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

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

RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S RENEWED MOTION FOR THE ADMISSION OF PORTIONS OF DR. JONATHAN BAKER'S EXPERT REPORTS INTO EVIDENCE

Pursuant to the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.22(c), Respondent Evanston Northwestern Healthcare Corporation ("ENH"), by counsel, hereby opposes Complaint Counsel's Renewed Motion for the Admission of Portions of Dr. Jonathan Baker's Expert Reports into Evidence ("Motion").

INTRODUCTION

Two weeks after the close of trial, and a month after this issue was first raised, Complaint Counsel seeks reconsideration of two prior rulings by this Court:

1. Expert reports are inadmissible "hearsay and should not be admitted" – "as a rule, we do not enter expert reports in the record. They are hearsay." 2/8/05 Final Pretrial Conf. Tr. 6 (Ex. 1). Accordingly, prior statements by an expert "could be offered for purposes of impeachment" – "[t]o the extent that they impeach only." Tr. 5113-14 (Ex. 2).[1]

[1] The Court did not reach the issue of whether statements by an expert fall within the party admission hearsay exception. *See* Fed. R. Evid. 801(d)(2); Tr. 5115 (Ex. 2).

2. "[T]o ensure that there's no harm to ENH on this issue, I will give them an opportunity as well to offer, for impeachment purposes only, any prior statements by any expert of complaint counsel that they would also offer." Tr. 5113-14 (Ex. 2).

This Court should stand by both rulings and thus deny Complaint Counsel's Motion. First, Complaint Counsel asserts that it should be allowed to put into evidence, as a party admission, portions of Professor Baker's initial report that were supplemented by him more than three weeks before his deposition and two months before his trial testimony. But Complaint Counsel cites no authority, and we are aware of none, holding that an expert's statements that were corrected before trial fall within the party admission hearsay exception. Accordingly, as this Court already held, Professor Baker's statements at issue should come into evidence solely for impeachment purposes.[2] The Court's evidentiary rulings were fundamentally fair, as Complaint Counsel had – and took advantage of – the opportunity at trial to cross-examine Professor Baker on the differences between his initial and supplemented reports.

Second, Complaint Counsel takes the unprecedented position that the parties should be subject to different applications of the Federal Rules of Evidence ("FRE"). According to Complaint Counsel, it should be permitted to submit portions of Professor Baker's initial report into evidence for the truth of the matters asserted therein, but Respondent should not have the same right to submit into evidence statements by Complaint Counsel's experts. *See* Mot. at 3 n.5. Complaint Counsel should not be allowed to have it both ways. If

[2] Under this holding, it makes no sense to admit RX-2040 (a set of tables from Professor Baker's second report) and RX-2041 (a graph from Professor Baker's second report) for impeachment purposes. These materials are not even discussed in the selected portions of Professor Baker's reports that Complaint Counsel has offered into evidence. Accordingly, an order denying Complaint Counsel's Motion should specify that these two exhibits are excluded from evidence.

the Court were inclined to admit portions of Professor Baker's reports into evidence, Respondent too should have the opportunity to introduce into evidence select portions of reports submitted by and/or deposition testimony of Complaint Counsel's various experts.

BACKGROUND

Complaint Counsel's Motion must be viewed in the proper context. Complaint Counsel has offered no credible expert testimony to support its position that Respondent had obtained market power as a result of the merger at issue. Accordingly, Complaint Counsel now attempts, after trial has ended, to admit into evidence select statements by Professor Baker from his initial expert report and to distort those statements to fit Complaint Counsel's theory of the case. Complaint Counsel's Motion, however, badly mischaracterizes Professor Baker's statements and opinions in this case. Professor Baker clearly testified that Respondent's prices were consistent with the learning about demand defense. Despite Complaint Counsel's assertion to the contrary, and as discussed in more depth below, in neither report did Professor Baker ever conclude that "Respondent had market power." Mot. at 1.

On November 2, 2004, pursuant to the Court's Third Scheduling Order, Professor Baker submitted an expert report, which included a section regarding Respondent's price levels as compared to a control group of academic hospitals. In this initial report, Professor Baker made a mistake in one step of the method he used to convert the output of a certain regression model into predicted prices in testing whether Respondent learned about the demand for its services. Tr. 4599-4600 (Ex. 3). After finding the mistake, Professor Baker corrected the error as soon as possible, and submitted a supplemented report on December 23, 2004. The supplemented report changed the numbers in his initial Table 4 and resulted in the

revisions of one subsection of his report (Paragraphs 56-67) as well as the corresponding summary of conclusions paragraph (Paragraph 16). Tr. 4803 (Ex. 4).[3]

Professor Baker's test in his supplemented report did not change from his initial report – *i.e.*, he was always examining ENH in comparison to the overall average price levels of the academic control group hospitals. Tr. 4686-87 (Ex. 4). In particular, Professor Baker used the overall average price levels, aggregating across all managed care organizations ("MCOs"), because the overall average has more information about the price in the market alleged by Complaint Counsel, and forms a reasonable approximation for the predicted upper bound of price levels. Tr. 4662-63, 4730 (Ex. 4). On the other hand, individual MCOs provide a poor proxy for measuring learning about demand because they vary in their negotiating abilities and tactics. Tr. 4663 (Ex. 4).[4] These differences are not subject to quantitative analysis because they cannot be observed, but they tend to be accounted for when examining the overall average. Tr. 4663 (Ex. 4). After examining the overall average prices of Respondent, Professor Baker found that Respondent's prices were consistent with its learning about demand defense. Tr. 4657, 4671, 4811 (Ex. 4).

Indeed, it bears repeating that *all economic experts* who have addressed the issue - for both sides - have agreed that price increases alone do not demonstrate market power.

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[3] While every expert does his or her best to write an error-free report, mistakes sometimes occur. In fact, other experts have made mistakes in this case. For instance, after submitting her initial report on September 21, 2004, Professor Deborah Haas-Wilson realized she made some mistakes, and filed a revised report on October 8, 2004. In fact, in preparing for her trial testimony, Professor Haas-Wilson realized there were further mistakes in her report, which she corrected on the stand. Tr. 2591-92 (Ex. 5). Even the FTC rules of practice recognize that mistakes happen and they thus include a procedure to correct those mistakes. *See* 16 C.F.R. § 3.31(e).

[4] In reaching his conclusion, Professor Baker treated pricing data from individual MCOs the same in both his initial and supplemented reports. **[REDACTED]**

Thus, it is clear that Professor Baker – in both reports – was always relying solely on the overall average to reach his conclusion that ENH's prices rose because it learned about its demand coincident with the merger.

Price increases resulting from learning about demand are not anticompetitive because they result from new information, not a loss of competition. Tr. 4655-56 (Ex. 4). While admitting that learning about demand is a plausible, alternative explanation for the price increases at issue, Complaint Counsel's experts failed to debunk this theory's viability in this case. Complaint Counsel's Motion is nothing more than an effort to stretch a mistake by one of Respondent's experts – a mistake that was corrected long before trial – into affirmative evidence to make up for Complaint Counsel's failure to meet its burden of proof.

ARGUMENT

I. Professor Baker's Expert Reports Constitute Inadmissible Hearsay, Not Party Admissions

Expert Reports are "merely discovery materials" and are presumptively inadmissible. *Blue Cross & Blue Shield United v. Marshfield Clinic*, 152 F.3d 588, 595 (7th Cir. 1998). Complaint Counsel's sole argument to admit Professor Baker's expert report is that it purportedly constitutes a party admission under Rule 801(d)(2). *See* Mot. at 4. Rule 801(d)(2), which governs party admissions, generally provides that a statement is not hearsay if the statement is offered against a party and was made by the party itself or a person acting as the party's agent. Fed. R. Evid. 801(d)(2). Such an agency relationship "is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act." Restatement (Second) of Agency § 1 cmt. a (1958).

The Third Circuit, in *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147 (3d Cir. 1995), rejected an argument that statements by a testifying expert fall within the party-admission hearsay exception. The court reasoned that testifying experts do not fall within the traditional definition of an agency relationship:

> In theory, despite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise. Thus, one can call an expert witness even if one disagrees with the testimony of the expert. *Rule 801(d)(2)(C) requires that the declarant be an agent of the party-opponent against whom the admission is offered, and this precludes the admission of the prior testimony of an expert witness where, as normally will be the case, the expert has not agreed to be subject to the client's control in giving his or her testimony.*

Id. at 164 (emphasis added). The court ultimately concluded that "[s]ince an expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent." *Id.* [5]

The case that is exactly on point is a case that Complaint Counsel cited to earlier in this hearing – back when it took the position that expert reports are inadmissible hearsay. *See Potts v. Sam's Wholesale Club*, 1997 U.S. App. LEXIS 5355 (10th Cir. Mar. 21, 1997), from Complaint Counsel's Mot. to Strike Expert Rep. as Exhibit to Resp.'s Pretrial Br., at 2. In *Potts*, the plaintiffs sought to admit into evidence an initial report prepared by the defendant's medical expert that conflicted with a subsequent report and his trial testimony. The trial court refused to admit the report into evidence and allowed it to be used for impeachment purposes only. The Tenth Circuit affirmed the holding because expert reports are, in fact, inadmissible hearsay:

> The magistrate judge was therefore correct to conclude that the [expert] report was hearsay. *Given that the expert testified*

[5] While Complaint Counsel is correct that, in *Kirk*, the moving party sought to introduce into evidence an opposing party's expert deposition from a previous proceeding, other courts have relied on *Kirk* for the premise that an expert who is hired by a party is not inexorably an agent of that party under Rule 801(d)(2). *See Koch v. Koch Indus.*, 37 F. Supp. 2d 1231, 1245 (D. Kan. 1998), *aff'd, rev'd on other grounds*, 203 F.3d 1202 (10th Cir. 2000) (refusing to allow the plaintiffs, in their case-in-chief, to offer an excerpt from the deposition of an expert retained by the defendants and scheduled to be called as a witness in the defendants' case-in-chief); *see also Bostick v. ITT Hartford Group, Inc.*, 82 F. Supp. 2d 376, 379 n.2 (E.D. Penn. 2000) ("Because an expert is charged with a duty of giving his or her expert opinion regarding the matter before the court, we fail to comprehend how an expert witness, who is not an agent of the party who called him, can be authorized to make an admission for that party.").

> *extensively at trial as to his opinion, including the reasons his opinion changed from his first report, the judge acted within his discretion in refusing to admit the report as an exhibit.*

Id. at *9-10 (emphasis added). As in *Potts*, Professor Baker testified extensively at trial as to his opinion, the mistake he made in a portion of his original report, and the reasons why he corrected those portions of his initial report. Tr. 4599-4600 (Ex. 3), 4686-92 (Ex. 4). Thus, as in *Potts*, excerpts from Professor Baker's reports should be excluded.

The purported "leading case" on this issue cited by Complaint Counsel, *Glendale Fed. Bank v. United States*, 39 Fed. Cl. 422 (1997), actually supports Respondent's position.[6] The Court of Federal Claims in *Glendale* cited *Kirk* with approval when holding that: "Even at the time of his deposition [an expert] remains autonomous. He is not the sponsoring party's agent at any time merely because he is retained as its expert witness." *Id.* at 424. The court, however, ultimately held that ***statements that the expert has been authorized by a party to make as of the first day of trial*** do constitute a party admission:

> By the beginning of trial it is fair to tie the party to the statements of its experts. When admitting expert deposition testimony under FRE 801(d)(2)(C) we need not find that these experts are obligated to do the sponsoring party's bidding. We merely note that they were selected as witnesses and retained through the start of the trial because the opinions they held all along, and still hold as the trial begins, are consistent with those of the sponsoring party. *We are not retroactively finding agency or control at the time of a prior deposition. Rather, an expert witness who is listed as such when the trial begins has been authorized and his or her prior statements are fair game. . . . All other such statements may only be used to cross-examine that expert or others connected with the statement.*

Id. at 425 (emphasis added).

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[6] Complaint Counsel's bare assertion that *Glendale* is the "leading case" does not make it so. Indeed, as far as we can tell, this decision has not been cited by any federal Court of Appeals. As discussed above, the leading case on this issue is the Third Circuit's decision in *Kirk*, a decision cited with approval by *Glendale*.

Complaint Counsel mischaracterizes this holding when arguing that "[i]n *Glendale*, the court held that the expert's out-of-court statements *were a statement of an agent of the party, and therefore admissible*[.]" Mot. at 4 (emphasis added). *Glendale* plainly did ***not*** find that testifying experts serve as a party's agent for purposes of FRE 801(d)(2)***(D)***, as Complaint Counsel asserts. *Glendale*, 39 Fed. Cl. at 424 (finding that, before trial, expert "is not the sponsoring party's agent"); *id.* at 425 ("We are not retroactively finding agency or control at the time of a prior deposition."). Instead, *Glendale* relied on FRE 801(d)(2)***(C)***, which applies the party admission hearsay exception to circumstances where the statement at issue was "authorized by the party[.]" This distinction – between FRE 801(d)(2)(C) and FRE 801(d)(2)(D) – is crucial here because Complaint Counsel primarily seeks to introduce into evidence statements by Professor Baker from his initial report that he expressly corrected well before trial. Unlike in *Glendale*, there is absolutely no basis for this Court to conclude that, as of the first day of trial, Respondent authorized Professor Baker to make the retracted statements at issue.[7]

In sum, the Court's rulings summarized at the beginning of this brief should stand. And Professor Baker's statements at issue should be admitted solely for credibility purposes.

[7] The other two cases that Complaint Counsel cites are similarly inapposite. In *In re the Chicago Flood Litigation*, 1995 U.S. Dist. Lexis 10305 (N.D. Ill. 1995), and *Dean v. Watson*, 1996 U.S. Dist. Lexis 2243 (N.D. Ill. 1996), neither parties' expert corrected a mistake from his expert report or deposition. In both cases, it was uncontroverted that the material to be included as admissions was true. Here, it is uncontroverted that there was a mistake in Professor Baker's initial report, which he corrected. See Mot. at 2.

II. In the Alternative, Respondent Should Have the Right to Offer Portions of Complaint Counsel's Expert Reports and Depositions into Evidence as Party Admissions

If the Court were to allow portions of Professor Baker's reports to come into evidence for the truth of the matters asserted therein, Respondent should be afforded the same right to admit into evidence select portions of reports and depositions submitted by Complaint Counsel's experts. Otherwise, Respondent will suffer undue prejudice.

At the Final Pretrial Conference, this Court established a general rule that expert reports would not be admitted for the truth of the matters asserted therein because they are hearsay:

> Well, let me just say that first of all, expert reports are hearsay. It's my understanding that Evanston has not asked that they be entered into the record, and it shall not be entered into the record. So, if that will help complaint counsel overcome whatever anxiety it may have about that fact, I will assure you that that expert report [of Dr. Monica Noether] is not going to come into the evidence.

2/8/05 Final Pretrial Conf. Tr. 7; *see also id.* at 6 ("Hearsay is what expert reports are."). (Ex. 1).

Respondent relied on the Court's ruling concerning the admissibility of expert reports throughout trial and, consequently, did not attempt to introduce any of Complaint Counsel's expert reports or deposition testimony into evidence for any purpose.[8] The Court recognized at trial that Respondent could be prejudiced if Complaint Counsel were given an exclusive right to submit expert statements into evidence, even for the limited purpose of establishing a witness' credibility: "Well, at this juncture, you know, I have indicated that I

[8] Complaint Counsel posits a scenario that if Respondent were given the right to admit certain portions of Complaint Counsel's expert reports into evidence, the entire case would have to be reopened. *See* Mot. at n.5. Even if this were the case (which is disputed), such assertion by Complaint Counsel merely demonstrates that its Motion should be denied, not that Respondent should be unduly prejudiced. Basic fairness principles and

will not put [Respondent] in a position where [it] might be unduly harmed by this ruling, so I will give [Respondent] that opportunity. So, you [referring to Respondent's counsel] can as well offer those statements by any expert from complaint counsel for the same purpose." Tr. 5117 (Ex. 2).

Based on this prior ruling by the Court, if Complaint Counsel were permitted to submit into evidence the proffered statements by Professor Baker for the truth of the matters asserted therein, Respondent requests a reciprocal opportunity to submit into evidence, for the truth of the matters asserted therein, portions of Dr. Werden's deposition transcript (Ex. 6).[9]

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common sense clearly dictate that the FRE must be applied in the same manner as to both Respondent and Complaint Counsel.

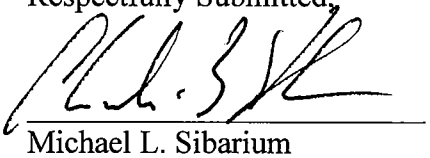
[9] Dr. Werden's deposition testimony fits squarely within the *Glendale* holding, even though Complaint Counsel ultimately decided not to call Dr. Werden to testify at trial. Dr. Werden was on Complaint Counsel's final witness list dated January 27, 2005 (Ex. 7), and Complaint Counsel is on record as representing to the Court that Complaint Counsel fully intended, as of the first day of trial - indeed *throughout* the trial - to call Dr. Werden to testify. 2/8/05 Final Pretrial Conf. Tr. 31 (Ex. 1); Tr. 6229 (Apr. 5, 2005) (Ex. 8). As the Court of Federal Claims put it in *Glendale*: "By the time the trial begins, we may assume that those experts who have not been withdrawn are those whose testimony reflects the position of the party who retains them. At the beginning of trial we may hold the parties to a final understanding of their case and hence an authorization of their expert witnesses who have not been withdrawn." *Glendale*, 39 Fed. Cl. at 424-25. Unlike Professor Baker, Dr. Werden did not supplement, retract, or otherwise correct any portions of his expert report or deposition before trial.

CONCLUSION

For the foregoing reasons, Respondent requests that this Honorable Court deny Complaint Counsel's Renewed Motion for the Admission of Portions of Dr. Jonathan Baker's Expert Reports into Evidence. In the alternative, if the Court determined that expert reports do constitute party admissions under FRE 801(d)(2), Respondent requests the right to offer into evidence select portions of Dr. Werden's deposition transcript – Exhibit 6 attached hereto.

Dated: April 28, 2005

Respectfully Submitted,



Michael L. Sibarium
Charles B. Klein
WINSTON & STRAWN LLP
1400 L Street, NW
Washington, DC 20005
(202) 371-5777
Fax: (202) 371-5950
Email: msibarium@winston.com
Email: cklein@winston.com

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

Counsel for Respondent

CERTIFICATE OF SERVICE

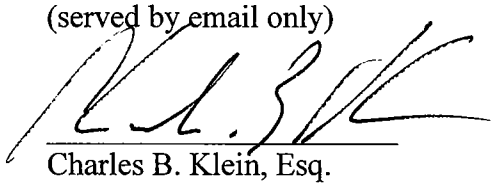
I hereby certify that on April 28, 2005, copies of the foregoing **Respondent's Opposition to Complaint Counsel's Renewed Motion for the Admission of Portions of Dr. Jonathan Baker's Expert Reports into Evidence (Public Record Version)** was served (unless otherwise indicated) by email and first class 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.