

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

DOCKET NO. 9312

**COMPLAINT COUNSEL'S BENCH MEMORANDUM
REGARDING INADMISSABILITY OF SPECIFIC EXTRINSIC CONDUCT**

The Federal Rules of Evidence expressly prohibit NTSP from attacking a third-party witness' credibility by using extrinsic evidence of specific conduct. Rule 608(b) explicitly states that specific instances of a witness' conduct "may not be proved by extrinsic evidence" for the purpose of attacking a witness' credibility, and that a party may not cross-examine a witness about such instances where they do not implicate the witness's character for truthfulness. Moreover, under Rule 401, such evidence is inadmissible as it has no bearing on the issue in this case, *i.e.*, whether NTSP's price-fixing and other conduct violates the antitrust laws. The compliance of third parties with various regulations simply has no bearing on that ultimate issue.

DISCUSSION

Rule 608(b) states as follows:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness

Rule 608(b) prevents trials from degenerating into a series of "mini-trials" on irrelevant extrinsic conduct. Accordingly, Rule 608(b) precludes NTSP from introducing evidence regarding

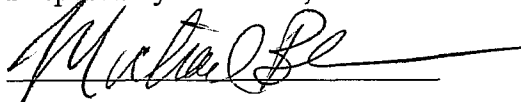
whether any third party complied or failed to comply with any particular regulation. Such evidence is designed solely as an attack on witness credibility. There is no evidence suggesting that this third-party conduct had any bearing on NTSP's negotiations with the third parties, on NTSP's internal deliberations regarding the third parties, or on NTSP at all.

Moreover, Rule 608(b) precludes NTSP from cross-examining the third-party witnesses about the specific acts. These acts are not probative of the witnesses' "character for truthfulness or untruthfulness." At most, the evidence relates to whether the third parties complied with certain regulations, not to the truthfulness or untruthfulness of the third parties or their employees. *See United States v. Young*, 567 F.2d 799 (8th Cir. 1977) (affirming trial court's refusal to allow cross-examination of witness concerning previous conduct which did not result in conviction, since proposed question was not relevant to veracity and honesty of witness); *Rhodes v. State*, 771 N.E.2d 1246 (Ind. Ct. App. 2002) (holding that a witness may not be impeached by specific acts of misconduct that have not resulted in criminal convictions).

For similar reasons, this evidence is inadmissible under Rule 401. This case is about NTSP's setting of minimum prices, joint negotiations, and other collective action, and whether that conduct violates the antitrust laws. The disputed evidence is not probative of these issues because it involves third-parties' conduct on extraneous matters – matters not involving NTSP. NTSP cannot defend its conduct by suggesting that third parties may have violated various state regulatory requirements. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (that a party's conduct may have been unlawful is insufficient justification for collusion among competitors to prevent it); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) (alleged unlawful conduct by plaintiff does not warrant unlawful conspiracy to stop it);

Burlington Indus. v. Milliken & Co., 690 F.2d 380 (4th Cir. 1982) ("unclean hands" not a defense to an antitrust action).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael J. Bloom", written over a horizontal line.

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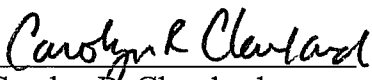
CERTIFICATE OF SERVICE

I, Carolyn R. Cleveland, hereby certify that on 30 April, 2004, I caused a copy of the foregoing document to be served upon the following:

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