

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Docket No. 9312

**NORTH TEXAS SPECIALTY PHYSICIANS' RESPONSE TO COMPLAINT COUNSEL'S MOTION FOR
LEAVE TO CALL DR. CASALINO AS AN EXPERT WITNESS ON REBUTTAL**

Respondent North Texas Specialty Physicians ("NTSP") files this response to oppose Complaint Counsel's Motion for Leave to call another expert witness in this case. This rebuttal evidence should not be allowed by the Court.

First, Complaint Counsel's motion does not make the necessary showing to justify rebuttal evidence under the Court's explicit instructions for rebuttal evidence. Second, the testimony of Dr. Casalino is improper rebuttal evidence because it does not counter new or unexpected facts presented by Respondent. Finally, Dr. Casalino is an improper rebuttal witness because he cannot even meaningfully address the facts identified by Complaint Counsel. Under the guise of rebuttal, Complaint Counsel merely seeks to have the last word in this case by presenting an expert witness that should have been timely presented during its case in chief.

ARGUMENT AND AUTHORITIES

I. Complaint Counsel's Motion Does Not Make the Necessary Showing to Justify Rebuttal Evidence.

Under this Court's instructions early in the hearing, any rebuttal motion "shall include a cite to the record by page and line number to the evidence that you intend to rebut."¹ Instead of providing even one such cite, Complaint Counsel ignores the Court's instruction and identifies four broad topics it wishes to rebut and makes a blanket reference to the entire testimony of three of Respondent's witnesses. This reference is clearly not sufficient to justify rebuttal under the Court's instructions.

Further, this Court defined rebuttal evidence as "limited to facts made necessary to meet new facts put in by the opponent."² The Court stated that Complaint Counsel would need to show that "this is something new that [Complaint Counsel] has no reason to expect."³ Complaint Counsel has made no attempt to show the necessity of this rebuttal testimony. In fact, in its motion, Complaint Counsel admits that it "learned about these issues in discovery," but claims that these issues "were not fully evident until trial." This conclusory statement admitting that the issues were raised prior to the hearing clearly defeats any justifiable basis for allowing rebuttal testimony. As discussed in the next section, it is impossible for Complaint Counsel to make such a showing because Complaint Counsel had conducted discovery (over 20 depositions) and knew thoroughly about Respondent's testimony on these topics.

¹ Hearing Transcript at 1252.

² Hearing Transcript at 1251-52.

³ Hearing Transcript at 2736.

II. The Testimony of Dr. Casalino is Improper Rebuttal Evidence Because It Is Not Necessary to Meet New or Unexpected Facts.

Even if Complaint Counsel's Motion had attempted to make the showing required by this Court's instructions, which it did not, no such showing can be made because Dr. Casalino's testimony is improper rebuttal evidence.

Rebuttal evidence may be introduced only to counter new or unexpected facts presented in Respondent's case.⁴ When the Plaintiff presents its case, it is required to offer evidence on "any other issue of potential importance to the outcome of its case" at that time.⁵ This rule is designed to prevent potential unfairness to the opponent.⁶ Complaint Counsel has identified four topics for rebuttal evidence: NTSP's clinical integration, NTSP's efficiencies, NTSP's quality of care, and whether collective negotiation is necessary for patients to benefit from clinical integration, efficiencies, or quality of care. All of these subjects should have been and in fact *were* anticipated by Complaint Counsel before the close of its case in chief. All evidence should have been offered at that time.

The First Circuit has said, "When a party knows that a contested matter is in the case, yet fails to address it in a timely fashion, he scarcely can be heard to complain" ⁷ That is exactly what has happened here. Complaint Counsel was fully aware that the topics it identifies were contested issues. Further, Complaint Counsel was fully aware of the nature and extent of

⁴ See Hearing Transcript at 1251-52; *Allen v. Prince George's County, Maryland*, 737 F.2d 1299, 1305 (4th Cir. 1984) (court did not allow rebuttal testimony because there was no new factual evidence discovered during trial).

⁵ *Tramonte v. Fibreboard Corp.*, 947 F.2d 762, 764 (5th Cir. 1991).

⁶ *Id.*

⁷ *Faigin v. Kelly*, 184 F.3d 67, 85 (1st Cir. 1999).

Respondent's arguments on these issues. Complaint Counsel deposed both fact and expert witnesses for Respondent on all four of these topics.⁸ Both parties discussed the full range of arguments related to these topics in their pretrial briefs and proposed findings of fact.⁹ In fact, before the hearing, Complaint Counsel knew that these four topics were important enough to devote two sections of its pretrial brief to the topics.¹⁰

Further, the expert reports in this case also show that the full range of arguments on these topics was contested and addressed prior to Respondent's case in chief.¹¹ Complaint Counsel even had Dr. Casalino prepare a report on these exact topics. For Complaint Counsel to say it was unaware of these topics, the full arguments on these topics, or their import is disingenuous at best.

⁸ Complaint Counsel deposed Respondent's witnesses concerning NTSP's efficiencies. *See, e.g.*, Maness Deposition at 13-17 and 32-41; Wilensky Deposition at 46-47. Complaint Counsel deposed Respondent's witnesses concerning NTSP's clinical integration. *See, e.g.*, Van Wagner Deposition taken on August 29, 2002, Volume 1, at 11-13, 145-47; Van Wagner Deposition taken on August 30, 2002, Volume 2, at 215-225; Maness Deposition at 50-62. Complaint Counsel deposed Respondent's witnesses concerning NTSP's quality of care. *See, e.g.*, Deas Deposition at 102-03; Johnson Deposition at 37-38. These discussions also addressed the fourth topic of the relationship between these activities and the allegations of collective negotiation.

⁹ *See* Section II.A. of Respondent's Pretrial Brief, entitled "NTSP's business model promotes efficiency and improves quality of care." There were similar discussions on all four topics in Respondent's Proposed Findings of Fact at 3-12 and 58-60. *See also* Complaint Counsel's Proposed Findings of Fact at 66-72. These six pages are entirely devoted to the four topics Complaint Counsel now claims were "not fully evident" and even includes cites to the report of Dr. Casalino.

¹⁰ *See* Sections II.E. and II.F. of Complaint Counsel's Pretrial Brief, entitled "NTSP has created minimal if any efficiencies in its non-risk sharing practice" and "NTSP's price fixing was not ancillary to the alleged efficiencies." These sections also address the issues of clinical integration and quality of care. *See* Complaint Counsel's Pretrial Brief at 16-20.

¹¹ *See* Maness Report at ¶¶ 9, 78, 83-100; Wilensky Report at 4-6, 11-16; Hughes Report at 4-5, 11-18; Frech Report at 15-16; Frech Rebuttal Report at 7-9; and Casalino Report at 3-5, 13-26.

Rebuttal is improper when the same evidence was available to the Plaintiff during its case in chief and when the testimony the Plaintiff seeks to rebut was not unexpected.¹² That is the situation here. Under the guise of rebuttal, Complaint Counsel seeks to place at the end of the evidence the last word on topics clearly known prior to Respondent's evidence. In fact, Complaint Counsel offered evidence on these same topics with its fact witnesses and expert witness.¹³ That these topics and the full range of argument on these topics was anticipated by Complaint Counsel is most evident in its own opening statement: "We expect that Respondent NTSP will talk at length about its business model ... and clinical efficiencies and spillover..."¹⁴ At that time, Complaint Counsel also anticipated needing the testimony of Dr. Casalino to address NTSP's arguments and went on for two pages of transcript about Dr. Casalino's testimony.

Complaint Counsel's claims that any aspect of Respondent's arguments on these topics was unanticipated is not supported even by Complaint Counsel's own actions. Complaint Counsel is merely attempting to use rebuttal to offer evidence that was not timely introduced

¹² *Lubanski v. Coleco Indus., Inc.*, 929 F.2d 42, 47 (1st Cir. 1991) (court did not allow rebuttal testimony to counter defendant's expert witness because the evidence was previously available to plaintiff and the expert's testimony was not unexpected).

¹³ Complaint Counsel addressed NTSP's clinical integration during its case in chief. *See, e.g.*, Opening Statement, Hearing Transcript at 9, 57-63; Direct of Grizzle, Hearing Transcript at 695; Direct of Jagmin, Hearing Transcript at 112-115; Direct of Frech, Hearing Transcript at 1351-55. Complaint Counsel addressed NTSP's efficiencies during its case in chief. *See, e.g.*, Opening Statement, Hearing Transcript at 9, 53-59; Direct of Roberts, Hearing Transcript at 496-97; Direct of Frech, Hearing Transcript at 1280-81 and 1343-50. Complaint Counsel addressed NTSP's quality of care during its case in chief. *See, e.g.*, Opening Statement, Hearing Transcript at 59; Direct of Jagmin, Hearing Transcript at 1001-02 and 1101-03; Direct of Frech, Hearing Transcript at 1334-35, 1343-44 and 1354-55. These discussions also addressed the fourth topic of the relationship between these activities and the allegations of collective negotiation.

¹⁴ *See* Complaint Counsel's Opening Statement, Hearing Transcript at 58.

during its case. Because rebuttal can be used in this way by Complaint Counsel to get the last word and prevent Respondent from having a fair opportunity to address all of Complaint Counsel's arguments is precisely the reason that the use of rebuttal testimony is limited.

III. The Testimony of Dr. Casalino is Improper Rebuttal Evidence Because It Would Not Meaningfully Address the Topics Identified by Complaint Counsel.

Even if the topics identified by Complaint Counsel were proper subjects for rebuttal, which they are not, Dr. Casalino is an improper rebuttal witness because he does not address these topics with reference to the facts pertaining to NTSP. Each of the topics addresses "the extent to which NTSP" has certain qualities. However, Dr. Casalino has admitted in his deposition that he has reached no conclusion based on numbers or data,¹⁵ knows very little about NTSP and NTSP's service area, and has never done an analysis of a Texas entity's utilization management or quality of care.¹⁶ Among the things Dr. Casalino does not know about NTSP and the North Texas are

(1) what the healthcare situation is in the North Texas area ("I don't know what people do in Texas" and "The North Texas area is not an area that I'm familiar with");¹⁷

¹⁵ Casalino Deposition at 86 ("Q. Is it correct to say you didn't find – I'm sorry – you didn't draw any definitive conclusion from the data concerning the numbers? A. Right. Q. And that you haven't really drawn any definitive opinion concerning the numbers. A. I would say that's correct."); Casalino Deposition at 88 ("Q. So if I understand your testimony, you're not really drawing any conclusions from data. You're really looking at what you understand NTSP does in utilization management and quality improvement. Is that correct? A. Yes. That's primarily correct. I mean, I paid attention to that data. If I had seen...").

¹⁶ Casalino Deposition at 148 ("Q. Have you ever done an analysis of any medical entity providing medical care in Texas as to either utilization management or quality of care? A. No.").

¹⁷ Casalino Deposition at 58 ("A. I don't know how many patients want to go to Brown & Toland. I don't know what people do in Texas, but other places I've been, the IPA brand name doesn't seem to do much."); Casalino Deposition at 147-48 ("Q. Do you know how NTSP compares to other IPAs of the

- (2) how NTSP compares to other North Texas groups in quality or cost;¹⁸
- (3) what other Texas IPAs are doing;¹⁹
- (4) how NTSP's data was compiled;²⁰
- (5) what kind of quality of care techniques NTSP uses;²¹ and
- (6) any instance of a good risk technique that an NTSP physician has not used in non-risk cases.²²

North Texas area concerning either their utilization management or their quality of care techniques? A. No, I do not. The North Texas area is not an area that I'm familiar with.”).

¹⁸ Casalino Deposition at 84 (“Q. Is it fair to say that you draw – you have not analyzed, in drawing any hard conclusions, as to how NTSP compares to other groups in the North Texas area as far as quality of care or costs? A. Well, there’s two questions there. One, did I – what kind of analysis, if any, did I do; and, second, what was my conclusion. I felt, after looking at everything – the depositions, the data, the expert reports – that that was not a question that could be answered from the numerical data available on costs or quality. I did not feel from what I saw...”).

¹⁹ Casalino Deposition at 94 (“Q. Did you talk to either one of them about what other IPAs in North Texas were doing? A. No Q. Do you have any information about what other IPAs in North Texas are doing? A. No.”).

²⁰ Casalino Deposition at 87-88 (“Q. Is it correct to day that you just didn’t know enough about how the data had been compiled in order to draw a conclusion? A. Yeah. As a broad statement, that’s correct.”).

²¹ Casalino Deposition at 128 (Q. What kind of quality of care techniques did you find that NTSP has used? A. Well, “quality” is often defined as – “improving quality” is defined as avoiding overuse, avoiding underuse, and avoiding misuse. And utilization management has the potential to limit overuse. So insofar – I mean, I don’t – it’s hard to know. You know, I can’t really give a judgment to what extent this happened.”).

²² Casalino Deposition at 170 (“Q. Do you know of any instance in which an NTSP physician has learned a good medical practice under the capitation contract where that physician has not used that in a nonrisk setting? A. Give me an example of a good medical practice. Q. I’m just asking a general question. A. I don’t know of any instances like that, but ... well, I’ll leave it at that.”).

Further, Dr. Casalino admits that he has not attended NTSP meetings and has not talked to NTSP doctors.²³

In addition to knowing little about NTSP and its participating physicians, Dr. Casalino also admits he does not know anything about contracting with payors. Dr. Casalino has never been involved in contractual negotiations,²⁴ has never been involved in messengering a contract,²⁵ and has never encountered a doctor accepting a contract around an IPA.²⁶ Further, Dr. Casalino offers no economic opinions.²⁷ He has not looked at NTSP or other North Texas payor contracting patterns.²⁸ He has not done any work on rates, prices, or costs in North Texas.²⁹ He has not looked at the details of NTSP's business relationships with payors.³⁰

²³ Casalino Deposition at 105 (“Q. Is it true that you have not either attended NTSP meetings or talk to NTSP doctors? A. That’s true.”).

²⁴ Casalino Deposition at 26 (“Q. Were you ever involved in contracting with an IPA? A. How do you mean? Q. Were you ever involved in contractual negotiations? A. On behalf of my practice? Q. Yes. A. No.”).

²⁵ Casalino Deposition at 46 (“Q. Have you ever been involved in messengering a contract? A. Not that I recall.”).

²⁶ Casalino Deposition at 45 (“Q. In you experience while you were in private practice, did you encounter situations where doctors frequently would accept contracts on their own around – around an IPA? A. I don’t recall that ever happening. Now, let me think back and see if I – you know, I don’t think that happened.”).

²⁷ Casalino Deposition at 46-47 (“Q. Not an economist, never have been. A. Right. ... Q. Not going to be giving economic opinions. A. Not an economist, right.”).

²⁸ Casalino Deposition at 187 (“Q. Have you taken a look at the contracting patterns of physicians in NTSP and elsewhere in North Texas? A. No. I consider that really outside the scope of my responsibility.”).

²⁹ Casalino Deposition at 194 (“Q. Have you done any work concerning rates or prices in the North Texas area? A. No. Q. Or costs? A. No.”).

³⁰ Casalino Deposition at 194 (“Q. Have you looked at the details of any of the business relationships or business history of NTSP with any payor? A. No. Again, I mean, for the questions I considered my responsibility ...”).

It is clear the Dr. Casalino is not able to offer a meaningful or relevant opinion on conduct specific to NTSP because he admits he has not studied NTSP or any physician groups or payors in the North Texas area. Given that the allegedly-unexpected evidence in Respondent's case involved NTSP and the North Texas area, there is nothing for Dr. Casalino to rebut. If Dr. Casalino intends now to address NTSP-specific facts, then Dr. Casalino will be doing so well after the Court's deadlines for pretrial disclosure and deposition have expired. As to the topics described by Complaint Counsel for rebuttal, Dr. Casalino is not a proper rebuttal witness.

CONCLUSION

Respondent respectfully requests that Complaint Counsel's Motion for Leave to allow the rebuttal testimony of Dr. Casalino be denied. Complaint Counsel's motion deliberately ignores this Court's standard for showing the necessity of rebuttal evidence because it provides no cites to the record in support and does not show that the testimony it seeks to rebut was unexpected. Further, the testimony Complaint Counsel seeks to rebut was not unexpected. Those topics were the subject of argument by both parties in pretrial briefing and opening statements. Complaint Counsel also addressed these topics during its own case in chief and already with an expert witness. Finally, Dr. Casalino himself is an improper rebuttal witness because he chose not to rely on the types of facts presented by Respondent on the topics identified by Complaint Counsel.

Respectfully submitted,

Gregory S. C. Huffman
William M. Katz, Jr.
Gregory D. Binns

THOMPSON & KNIGHT LLP

1700 Pacific Avenue, Suite 3300
Dallas TX 75201-4693
214.969.1700
214.969.1751 - Fax
gregory.huffman@tklaw.com
william.katz@tklaw.com
gregory.binns@tklaw.com

**ATTORNEYS FOR NORTH TEXAS SPECIALTY
PHYSICIANS**

CERTIFICATE OF SERVICE

I, William M. Katz, Jr., hereby certify that on May 14, 2004, I caused a copy of the foregoing to be served upon the following persons:

Donald S. Clark (via Federal Express and e-mail)
Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Michael Bloom (via Federal Express and e-mail)
Senior Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

Hon. D. Michael Chappell (via Federal Express and facsimile)
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue NW
Washington, D.C. 20580

and by e-mail upon the following: tzang@ftc.gov and jplatt@ftc.gov.

William M. Katz, Jr.

007155 000034 DALLAS 1740470.3