As demonstrated below, courts have held that the statements of independent expert witnesses do not qualify as party admissions under Rule 801(d)(2). Dr. Baker is an independent expert hired by ENH to testify at trial as to his impartial opinion; he is not an "agent" whose statements qualify for non-hearsay pursuant to Rule 801(d)(2). Complaint Counsel, therefore, cannot admit any portion of Dr. Baker's report under this Rule. Nor has Complaint Counsel provided any basis to reverse the law of the case described above that, "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).

Nevertheless, should the Court be inclined to admit portions of Dr. Baker's report into evidence, ENH requests the opportunity to introduce into evidence select portions of reports submitted by Complaint Counsel's various experts.

ARGUMENT

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

[redacted]

the expert. *Rule 801(d)(2)(c) requires that the declarant be an*

[redacted]

> *agent of the party-opponent against whom the admission is offered, and this precludes the admission of the prior testimony of an*

[redacted]

justify its position that select portions of Dr. Baker's November 2, 2004, expert report should be admitted into evidence. Trial Tr. 4722-23 (March 22, 2005) (Ex. 2). But neither of those cases – *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980), or *In re the Chicago Flood Litigation*, 1995 WL 437501 (N.D. Ill. 1995) – supports Complaint Counsel's argument.

The first case relied on by Complaint Counsel, *Collins*, is plainly inapposite. This case addressed whether deposition testimony by someone hired by the defendant to investigate an accident involving a bus manufactured by defendant was held to be an admission of the defendant. 621 F.2d at 782. The agent prepared a "Report of Investigation" for his employer – but there is no indication that he prepared any expert report under Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, which governs testifying experts. *Id.* at 780. The Fifth Circuit accepted, without discussion, that the investigator was defendant's agent and thus held that "his *deposition testimony* in which he explained his analysis and investigation was an admission of Wayne." *Id.* at 782 (emphasis added). This case has no bearing on the issue raised by Complaint Counsel – *i.e.*, whether Dr. Baker's expert report is a party admission

because 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

801(d)(2)." *Id.* at *11. This conclusory statement falls far short of providing a persuasive reason to ignore the conflicting authority discussed above and, therefore, should be disregarded.

II. Complaint Counsel's Position Is Barred By The Law of the Case Doctrine.

Complaint Counsel's position concerning the admissibility of Dr. Baker's report also conflicts with the law of the case. At the Final Pretrial Conference, this Court settled the issue of whether expert reports should be admitted into evidence:

> "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) For the reasons discussed above, this Court got it right the first time. Reconsideration of the Court's ruling is thus neither warranted nor appropriate. *See, e.g.*, Moore's Federal Practice § 134.21[1] ("The Supreme Court has held that although a court has the power to revisit its own decisions or those of a coordinate court, it should not do so absent extraordinary

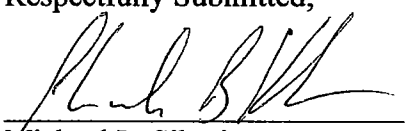
Counsel's present position should be rejected on this basis alone. Nevertheless, fairness principles dictate that, if the Court decided to reconsider its prior ruling at the Final Pretrial Conference and admit selected portions of Dr. Baker's expert report into evidence, ENH should have the right to admit into evidence select portions of reports submitted by Complaint Counsel's experts. [3]

CONCLUSION

For the foregoing reasons, Respondent asks the Court to uphold its prior ruling that expert reports constitute admissible hearsay and deny Complaint Counsel's request to admit portions of Dr. Baker's expert report into evidence. In the alternative, and to the extent the Court determines that expert reports do constitute party admissions under Rule 801(d)(2), Respondent requests the right to offer into evidence select portions of reports submitted by Complaint Counsel's experts.

Dated: March 29, 2005

Respectfully Submitted,



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[3] For example, if the parties were to be permitted to submit statements of opposing parties' experts into evidence,

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Counsel for Respondent

UNITED STATES OF AMERICA

[redacted]

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

ORDER

Upon consideration of Respondents' Brief on Admissibility of Expert Reports as

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2005, copies of the foregoing ***Respondent's Brief On Admissibility Of Expert Reports As A Party Admission*** (Public Record Version) and proposed order were 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
[redacted]

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Exhibits

In The Matter Of:

EVANSTON NORTHWESTERN HEALTHCARE CORP., ET AL
MATTER NO. D09315

FINAL PRETRIAL CONFERENCE
February 8, 2005

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EXHIBIT 2

[REDACTED]

LEXSEE 1997 U.S. APP. LEXIS 5355

CAROLE POTTS; JAMES POTTS, Plaintiff - Appellant, v. SAM'S WHOLESALE CLUB, Defendant - Appellee.

No. 95-5253

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1997 U.S. App. LEXIS 5355

March 21, 1997, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of

[illegible] returned a general verdict in favor of [illegible] Co., 910 P.2d 1024 (Okla. 1996). Hardy, however

[illegible]

defendant

reaffirms McKellips, which, in addition to stating the

Plaintiffs' first claimed error involves Jury Instruction No. 8, which addresses the consideration to

general rule of causation, established an exception for cases involving medical malpractice causing lost chance

P. 32(a)(3)(E) (requiring notice to use deposition testimony in open court if no showing of unavailability). In finding the witnesses to be unavailable, the magistrate accepted **[*8]** the representation of defendant's counsel that the two deposition witnesses were truly unavailable. The magistrate did not abuse his discretion in allowing

1499, 1504 (10th Cir. 1994). Plaintiffs argue that the first report, provided by the expert in preparation for testimony and disclosed pursuant to *Fed. R. Civ. P. 26(a)(2)*, is not hearsay as defined by *Fed. R. Evid. 801*, specifically, Rule 801(d)(1). That rule reads: "A statement is not hearsay if the declarant testifies at

Finally, plaintiffs argue that the trial court erred in refusing to admit as an exhibit a report prepared by defendant's medical expert, a report that conflicted with

concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition"