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

In the Matter of EVANSTON NORTHWESTERN HEALTHCARE CORPORATION, and ENH MEDICAL GROUP, INC., Respondents.	)	Docket No. 9315

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

On April 21, 2005, Complaint Counsel filed a motion seeking to have portions of the reports filed by Respondent's expert, Dr. Jonathan Baker, admitted into evidence ("Motion"). On April 25, 2005, Evanston Northwestern Healthcare Corporation ("Respondent") filed its opposition ("Opposition"). This issue was previously briefed by the parties on March 25, 2005. *See* Complaint Counsel's Motion for the Admission of Portions of Dr. Jonathan Baker's Expert Reports into Evidence and Respondent's Brief on Admissibility of Expert Reports as a Party Admission.

Complaint Counsel contends that the excerpts of Baker's expert reports are admissible for the truth of the matter asserted and should be admitted as a party admission under Federal Rule of Evidence 801(d)(2). Motion at 4-6. Respondent argues that Baker's expert reports constitute inadmissible hearsay, not party admissions, and that, in the alternative, Respondents should have the right to offer portions of Complaint Counsel's expert reports and depositions into evidence as party admissions. Opposition at 5-10.

Expert reports are hearsay and not admissible, as the parties were advised at the final pretrial conference. Trial Transcript (Tr.) at 6 ("[A]s a rule, we do not enter expert reports in the record. They are hearsay."); Tr. at 7 ("expert reports are hearsay"). In accord with the circuit court decisions in *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147 (3rd Cir. 1995) and *Potts v. Sam's Wholesale Club*, 108 F.3d 1388, 1997 US LEXIS 5355 (10th Cir. 1997) (unpublished opinion), Baker's reports are not admissible pursuant to Rule 801(d). In addition, unlike the expert in *Glendale Fed. Bank v. United States*, 39 Fed. Cl. 422 (Ct. Fed. Cl. 1997), by the time trial began, Baker had identified an error in his initial report and issued a supplemental report correcting the error. *See* Motion at 2; Opposition at 3. Therefore, *Glendale* is not persuasive.

On March 28, 2005, the Court ruled that the relevant portions of Baker's report would be admitted "for purposes of impeachment" and to "the extent that they impeach only." Tr. at 5113, 5114. The parties were allowed an opportunity to confer in an attempt to reach an agreement on whether Baker's reports would be admitted under Rule 801 for the truth of the matter asserted. Tr. at 5115-16. On March 29, 2005, the Court stated:

> [W]hat I said yesterday . . . was that I would allow the first expert report of Dr. Baker to come in for impeachment purposes only. It is my understanding that counsel was going to confer, and if they could reach some agreement regarding . . . whether statements in the expert report could be offered for the truth of the matter asserted, then I would entertain [the] agreements. I haven't heard from counsel, so as we stand today, those statements may only be used for impeachment purposes.

Tr. at 5551-52.

Complaint Counsel's motion does not provide any support for reconsideration of this ruling. Specifically, Complaint Counsel's motion does not indicate that there has been an intervening change in controlling law; new evidence is available; or there is a need to correct clear error or manifest injustice. There is no agreement between the parties. In addition, Complaint Counsel was not limited in its use of Baker's report in cross examination. Thus, the Court's ruling that the relevant portions of Baker's expert reports are admissible for impeachment purposes only and not for the truth of the matter asserted will stand. Accordingly, Complaint Counsel's motion is **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: May 10, 2005