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

In the matter of	
Evanston Northwestern Healthcare Corporation, a corporation.	Docket No. 9315 **PUBLIC VERSION**

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

During the March 22, 2005, cross-examination of Respondent's expert witness, Dr. Jonathan Baker, Complaint Counsel asked the Court to admit as evidence limited portions of Dr. Baker's reports. In these excerpts,[1] Dr. Baker confirmed that {[redacted]} that Respondent had market power. After the parties had briefed the issue, the Court admitted the designated portions of the reports for the purposes of impeaching Dr. Baker.[2] However, the Court withheld a decision on Complaint Counsel's motion that designated portions of Dr. Baker's reports be admitted as a party admission evidence under Rule 801(d)(2), F. R. E. Further, the Court instructed the parties to bring the issue back to the Court if they were unable to resolve it through negotiations. Tr. 5115-16.

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[1] Pursuant to the Court's instructions, the parties submitted the excerpts of Dr. Baker's report as RX-2038, RX-2039, RX-2040, and RX-2041, on March 23, 2005. *See* Tr. 4834. On reviewing the record, Complaint Counsel noted that these RX- numbers assigned to these exhibits was different than the numbers that had been used to identify the exhibits during the cross-examination of Dr. Baker. Therefore, for the sake of clarity, Complaint Counsel will file a duplicative set of these exhibits with the Court bearing the exhibit numbers that were used during the examination of Dr. Baker.

[2] *See* Tr. 5113-14 (March 28, 2005).

By this motion, Complaint Counsel renews its request that the Court admit the designated portions of Dr. Baker's reports as evidence. These segments of Dr. Baker's two expert reports demonstrate that the prices that were imposed by Respondent after the merger were higher than the prices that even Respondent can label as "competitive." Further, the report of a party's expert is properly admitted into evidence as a party admission.

BACKGROUND

This evidentiary dispute arises from the two reports that were prepared by Respondent's expert, Dr. Jonathon Baker. Briefly, to justify Respondent's post-merger price increase, Dr. Baker's first report compared Respondent's prices to the prices charged by a "control group" of hospitals, *i.e.,* the prices charged by other hospitals that meet certain criteria. However, due to some fundamental mistakes in his initial calculations, Dr. Baker issued a second expert report dated December 23, 2004.

Dr. Baker's reports offer strong probative evidence that, due to the merger, Respondent had market power. In his first report, Dr. Baker stated that he would conclude that Respondent had market power if the prices Respondent charged any individual managed care plan exceeded the prices that the "control group" hospitals had charged that plan.[3] In his second report, Dr. Baker confirmed that, in fact, after the merger Respondent {[redacted]}.

[3] Thus, in his first report, Dr. Baker determined that the prices Respondent charged some of four individual managed care organizations increased,"but only to about the levels that those managed care organizations negotiated with other . . . hospitals [in the control group]." RX-2038 ¶ 16 (Dr. Baker's Expert Report dated November 2004).

By this motion, Complaint Counsel seeks to introduce as evidence these factual findings and analysis of Dr. Baker.[4] RX-2038 and RX-2039 are the relevant excerpts from the reports of Dr. Baker. RX-2040 is a set of four tables from Dr. Baker's reports setting forth the data. RX-2041 is a graph from his second report which reflect the corrections in the fourth table in RX-2040. These four excerpts from Dr. Baker's reports constitute strong probative evidence that Respondent exercised market power after the merger, and they are admissible evidence as a party admission.[5]

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[4] Complaint Counsel notes that, in its Order on March 28, 2005, the Court admitted the designated portions of Dr. Baker's report into evidence for impeachment purposes, Tr. 5113, and that portion of the Court's decision is not at issue here.

[5] In its March 28, 2005, ruling, the Court offered Respondent the opportunity to designate portions of the reports of Complaint Counsel's experts for impeachment purposes after these experts had completed their testimony. Tr. 5113-14. Complaint Counsel respectfully asks the Court to re-consider this portion of its March 28 ruling because Complaint Counsel's experts will not be "afforded the opportunity to explain or deny the same," and because Complaint Counsel will not be "afforded an opportunity to interrogate the witnesses thereon," as required by Rule 613(b) of the Federal Rules of Evidence. Obviously, Respondent had the chance to use these reports to impeach Complaint Counsel's experts during its cross-examination of Complaint Counsel's experts, and there is no discernable reason that Respondent should have the opportunity to do so now that the introduction of this evidence for impeachment purposes would compromise the protections Rule 613 affords the experts and Complaint Counsel.

Still, if Respondent is given this discretion, Complaint Counsel will work with Respondent to develop a schedule by which each party may designate any additional portions of the opposing party's expert reports it deems appropriate for impeachment purposes.

Notably, at trial, Respondent never sought to introduce any portions of Complaint Counsel's expert reports as substantive evidence. Therefore, even if Respondent is permitted to present report excerpts for impeachment purposes, Complaint Counsel assumes that Respondent will not be given discretion to reopen its case in chief belatedly to present portions of the reports of Complaint Counsel's experts as substantive evidence it did not introduce at trial.

Nevertheless, if Respondent is given the opportunity to introduce new evidence for purposes other than impeachment, Complaint Counsel assumes that its rebuttal case will be reopened so that Complaint Counsel can present additional rebuttal evidence (and can call

ARGUMENT

The Excerpts of Dr. Baker's Expert Reports are Admissible for the Truth of the Matter Asserted Therein

A statement is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. F.R.E. 801(d)(2)(D). "The tradition [in applying Rule 801(d)(2)(D)] has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency." F.R.E. 801, Advisory Committee Notes. Here, Dr. Baker's reports are statements by an agent of Respondent concerning matters within the scope of Dr. Baker's agency and made during the existence of the agency relationship.

The leading case on this issue is *Glendale Fed. Bank v. United States,* 39 Fed. Cl. 422, 1997 U.S. Claims Lexis 266 (Ct. Fed. Cl. 1997). In *Glendale,* the court held that the expert's out-of-court statements were a statement of an agent of the party, and therefore admissible:

> "By the time 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. At this point, when an expert is put forward for trial it is reasonable and fair to presume they have been authorized." *Id.* at 424-25.

See also In Re the Chicago Flood Litigation, 1995 U.S. Dist. Lexis 10305, 34-35 (N.D. Ill. 1995)("[a] party's pleadings and *expert reports* often constitute party admissions pursuant to Fed. R. Evid. 801(d)(2)"); *Dean v. Watson*, 1996 U.S. Dist. Lexis 2243 at 8, 14, 16 (N.D. Ill. 1996) (admitted portions of the deposition of the defendant's expert witness as an admission against the

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additional rebuttal witnesses to present testimony) relevant to the additional substantive evidence that Respondent obviously should have presented in its case in chief.

defendant).

These decisions all support the conclusion that Dr. Baker's expert reports are properly admissible under F.R.E. 801(d)(2)(C). Like the expert in *Glendale* and the other cases, Dr. Baker is an agent of Respondent. These expert reports explaining Dr. Baker's analysis, like the expert's report in *Glendale* and the other cases, were made in the course of Dr. Baker's employment relationship with Respondent, are therefore admissions by Respondent.[6]

Contrary to Respondent's suggestion in its initial March 25, 2005, brief on this issue, the Court's decision at the pre-trial conference precluding Respondent from introducing into evidence its own expert report is wholly irrelevant to this motion. *See* Respondent's Brief on Admissibility of Expert Reports as a Party Admission, dated March 25, 2005, at 1, *citiing* Tr. at 6 (Feb. 8, 2005). There, the Court properly concluded that Respondent's expert report constituted hearsay *because it had been submitted to the Court by Respondent. Id.* However, the characterization of an out-of-court statement as "hearsay" depends, *inter alia*, on which party seeks to introduce that statement into evidence

This principle is ingrained in the very definition of hearsay under Rule 801 of the Federal Rules of Evidence. Rule 801(d)(2) specifies that "a statement *is not hearsay* . . . if the statement is offered against the party" who made the statement and, as here, the statement satisfies the other requirements of Rule 801(d). Thus, although the hearsay rule prevented Respondent from introducing into evidence its own expert reports, Rule 801 guarantees that the same reports are

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[6] On a related score, the authority cited by Respondent in its initial brief is inapplicable here. In *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147 (3d Cir. 1995), the moving party sought to introduce into evidence the testimony of the opposing party's expert witness in previous, unrelated proceedings. The *Kirk* court ruled "[the expert's] prior trial testimony to be hearsay in the context of the present trial." *Id.* at 164

not classified as hearsay when they are introduced into evidence by Complaint Counsel.

CONCLUSION

For the foregoing reasons, the excerpts of the expert reports of Jonathan Baker, RX-2038, RX-2039. RX-2040, and RX-2041, are admissible into evidence as an admission of a party-opponent under Federal Rule of Evidence 801(d)(2)(D).

Respectfully submitted,

Dated: 5/2/05

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a corporation.	)	

ORDER

Upon motion of Complaint Counsel, and in consideration of the issues pertaining thereto, it is hereby,

ORDERED, that the excerpts of the expert reports of Jonathan Baker, RX-2038, RX-2039, RX-2040, and RX-2041, are admitted into evidence.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:_____

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing documents were served on counsel for the respondents by electronic mail and first class mail delivery:

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