UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: Evanston Northwestern Healthcare Corporation Antitrust Litigation	**Master File No. 07-CV-4446**
	Judge Lefkow
	Magistrate Judge Denlow
This Document Relates To:	
All Actions	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO EXCLUDE THE EXPERT OPINION OF MONICA NOETHER

REDACTED VERSION
FOR PUBLIC FILE

Dated: December 9, 2009

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INTRODUCTION

Dr. Monica Noether's Expert Report (public version filed at Dkt. No. 285 ("Noether Rep")) should be stricken because it fails to meet the requirements of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), Dr. Noether's testimony suffers from a number of fatal flaws, including:

- Her report is intentionally confusing and laden with irrelevant detail, laboriously describing minute variations in charges for services in managed care organization ("MCO") contracts that are entirely unrelated to an analysis of antitrust impact;
- Her analysis of changes to ENH's chargemaster is incomplete and inaccurate;
- She erroneously claims numerous class members – including Blue Cross and Blue Shield of Illinois ("BCBSI"), and thus, Plaintiff Painters Fund – were not injured without conducting any economic analysis, research or review of BCBSI's own transactional data;
- She asserts – without support – that ENH never exercised market power as a result of the merger, despite overwhelming evidence to the contrary in this action as well as the FTC proceeding;
- She offers legal conclusions, such as that the named Plaintiffs are neither typical nor adequate class representatives, when she is not qualified to do so; and
- Her regression and other economic analyses are fundamentally defective, thus invalidating her opinions.

These problems infect Dr. Noether's analysis so pervasively that her opinion should be stricken as a whole.

LEGAL STANDARDS

Dr. Noether's expert opinion should be stricken because it does not meet the requirements of *Daubert* and Federal Rule of Evidence 702. In discussing *Daubert* requirements, the Seventh Circuit observed:

> We have interpreted *Daubert* as requiring a district court to conduct a two-step analysis when a party proffers expert scientific testimony. . . . [First], the district court must "consider whether the testimony has been subjected to the scientific method; it must

> rule out 'subjective belief or unsupported speculation'". . . . Second, the district court must "determine whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue". . . . This second step requires that the district court consider whether the proposed scientific testimony fits the issue to which the expert is testifying.

United States v. Hall, 165 F.3d 1095, 1101-02 (7th Cir. 1999) (citations omitted). "In other words, a district court may admit expert testimony *only* if such testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* (emphasis original). The party offering expert testimony must also prove by a preponderance of the evidence that it satisfies these requirements. *Lewis v. Citgo Petrol. Corp.*, 561 F.3d 698, 705 (7th Cir. 2009) (citations omitted). Finally, "[w]hen applying the *Daubert* framework, if the court determines that the expert scientific evidence is properly excluded under the second prong of Daubert (helpfulness to the jury), the court is not required to undertake an inquiry into the reliability of the proffered testimony." *United States v. Carter*, No. 01 CR 783, 2003 WL 22682360, at *4 (N.D. Ill. Nov. 12, 2003) (*citing Hall*, 165 F.3d at 1103 n.4).[1]

If inquiry into the reliability prong is required, expert testimony is admissible "if (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." Fed. R. Evid. 702. Rule 702 imposes a "special obligation" upon trial judges

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[1] *See also Niebur v. Town of Cicero*, 136 F.Supp.2d 915, 919 (N.D. Ill. 2001),

> [A] threshold question is whether [the expert's] testimony would be helpful or "will assist the trier of fact to understand the evidence or to determine a fact in issue." If so, I then consider whether it is reliable and sufficiently based on facts or data. In determining whether expert testimony would be helpful, I am to consider two factors: first, "whether the proffer demonstrated that a sufficiently reliable body of specialized knowledge existed." The Seventh Circuit warns that "it may be more difficult at times to distinguish between testimony that reflects genuine expertise-a reliable body of genuine specialized knowledge-and something that is nothing more than fancy phrases for common sense." Second, I consider whether, "even if . . . the field in general qualifies for expert testimony, the proffered testimony [is] based upon the expert's special skills." Otherwise "the expert at best is offering a gratuitous opinion, and at worst is exerting undue influence on the jury that would be subject to control under Rule 403."

to ensure that expert testimony is reliable. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147 (1999). Courts examine several factors to ascertain this reliability: (1) whether the methodology used can be tested, (2) whether the methodology has been subjected to peer review, (3) whether there is a known potential rate of error, (4) whether there are standards controlling the technique used, and (5) whether a known technique is generally accepted in the relevant scientific or technical community. *See Daubert,* 509 U.S. at 594; *Kumho Tire,* 526 U.S. at 149.

The Seventh Circuit recognizes additional "benchmarks for gauging expert reliability," including whether the testimony was developed specifically for litigation purposes, whether the expert "unjustifiably extrapolated from an accepted premise to an unfounded conclusion," whether the expert considered or accounted for "obvious alternative explanations" for his or her conclusions, and whether the expert is acting with the same care as she would in the course of regular professional, non-litigation work. *Fuesting v. Zimmer,* 421 F.3d 528, 534-35 (7th Cir. 2005), *vacated in part on other grounds,* 448 F.3d 936 (2006). The objective of this inquiry "is to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire,* 526 U.S. at 152; *accord Fuesting,* 421 F.3d at 535.

Under applicable Seventh Circuit precedent, Dr. Noether's Report should be stricken.

ARGUMENT

I. Whether Managed Care Contracts Are Complex Is Irrelevant

The first substantive section of Dr. Noether's report, titled "Managed Care Contracting Is Complex," is a factual section in which she argues that MCO contracts have complex and varied prices for different types of hospital services, *i.e.*, there are different prices for individual medical, surgical, obstetric intensive care services. (*See* Noether Rep.

¶¶ 14-39, Appx. 1). From this, she quickly leaps to the conclusion that neither impact nor damages can be determined without a patient-by-patient and charge-by-charge analysis. To reach this bottom line, however, Dr. Noether does not employ any recognizable method.

Dr. Noether fails to recognize that whenever ENH negotiated price increases for its contracts with MCOs, these price increases - REDACTED - Dr. Noether says nothing in her report to contradict this finding. Her analysis of the ENH-MCO contracts – consisting merely of her observation that the contracts contain a litany of multiple prices and services – is designed to confuse the Court and jury. It is misleading, and does not assist the trier of fact "to understand the evidence or to determine a fact in issue." *See Hall*, 165 F.3d at 1101-02.

While Dr. Noether may possess experience with antitrust issues regarding hospital competition, her expertise does not extend to the relationship between MCOs and their customers. Indeed, much of the industry background information in Dr. Noether's report is not based on her expertise, but instead - REDACTED - A review of Dr. Noether's CV further underscores this point. While her resume includes many assignments regarding antitrust issues by and between hospitals and healthcare plans, there are no assignments on behalf of consumers of healthcare plans. The void in her background renders her an inappropriate expert on the impact of healthcare plans and their members. *See e.g., Baldauf v.*

Davidson, No. 04-cv-1571, 2007 WL 2155967, at *4 (S.D. Ind. July 24, 2007) (finding medical doctor who reviewed articles about pharmacology not qualified to give a pharmacological opinion about effects of drugs on plaintiff). Dr. Noether's lack of expertise in this area explains her failure to consider the overwhelming documentary and industry information cited by Dr. Dranove, confirming that ENH increased service prices at uniform rates. (*See* Dranove Reply Rep. ¶¶ 32-45.)

Moreover, an expert may not act as a mere mouthpiece for expressing the undisclosed opinion of someone else. *See In re Sulfuric Acid Antitrust Litig*, 446 F. Supp. 2d 910, 916 (N.D. Ill. 2006) ("A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. That would not be responsible science.") (*citing Dura Automotive Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002)).

II. Dr. Noether's Analysis of Changes to ENH's Chargemaster is Fatally Flawed.

Dr. Noether purports to analyze changes in ENH's chargemaster. She claims that ENH made non-uniform increases across the chargemaster, and thus asserts that impact is not common. - REDACTED - Thus she lacks any pre-merger benchmark with which to measure or compare any chargemaster price increases.

Although she concedes that certain chargemaster prices increased after 2002, (Noether Rep. Figures 2-10), Dr. Noether marginalizes the fact that these are essentially "list" prices paid only perhaps by an occasional uninsured, and change independently from contract transaction prices, which are what MCOs pay. Insofar as chargemasters are even relevant to ENH's exercise of market power, it is the single percent off of chargemaster

prices that ENH negotiates with MCOs, not the chargemaster list prices. (*See* Expert Report of Dr. David Dranove Supporting Motion for Class Certification ("Dranove Initial Rep.") ¶¶ 79-81; Dranove Reply Rep. Section III.3.) Dr. Noether admits that she never analyzed the changes in discounts that applied to chargemaster prices, and whether these changed during the class period. (Noether Dep. at 123:09-128:05.) Finally, Dr. Dranove notes in his most recent report that chargemaster prices are primarily driven by costs and are independent of market power, again rendering Dr. Noether's opinion irrelevant to the analysis of impact. (*See* Dranove's Reply Rep. Section III.3.)

- REDACTED -

Obviously, if ENH could raise prices at the time of the merger and then protect those gains in subsequent years through its market power, this would demonstrate market power even if the raises were infrequent in subsequent years.

III. Noether's Claim That Certain Class Members May Not Have Been Injured Must Be Disregarded

Dr. Noether argues that a number of members of the proposed Class did not suffer any impact from the anti-competitive behavior, and that Plaintiffs must show that *every* class member was injured. (Noether Rep. ¶¶ 8-11.) Again, such speculation renders the report unhelpful to the trier of fact since Plaintiffs need not demonstrate that every class member was injured definitively. *See Kohen v. Pacific Inv. Management Co., LLC*, 571 F.3d 672, 677 (7th Cir. 2009) ("What is true is that a class will often include person who have not been injured by the defendant's conduct; indeed this is almost inevitable. . . .") (citations omitted).

Dr. Noether claims that BCBSI, MCOs that are merely plan administrators

("TPAs"), and a variety of individual patients suffered no injury. (Noether Rep. ¶ 47-55.) Her opinion that BCBSI did not suffer any injury is derived primarily from several sentences in a declaration by one of BCBSI's contract negotiators, Joseph Arango. (*Id.* ¶ 47.) Mr. Arango is not an economist, and performed no formal analysis, statistical or otherwise, when preparing his declaration. - REDACTED -

In fact, the FTC proceedings focused on inpatient costs for 2003 and earlier, and, as Dr. Dranove found, BCBSI suffered most of its damages in that period in its outpatient services, while suffering most of its damages for inpatient services after 2003. (*See* Plaintiffs' Reply Memorandum in Support of Motion for Class Certification, Section IB.) - REDACTED This review certainly does not satisfy *Daubert* standards, and Dr. Noether's uncritical reliance on it to such a heavy degree yet again demonstrates that she is acting as an advocate rather than an academic. .

Similarly, Dr. Noether also ignores FTC data and findings showing that BCBSI was overcharged for outpatient services and fails to note that the FTC data regarding BCBSI's inpatient charges was limited to the two years immediately after the merger. In contrast, Dr. Dranove, incorporating recently produced data from BCBSI, shows through an econometric analysis that BCBSI did in fact suffer significant injury in both

inpatient and outpatient services throughout the class period, particularly in the time frame after the FTC data ended. (*See* Dranove's Reply Rep. ¶¶ 119-121.) Dr. Noether never reviewed this post-2003 BCBSI data in providing her opinion.

Additionally, Dr. Noether overplays BCBSI's significance as a class member, arguing that it accounts for 56% of ENH's private payor revenue. Dr. Noether's figure reflects a failure to account for the fact that BCBSI pays ENH - REDACTED - and sloppy use of a computer program to account for said fact. (*Id.* ¶ 18 n.30.) Dr. Dranove corrected her mistake, demonstrating that BCBSI is actually responsible for 33% of ENH's private payor revenue. (*Id.*)

Finally, Dr. Noether raises several straw-man arguments and/or issues in her report. For example, while the Class defined by Plaintiffs applies to certain defined purchasers of healthcare services from ENH, the Class does not include the sort of entity Dr. Noether describes as a TPA, which has no customers to whom it actually offers insurance but instead merely administers plan coverage. (*See* Noether Rep. ¶ 48.) TPAs such as these are excluded from the class definition because they have not paid ENH for any services. Dr. Noether's similar analysis of various individuals who did not pay for services is equally irrelevant since these individuals are also excluded from the class definition. In his Reply Report, Dr. Dranove clearly points out that any entities or individuals who did not pay ENH due to out-of-pocket maximums, supplemental insurance, or stop-loss provisions, for example, can be fully dealt with at the time of allocation of damages. (*See* Dranove Reply Rep. ¶¶ 148-153.)

IV. Noether's Unsupported Opinion That ENH Never Had Market Power Should Be Stricken

Dr. Noether stubbornly asserts that ENH never raised prices anti-competitively following the merger. (Noether Rep. ¶ 8; Noether Dep. at 49:14-50:04.) However, she does not offer a

single shred of economic evidence in support, - REDACTED - She appears blithely unconcerned with the volume of information undermining her opinion, including almost every expert in the FTC proceeding, the post-2003 data itself, and Dr. Dranove's rigorous econometric analysis.

Dr. Noether's continued failure to recognize the obvious defects in her views infects the entire fabric of her report. Her completely subjective belief is improper under Federal Rule of Evidence 702 and *Daubert*, and requires that her entire report be stricken.

V. Dr. Noether Impermissibly Opines On Many Legal Matters, Including Typicality, Adequacy, Injury and Damages.

Binding precedent clearly provides that an expert may not offer an opinion on legal matters or ultimate issues in the case. *See, e.g., Good Shepherd Manor Found., Inc. v. City of Momence,* 323 F.3d 557, 564 (7th Cir. 2003); *Bammerlin v. Navistar Int'l Transp. Corp.,* 30 F.3d 898, 900 (7th Cir. 1994). Permitting expert testimony regarding issues of law would infringe upon the role of the judge, who must determine the law. *See Klaczak v. Consolidated Med. Transport Inc.*, 2005 WL 1564981, at *4-8 (N.D. Ill. May 26, 2005). Moreover, "[t]he potential for jury confusion may be substantial when the evidence refers to legal issues at the heart of [ ] litigation." *United States v. Sinclair*, 74 F.3d 753, 757 (7th Cir. 1996).

An important part of the Court's gatekeeper function under *Daubert* is to protect against the prejudice of allowing an "expert" to argue facts or law, or opine on matters beyond her expertise. *See United States v. Caputo*, 382 F. Supp. 2d 1045, 1049 (N.D. Ill. 2005) ("danger of unfair prejudice" results from "testimony that does little more than tell the jury what result to reach"). This portion of inquiry under Rule 702 overlaps the concerns of prejudice in Rule 403.

See Carter, 2003 WL 22682360, at *6. Allowing someone to testify as to legal matters with an attached "expert" moniker may lead jurors to give her testimony undue weight.

Dr. Noether repeatedly says that a class cannot be certified in this case, often going beyond responding to Dr. Dranove's Report or any recognizable economic concept. [redacted] In her report, Dr. Noether argues that the class representatives are inadequate because they are not clones of the absent class members. (Noether Rep. ¶¶ 94-97.) [redacted]

Class representatives need not be a statistical representative sample of the class; they must only be interested members of the class, and not possess interests antagonistic to the class. *See, e.g.*, *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992); *Scholes v. Stone, McGuire & Benjamin,* 143 F.R.D. 181, 186 (N.D. Ill. 1992). Under Dr. Noether's approach, it is unlikely that anyone would ever be an adequate class representative.

Dr. Noether's pronouncements on impact and damages are similarly rife with legal opinions. For example, she claims – without conducting any analysis or citing any supporting evidence – that there could be conflicts between class members since each will want to maximize their own injury. (Noether Rep. ¶ 33.) However, the law recognizes that such disagreement does not disqualify a class representative. As observed in *In re NASDAQ Market-Makers Antitrust Litigation*, "[t]he conflict to which Defendants refer relates only to the apportionment of

damages as between [proposed class members]. Such hypothetical conflicts regarding proof of damages are not sufficient to defeat class certification at this stage of the litigation." 169 F.R.D. 493, 512 (S.D.N.Y. 1996). Dr. Noether also suggests that certain class members were not injured because they were able to "pass on" the overcharge to their customers. (Noether Report ¶ 26.) The concept of a "pass on" is a legal concept under *Illinois Brick Co. v. Illinois*, and is not a permissible inquiry for this expert's testimony under that case law. 431 U.S. 720 (1977). Dr. Noether repeatedly, and incorrectly, states what she believes the legal standards to be, and such opinions are impermissible.

While Dr. Noether theorizes that certain factual situations may exist, which she contends would affect impact, damages, or class membership, she almost always fails to give any objective quantification of the scope of the issue. For example, she claims that people with secondary insurance, out-of-pocket maximum restrictions, or stop-loss provisions may not have out-of-pocket expenditures. (Noether Rep. ¶¶ 51-54.) Dr. Dranove's Report demonstrates that these considerations are pure speculation, and in fact do not apply to the vast majority of Class members. (*See e.g.*, Dranove Reply Rep. ¶ 151.) Since courts routinely reject expert reports that merely speculate regarding the existence of certain facts, s*ee Kunz v. DeFelice*, 538 F.3d 667, 676 (7th Cir. 2008), Dr. Noether's speculation without quantification does nothing to demonstrate that class certification is not appropriate here, and should be rejected.

VI. Dr. Noether's Limited DID Analysis Analyzing Changes In Prices Is Defective

Dr. Noether purports to analyze ENH prices and finds that while average ENH prices may have increased at a rate greater than the increase in price at control hospitals, the prices for some individual services did not increase. (*See* Noether Rep. ¶¶ 64-65.) Her analysis is filled with technical errors and limitations. For example, she fails to compare post-merger prices with

pre-merger prices, so she has no benchmark to compute impact. Her regressions include too few observations which generate statistically unreliable results. She makes numerous other mistakes which cause her not to find an upward impact on individual prices. (*See* Dranove Reply Rep. ¶¶ 130-146. Consequently, what little in pricing analysis Dr. Noether performed is unreliable under *Daubert*, and thus inadmissible.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Exclude the Expert Opinion of Dr. Monica Noether should be granted.

Dated: December 9, 2009

Respectfully submitted,

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EXHIBIT A

SEALED DOCUMENT

NOT AVAILABLE
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EXHIBIT B

SEALED DOCUMENT

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CERTIFICATE OF SERVICE

I, Mary Jane Fait, hereby certify that on December 14, 2009, service of the foregoing document was served on all counsel of record and was accomplished pursuant to ECF as to Filing Users.

/s/ Mary Jane Fait
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