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 Record Version

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

To assess the competitive effects of the merger challenged in this case, Respondent's expert, Dr. Jonathan Baker, analyzed the prices that Respondent charged before and after the merger. Upon reviewing the report of Complaint Counsel's rebuttal expert, Dr. Baker realized that the price calculations he had developed and used in his original report were wrong. Then, after correcting the mistakes and running a second set of price calculations, Dr. Baker changed the standards he had used in his original report. The need for this change is clear: if Dr. Baker applied his original standards to his corrected price calculations, his analysis would confirm that Respondent's post-merger prices were excessive. By changing standards in midstream, Dr. Baker could still conclude that, at least in his opinion, Respondent's prices were not the result of market power.

Respondent has asked the Court to exclude the excerpts of Dr. Baker's reports[1] that

[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.

demonstrate how Dr. Baker changed the standards he used to assess Respondent's prices. Nevertheless, these segments of Dr. Baker's two expert reports are properly admissible into evidence. First, these materials have probative value, in that they demonstrate that Dr. Baker's revised analysis is wrong. Second, at the very least, these materials impeach the testimony that Dr. Baker decided to offer the Court. Under these circumstances, Respondent's motion to exclude the designated portions of Dr. Baker's reports – in the hope that Dr. Baker's conclusions might seem slightly more persuasive – should be denied.

Background

This evidentiary dispute can be best understood with a brief summary of the differences in the analysis that Dr. Baker used in his first report – which was based on erroneous calculations of the prices charged by Respondent and other hospitals – and the analysis used in his second report. Respondent contends that, in order to evaluate the prices Respondent charged after the merger, it is necessary to compare Respondent's prices to the prices charged by a "control" group, *i.e.,* the prices charged by other hospitals that meet certain criteria. Thus, in his first report, Dr. Baker examined the prices that Respondent had charged [redacted] managed care organizations to the prices that certain other hospitals had charged the same managed care organizations for their services. In conducting this analysis, Dr. Baker concluded that it was necessary to compare the prices that Respondent and the hospitals in the control group had charged "both to individual payers and on average overall." RX-2038 ¶ 56 (Dr. Jonathan Baker's Expert Report dated November 2, 2004).[2]

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[2] Thus, 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

However, Complaint Counsel's rebuttal expert identified arithmetic mistakes that Dr. Baker had made in his calculations and comparison of the prices charged by Respondent and his control group hospitals. Therefore, Dr. Baker corrected the mistakes and issued a second expert report dated December 23, 2004. Tellingly, these corrected price calculations confirmed that Respondent had imposed post-merger prices on [redacted] that were significantly higher than the average prices those payers were charged by the hospitals in Dr. Baker's control group. Confronted with this corrected data, Dr. Baker abandoned the comparison of prices that either Respondent or the hospitals in the control group had charged any individual managed care organization. Instead, Dr. Baker reported that it was necessary only to compare the average prices that Respondent had charged the [redacted] managed care companies combined to the average prices that the control group hospitals had charged those four managed care organizations.[3] In other words, in his revised report, Dr. Baker did not test the prices that either Respondent or the control group had charged any individual managed care organization.

Although this modification may seem abstract, Dr. Baker's testimony would have little, if any value to Respondent's case without this change. In his original report, Dr. Baker acknowledged that if Respondent had charged any individual managed care organization a price that exceeded the price that his control group hospitals had charged that specific managed care organization, he could not defend Respondent's post-merger price increases.[4] However, Dr. Baker's second report shows that Respondent had charged [redacted] managed care organizations prices

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¶ 16 (Dr. Baker's Expert Report dated November 2, 2004).

[3] RX-2039 ¶ 58 (Dr. Baker's Revised Expert Report dated December 23, 2004).

[4] RX-2038 ¶¶ 56, 58 (Dr. Baker's Expert Report dated November 2, 2004).

that were significantly higher than the prices that the control group had charged those same two managed care organizations.[5]

With this in mind, the excerpts of Dr. Baker's reports are properly made part of the record for two distinct reasons. First, these excerpts are statements that can be attributed to Respondent and, therefore, are properly admitted as a party admission. Second, even if the excerpts of Dr. Baker's reports are hearsay and cannot be admitted to prove the truth of the matter asserted therein – *i.e.,* that Respondent actually charged prices that were higher than those charged by hospitals in Dr. Baker's control group – Dr. Baker's reports should be part of the record to impeach his testimony. These excerpts demonstrate that Dr. Baker first endorsed one standard for assessing Respondent's price increases; that the actual prices charged by Respondent do not meet this first standard; and that Dr. Baker then changed the standards that he used in reaching the conclusions he offered the Court in his testimony.

Argument

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

Dr. Baker's expert reports are not hearsay under Rule 801 because they constitute an admission by a party-opponent, as defined in Rule 801(d)(2)(D) of the Federal Rules of Evidence.[6] "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

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[5] RX-2040 (Table 4).

[6] 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).

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 plaintiff sought to introduce into evidence the prior statements of the defendant's experts, reasoning that the expert's statements were "an admission by a party-opponent." *Id.* at 422. 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.

The *Glendale* decision is consistent with longstanding precedent. For example, in *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980), the plaintiffs sought to introduce, as an admission of the defendant, the deposition testimony of one of defendant's experts. *Id.* at 777. In affirming the district court's decision to admit the testimony, the Fifth Circuit noted that the defendant had employed the witness as an expert to investigate and analyze the product. The court further explained that

> "[the defendant had] hired [the witness] to investigate the [. . .] accident and to report his conclusions. In giving his deposition he was performing the function that [the defendant] had employed him to perform." *Id.* at 782.

Therefore, the Court concluded that the expert's report (and his deposition testimony in which he explained his analysis and investigation) was thus an admission of the defendant. *Id.*

The court reached the same conclusion in *In Re the Chicago Flood Litigation*, 1995 U.S.

II. The Excerpts of Dr. Baker's Expert Reports are Admissible For Impeachment Purposes as Proof of Prior Inconsistent Statements

Even if the statements are not party admissions, the excerpts of Dr. Baker's reports are admissible for impeachment purposes as prior inconsistent statements. Implicit in Federal Rule of Evidence 613 is authorization for impeachment of witnesses by prior inconsistent statements, which is well-established in federal courts.[8] A witness may be impeached with any kind of prior statement - oral, written, sworn, or unsworn.[9]

During Dr. Baker's cross-examination, Complaint Counsel sought to admit statements in Dr. Baker's first expert report which were inconsistent with his in-court testimony. Specifically, in Table 1 and paragraphs 16, 56-59, and 66 of his first report, *see* RX-2038, Dr. Baker asserted that it was necessary to look at price changes on an individual payer-by-payer basis and on average overall. However, in Dr. Baker's second report and in his trial testimony, he claimed that one only needs to look at average prices, and hence, it is no longer mandatory to look at the price changes on a payer-by-payer basis. RX-2039. Because Complaint Counsel properly used these excerpts of Dr. Baker's reports for impeachment purposes, to demonstrate the inconsistencies between his first report and his current testimony, they are properly made part of the record for impeachment purposes even if they cannot be admitted into evidence to prove the truth of the matters asserted therein.

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[8] *See* F.R.E. 613, Commentary, citing *United States v. Hale*, 422 US 171 (1975).

[9] *See Jankins v. TDC Management Corp.*, 21 F.3d 436, 442 (D.C. Cir. 1994).

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 admissions of a party-opponent under Federal Rule of Evidence 801(d)(2)(D).

Respectfully submitted,

Dated: March 29, 2005

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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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and delivery of two copies to:

The Honorable Stephen J. McGuire
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Dated: March 29, 2005

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