UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of NORTH TEXAS SPECIALTY PHYSICIANS, a corporation.	**DOCKET NO. 9312**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S EXPEDITED MOTION FOR A PROTECTIVE ORDER AND TO STAY DEPOSITIONS, OR IN THE ALTERNATIVE, MOTION TO QUASH DEPOSITIONS

Respondent demands that Complaint Counsel be barred from taking depositions of NTSP and others until Complaint Counsel has produced to NTSP both responses to contention interrogatories and third-party documents. This demand–the only issue properly before the Court–is unprecedented, illogical, and undermines the structure of Part III litigation.[1] Respondent's request directly contradicts the FTC Rules of Practice for Adjudicative Proceedings ("Rules of Practice"), which explicitly require parties to conduct simultaneous discovery, and provide that the conduct of one party's discovery "shall not operate to delay" another's. Rules of Practice, 16 C.F.R. § 3.31(a). Furthermore, Respondent's request runs counter to the formal structure of Part III litigation, which requires the Administrative Law Judge to issue an Initial Decision within one year of the complaint's issuance and therefore permits only

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[1] Expedited Motion of North Texas Specialty Physicians and Southwest Neurological Associates For a Protective Order and to Stay Depositions, or in the Alternative, Motion to Quash Depositions, November 11, 2003. In the same motion, Respondent requested that the Court issue a protective order concerning the dates and locations of depositions. As explained *infra*, there is no impasse that calls for the intervention of this Court on any issue involving the scheduling of particular depositions or the document production of Southwest Neurological Associates, PA ("SWNA"). Separately, Respondent has moved to compel responses to its contention interrogatories, and Complaint Counsel will be submitting its opposition to this motion by or on November 17, 2003.

a brief period for fact discovery, as reflected in this Court's Scheduling Order of October 16, 2003.[2] Respondent cites no precedents supporting its request because, to the best of Complaint Counsel's knowledge, there are no such precedents: neither the Rules of Practice, nor the Federal Rules of Civil Procedure, nor the decisions construing those rules support staying fact discovery until responses to contention interrogatories are provided. To the contrary, the case law holds that contention interrogatories are typically not permitted until the end of fact discovery. The order sought by Respondent would jeopardize the parties' ability to comply with the deadlines for fact discovery and prevent Complaint Counsel from being adequately prepared to commence trial on the scheduled date. For the foregoing reasons, this Court should deny Respondent's Motion in its entirety.

A. There is no basis in logic or law for conditioning a party's right to conduct fact discovery on its response to contention interrogatories.

Respondent recognizes that, pursuant to the Rules of Practice 3.31(a), "the frequency and sequence of the discovery methods allowed by the [Rules of Practice] is not limited," adding the incontrovertible observation that the Court has the discretion to order otherwise in a particular case. Rule 3.31(a), however, goes on to state that: "The parties shall, to the greatest extent practicable, conduct discovery simultaneously; the fact that a party is conducting discovery shall not operate to delay any other party's discovery." 16 C.F.R. § 3.31(a). Respondent seeks to impose such a delay, using its own contention interrogatories to Complaint Counsel to delay

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[2] The Court's scheduling order provides for completion of fact discovery approximately 11 weeks from today, by the end of January 2004.

Complaint Counsel's fact discovery.[3] Respondent does not cite a single authority for its theory that discovery should be stayed until its contention interrogatories are answered.[4] In fact, the request stands the law on its head: rather than preceding fact discovery, contention interrogatories are usually answerable, if at all, close to or at the end of fact discovery.[5] Complaint Counsel believes that this Court should adhere to the well established practice of allowing fact discovery to proceed simultaneously. Staying fact discovery typically is reserved for the rare instance in which a dispositive motion is pending before the court, and that motion can be resolved without further development of the factual record.[6]

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[3] This reflects a disturbing pattern of dilatory and obstructive behavior, including: Respondent's insistence that Complaint Counsel promulgate interrogatories to obtain information that Respondent plainly should have provided in its initial disclosure; its significant delay in producing, and continued failure to produce most of, the documents responsive to Complaint Counsel's First Request for Production of Documents; its refusal to designate persons to testify on behalf of NTSP with respect to each subject identified by Complaint Counsel under the plain requirements of Rules of Practice § 3.33(c); and its request that the Court now intervene in the scheduling of physician depositions despite Complaint Counsel's explicit offer to Respondent's counsel to negotiate time and place of appearance to accommodate the witnesses.

[4] Nor does Respondent provide a logical justification for why the Court should intervene to stop fact discovery in this case. Respondent merely notes the Commission's pre-complaint investigation and claims that Respondent's interrogatories would "allow NTSP to gain knowledge regarding the specific facts that form the basis of the complaint's general allegations."

[5] As we will explain more fully in our forthcoming response to Respondent's Motion to Compel Interrogatory Responses, case law overwhelmingly favors delaying responses to contention interrogatories until the end of fact discovery. *See, e.g., McCarty v. Paine Webber Group*, 168 F.R.D 448, 450 (D. Conn. 1996); *Everett v. US Air Group*, 165 F.R.D. 1 (D. Col. 1995); *B.Braun Medical Inc. V. Abbott Laboratories*, 155 F.R.D. 525, 527 (E.D. Pa. 1994); *Kendrick v. Sullivan*, 125 F.R.D. 1, 4 (D.D.C. 1989); *Convergent Technologies Secs. Litig.*, 108 F.R.D. 328, 336 (N.D. Cal. 1985).

[6] *See, e.g., Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987); *Lugo v. Alvarado*, 819 F.2d 5 (1st Cir.1987); *Tilley v. U.S.*, 270 F.Supp.2d 731, 92 (M.D.N.C., 2003); *Chavous v. District of Columbia Financial Resp. and Mgmt. Asst. Auth.*, 201 F.R.D. 1, 3 (D.D.C.2001); *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D.Fla., 1997); *Hachette Distribution, Inc. v. Hudson*

As reflected in the cases cited in notes 5 and 6 above, Respondent's position that it is entitled to interrogatory responses and third-party documents before Complaint Counsel may proceed with depositions is untenable.[7] Respondent already possesses a trove of information about the facts and theories underlying the Commission's Complaint. The Commission's Complaint plainly alleges a broad pattern of concerted action by NTSP with and on behalf of its members, including practices such as joint negotiations with payors, sharing of current and future price information among physicians, refusals to "messenger" payor offers to members, and interference with the ability of payors to contract directly with NTSP members.[8] Respondent could have moved for a more definite statement of the complaint, but chose not to do so. At the initial conference before this Court, Complaint Counsel provided an even more detailed summary of its legal theory and the facts that it expects to prove at trial. Complaint Counsel also provided

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County News Co., 136 F.R.D. 356, 358 (E.D.N.Y. 1991); *see also, Howard v. Galesi*, 107 F.R.D. 348 (S.D.N.Y.1985) (the moving party bears the burden of showing good cause and reasonableness).

[7] Respondent suggests that responses to contention interrogatories would help it prepare its witnesses and prevent them from being "ambushed" with documents they have not recently reviewed (though again it cites no precedent for staying depositions until such answers or documents have been provided.) The purpose of these depositions is discovery: witnesses will be asked to testify about certain events of which they have knowledge, and they may in the course of their testimony also be asked to explain statements in certain documents. Complaint Counsel is not aware of any authority requiring it to provide a deposition witness or his counsel with a list of questions or relevant documents in advance of the deposition.

[8] As discussed in more detail in Complaint Counsel's opposition to Respondent's Motion to Compel Responses to Interrogatories, forthcoming, Complaint Counsel has put forth our "present concept of theor[ies] of the case" and a current "roadmap" of where the case is headed. *Flowers Industries*, FTC No. 9148, 1981 FTC LEXIS 110 at *3 (October 7, 1981), Attachment A.

the initial disclosures required by the Rules of Practice, and Respondent did not object to the completeness of those disclosures.

Parenthetically, it appears that the contention interrogatories with which Respondent is so concerned are actually an attempt by Respondent to misconstrue the applicable law in order to restructure the theory of the case. As discussed more fully in Complaint Counsel's forthcoming opposition to Respondent's Motion to Compel, Respondent has framed its interrogatories to suggest that Complaint Counsel must establish that NTSP, as a single entity, is conspiring with *other* doctors. As Complaint Counsel has made clear numerous times, including but not limited to, the administrative complaint filed on September 17, 2003,[9] Complaint Counsel's opening statement at the initial conference before this Court on October 15, 2003, and in numerous conference calls with Respondent, Complaint Counsel's position is that NTSP is an organization comprised of competing members and that, insofar as its practices seek to affect the prices obtained by those physicians, NTSP acts as a combination of those members. Moreover, insofar as these physicians participate in NTSP acts to that end, they do so in combination with (and through) one another. Rather than putting forth a legitimate need for early answers to its contention interrogatories, it is clear that Respondent is really trying to limit fact discovery to the issues Respondent wants to discuss rather than the issues framed by the law and in the Complaint.

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[9] *See* Complaint, In the Matter of North Texas Specialty Physicians, September 17, 2003, ¶¶ 11, 12, 17, 18, 19, 20, 21.

B. The Court should not stay Complaint Counsel's depositions pending production of third party documents covered by the Court's Protective Order.

Pursuant to this Court's Protective Order Governing Discovery Material, October 16, 2003 ("Protective Order"), Complaint Counsel is not yet permitted to produce the third party documents. In the present motion, Respondent refers to a "fourteen month pre-complaint investigation," and to "almost five boxes of documents [Complaint Counsel] received during its pre-complaint investigation from the fifty third parties who produced documents or information concerning NTSP or payor contracts in the DWF Metroplex."[10] Respondent protests that Complaint Counsel has not produced these third party documents, and seeks a stay of depositions until these documents are produced.

Complaint Counsel has never refused to produce these documents. The Protective Order requires Complaint Counsel, prior to producing the third parties documents to NTSP, to notify the third parties of the document production and allow them 30 days to object to the disclosure of its documents and to request confidential treatment of those documents. All of the third parties have received the required notice, but the 30-day period has not yet run.[11] Complaint Counsel is

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[10] The vast majority of facts of this case are found in NTSP's own documents. The documents produced by third parties total approximately two boxes, and include, in significant part, documents that NTSP itself should have produced. Furthermore,. Respondent also stresses that it has produced 43,000 pages of documents (17 boxes) thus far. Eight of these boxes were produced within the last week, and Complaint Counsel was told on November 12, 2003 that approximately 13 additional boxes apparently newly discovered may be produced at the end of this week, while another forty or so boxes may be forthcoming. Contrary to Respondent's protestations of timeliness, all documents were supposed to have been produced by or on October 8, 2003.

[11] The 30 day period for each third party expires next Monday, November 17, 2003.

not at liberty to produce such documents at present, but intends to do so as quickly as possible once all of the terms of the protective order have been satisfied, as Complaint Counsel has explained to Respondent on numerous occasions.

The Court's scheduling order permits fact discovery at the present time. It does not condition any such discovery on the turning over to the other party of third party documents following compliance with the procedures contained in the Protective Order for the protection of third parties. Complaint Counsel does not believe that the Court intended those procedures to freeze other discovery. Were the Court to accept Respondent's contention, any third party challenge to the disclosure of its documents under the Protective Order could indefinitely delay Complaint Counsel's taking of depositions, utterly disrupting Part III litigation.

C. There is no issue ripe for decision by the Court concerning the scheduling of depositions, their timing, or their location.

Respondent implies that there is an issue concerning the scheduling, timing, and location of depositions, but it has completely failed to disclose to this Court that Respondent and Complaint Counsel have been, and continue to be, involved in discussions on these issues. Respondent and Complaint Counsel have not reached impasse; negotiations are ongoing. On October 30, 2003, Complaint Counsel advised Respondent that notices of deposition would be sent the following week. On November 4, 2003, Complaint Counsel issued the notices of deposition. As is normal practice, Complaint Counsel designated a time and place for each deposition in the notice, anticipating discussion and adjustment of the noticed deposition schedule at a teleconference scheduled for November 6, 2003. That same day Respondent cancelled the November 6, 2003 call, and requested that the call be rescheduled for November

10, 2003. At the same time, Respondent explained that they did not plan to produce witnesses. Complaint Counsel immediately issued *subpoenas ad testificandum*, on November 6 and 7, 2003.

After the notices of deposition and subpoenas were issued, but before Respondent filed the present motion, Respondent and Complaint Counsel held a teleconference concerning the deposition schedule, on November 10, 2003 at approximately 4:00 pm. During that conference, Complaint Counsel expressed its willingness to try to accommodate physician-deponents by taking account of their preferred dates, conducting simultaneous depositions as necessary, doing the depositions in the afternoon and evening, and seeking a Fort Worth venue. Respondent contacted Complaint Counsel by email that same day, on November 10, 2003 (at 8:27pm and 9:08pm), to advise of changes to the deposition schedule that would be necessary because of limited availability of two of the deponents for the following week. Complaint Counsel responded to that email on November 13, 2003, proposing an alternate schedule to accommodate the travel schedules of deponents. At present, Complaint Counsel and Respondent continue to try and resolve the scheduling issues. Consequently, there are no scheduling issues that require the intervention of the Court at this time.

D. There is no issue ripe for decision by the Court concerning the document production by Southwest Neurological Associates, PA.

Respondent and Complaint Counsel have not reached impasse regarding the deadline for document production by SWNA. Complaint Counsel requested document production by SWNA on or before November 14, 2003, in anticipation of a November 20, 2003 deposition of one of its members, Dr. J. McCallum. Complaint Counsel did not know that the deadline for documents was at impasse, and is open to negotiating the deadline, for example, to the earliest of 48 hours

prior to the deposition of Dr. J. McCallum, or November 21, 2003. Until Complaint Counsel and Respondent reach impasse, if at all, there is no issue that requires the intervention of the Court at this time.

Conclusion

Respondent has not met its burden of demonstrating good cause and reasonableness for this Court to grant a motion to stay discovery pending response to contention interrogatories and the production of third party documents. Instead, Respondent has provided only spurious reasons for its motion, and has failed to cite any rules or precedents to support its argument. In addition, this Court does not need to make a decision on the scheduling of particular depositions, or the deadline for document production of SWNA, because Respondent and Complaint Counsel have not yet reached impasse on these matters. Complaint Counsel respectfully requests this Court, therefore, deny Respondent's Expedited Motion For a Protective Order and to Stay Depositions in its entirety.

Dated: November 13, 2003

Respectfully submitted,

Michael Bloom / CLM

Michael Bloom
Attorney for Complaint Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004
(212) 607-2829
(212) 607-2822 (facsimile)

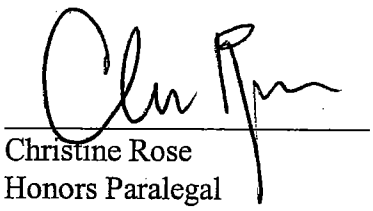
CERTIFICATE OF SERVICE

I, Christine Rose, hereby certify that on 13 November 2003, I caused a copy of Complaint Counsel's Opposition to Respondent's Expedited Motion for a Protective Order and to Stay Depositions to be served upon the following:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Gregory S. C. Huffman, Esq.
Thompson & Knight, LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693



Christine Rose
Honors Paralegal
Federal Trade Commission

Attachment A

LEXSEE 1981 FTC LEXIS 110

In the Matter of FLOWERS INDUSTRIES, INC., a corporation

DOCKET NO. 9148

Federal Trade Commission

1981 FTC LEXIS 110

ORDER COMPELLING ANSWERS TO INTERROGATORIES

October 7, 1981

ALJ: [*1]

James P. Timony, Administrative Law Judge

ORDER:

ORDER COMPELLING ANSWERS TO INTERROGATORIES

Respondent moves to compel answers to interrogatories 10 through 25, 27 through 31, 34 and 37 of its initial set of interrogatories. These interrogatories, except numbers 34 and 37, seek information about allegations of the complaint, and require a statement of the facts and contentions upon which complaint counsel currently rely in support of the allegations.

Before filing the motion, respondent met with complaint counsel in an attempt to resolve objections to the interrogatories. Complaint counsel offered to respond to the interrogatories upon the condition that, prior to receiving the responses, respondent should agree to waive its right to move to compel additional responses even if complaint counsel's responses were insufficient. n1 Respondent refused to accept the condition and now seeks to compel answers.

n1 Complaint counsel asked for such an agreement "in order to avoid being faced with a motion to compel despite having spent substantial time and effort in providing respondent with expanded answers." Complaint counsel's response, at p. 3. It is not clear whether the meeting on the motion took place before counsel received the order of September 2, 1981, requiring a good faith attempt to resolve discovery issues before a motion was filed. I do not consider complaint counsel's conditional offer a good faith attempt to resolve this dispute and if it was clear that they were aware of the September 2

order at the time of the meeting, I would probably compel answers without further consideration. [*2]

In opposing the interrogatories, complaint counsel argue that they have already provided respondent with a great deal of discovery; that respondent is in the industry and already has the requisite knowledge; that respondent's counsel are learned and do not really need a further elaboration of merger law; that the interrogatories attempt to depose complaint counsel and learn their mental processes and work product; and that complaint counsel are busy with other matters. These insubstantial arguments, if accepted, would extinguish the use of this useful discovery device in Federal Trade Commission adjudicatory proceedings. The Commission surely recognized these factors, which are hardly unusual, when it added the rule providing for interrogatories. 43 Fed. Reg. 233 (1978) at p. 56863. n2

n2 The use of contention interrogatories is recognized by Rule 3.35(b)(2).

Complaint counsel do point out that the interrogatories, if read literally, might call for every item of evidence which they will use to support the allegations of the complaint. Respondent states, however, that it does not seek minute detail or a meticulous order of proof for complaint counsel's case, but merely seeks the [*3] information in reasonable detail.

Complaint counsel also argue that the interrogatories are premature since they have not yet chosen all of their witnesses and documents which they will use to support the allegations of the complaint. That argument would not preclude, of course, answers based upon their present concept of the theory of the case and the evidence they will use. If complaint counsel have not yet chosen the evidence they will use they can so state. n3 In all likelihood, however, they have reached a preliminary determination as to some documents and witnesses they will use at trial, and they certainly must have a more elaborate theory of the case than they had when the complaint issued. Based upon this assessment, complaint counsel should answer the contention interrogatories by sufficiently identifying documents and stating facts, and by elaborating their legal contentions, so that respondent will have a current road map of where this case is headed.

n3 Complaint counsel did in fact state in response to interrogatory 34 that they have not yet selected the experts they will call as witnesses.

Interrogatory 37, however, goes too far. That interrogatory would require [*4] complaint counsel to:

> Identify each and every person, not previously identified in response to these Interrogatories, who has or may have knowledge as to the facts and contentions set out in your Complaint and in your response to these Interrogatories.

In antitrust cases a party is not generally permitted to discover the identity of every person interviewed by the other party. Graber Mfg. Co., Inc., 68 FTC 1235, 1239 (1965); United States v. Aluminum Ltd., 268 F. Supp. 758, 764-65 (D. N.J. 1966); Ethyl Corp., FTC Docket No. 9128, order of 10/11/79. Interrogatory 37 is even broader, apparently seeking identification of each

person who complaint counsel believe may have knowledge as to the facts and contentions made in the complaint. Although such discovery may be required in less complicated cases (e.g., those brought for personal injuries), n4 the rule in antitrust cases is contrary. In United States v. Loew's, Inc., 23 F.R.D. 178, 180 (S.D.N.Y. 1959), the court refused to compel an answer to a similar interrogatory and held that: n5

> . . . To ask the Government to state the names and addresses of every person known to "have knowledge" of any fact tending to [*5] prove the existence or circumstances of such oral contract would impose an impossible burden upon the Government. It would require, for example, that the names of every person who worked upon the case in the anti-trust division, including the lawyers, stenographers, investigators, etc. would have to be furnished, because they all might have received some information about the evidence . . . .

n4 Reichert v. United States, 51 F.R.D. 500, 503 (N.D. Ca. 1970).

n5 If the interrogatory were limited to one or two issues it might be enforced. United States v. Aluminum Ltd., 268 F. Supp. at 762.

Interrogatory 37 will therefore be quashed.

IT IS HEREBY ORDERED that, within 30 days, complaint counsel shall answer interrogatories 10 through 25 and 27 through 31 of respondent's initial set of interrogatories.