

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 Board Version

_____)
_____)

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

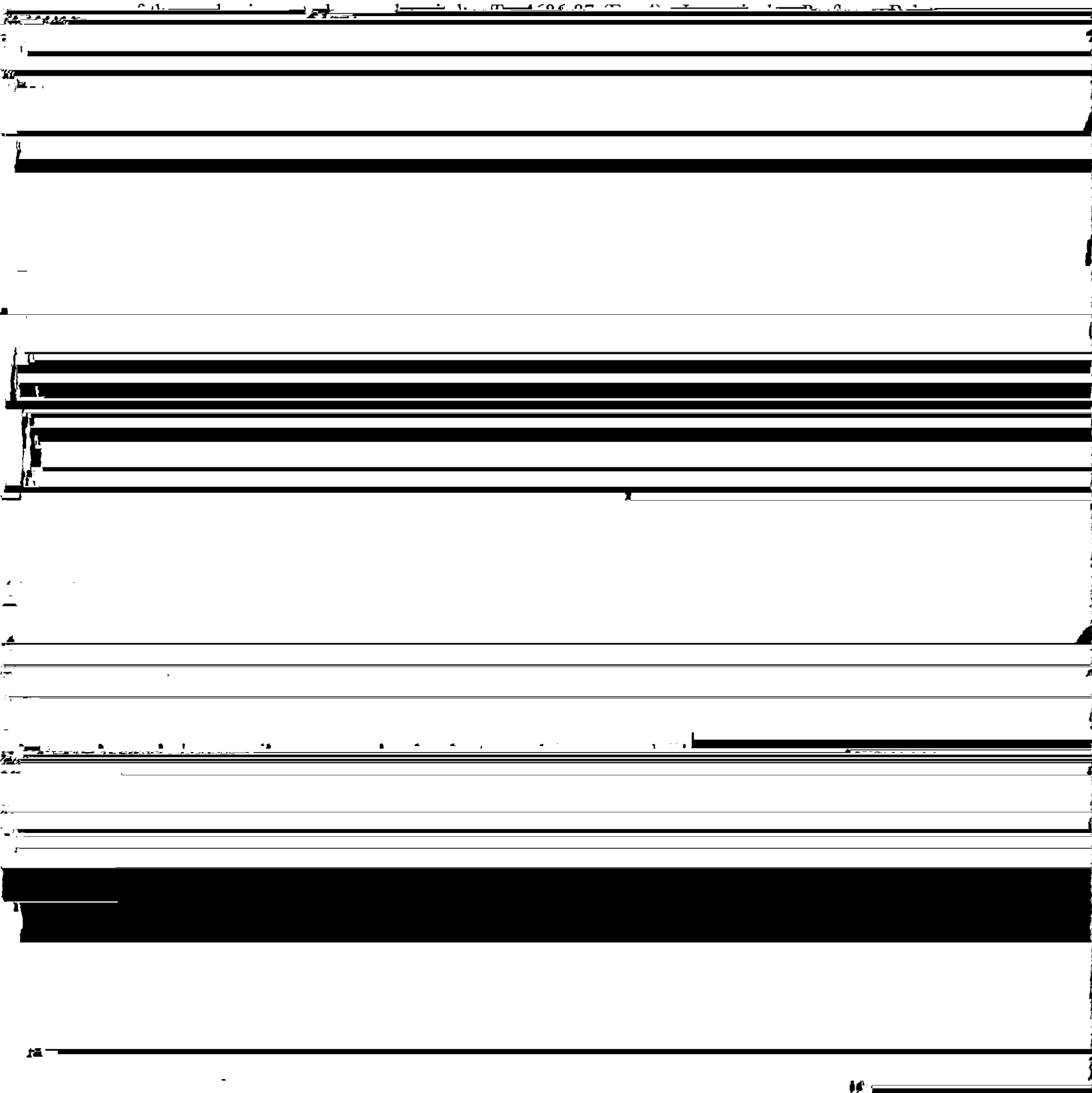
Document to the Federal Trade Commission's Bureau of Consumer Protection

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 member of complaint counsel that they would also offer.” Tr. 5112-14 (En. 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

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



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

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

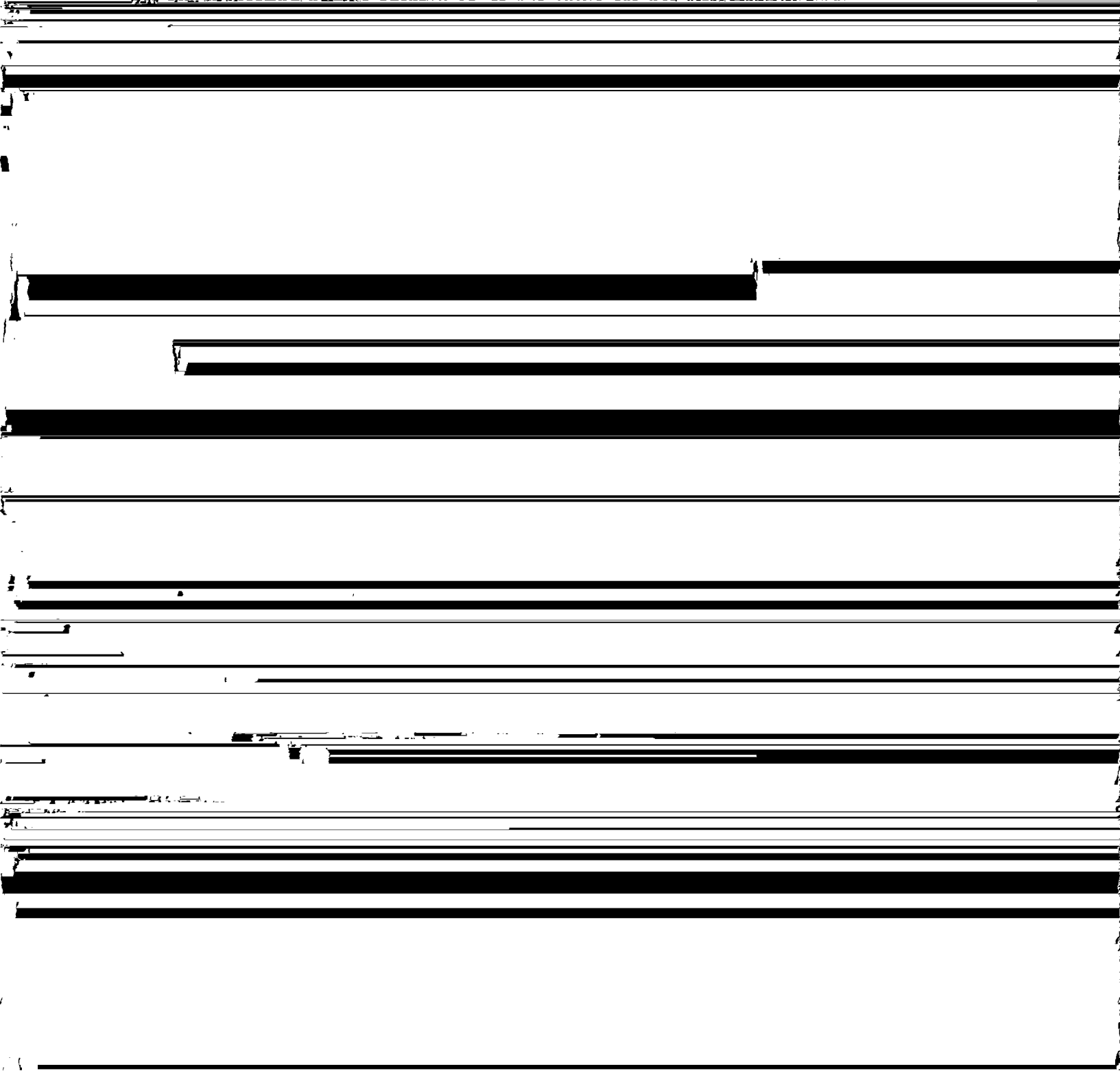
as to the reliability of the report as to his opinion including the manner in

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

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 opposing party’s agent.”); 39 Fed. Cl. at 425 (“[T]he court in *Glendale* found that the expert was not the opposing party’s agent.”)



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

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

⁹ Dr. Werden's deposition testimony fits squarely within the *Glendale* holding, even though Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2005, copies of the foregoing **Respondent's**
~~Opposition to Complaint, Cross-Motion, Proposed Motion for the Admission of Evidence~~

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)