if Dr. Elzinga were proposed to testify that patient preferences and needs were implemented

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[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

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

[REDACTED]

[REDACTED]

[REDACTED]

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

[REDACTED]

[REDACTED]

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 needless"

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



subject -- Dr. Haas-Wilson during its case-in-chief and Dr. Werden in its rebuttal case.<sup>5</sup> Dr. Elzinga should thus be precluded from presenting his cumulative testimony on the necessity of

**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**

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: [dkellev@winston.com](mailto:dkellev@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](mailto:msibarium@winston.com)  
Email: [jlevine@winston.com](mailto:jlevine@winston.com)  
Email: [cklein@winston.com](mailto:cklein@winston.com)

*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 24, 2005, copies of the foregoing **Memorandum**

**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