

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
)

North Texas Specialty Physicians,)
Respondent.)
_____)

Docket No. 9312

**ORDER DENYING COMPLAINT COUNSEL'S
MOTION TO EXCLUDE RX 3118-3130**

I.

On June 25, 2004, Complaint Counsel filed a motion to exclude from evidence Respondent's exhibits RX 3118-3130. Respondent filed its opposition on July 6, 2004. For the reasons set forth below, Complaint Counsel's motion is DENIED.

II.

RX 3118-3130 are the expert report and exhibits thereto prepared by Respondent's expert, Dr. Robert Maness. RX 3118-3130 were offered and admitted into evidence at the trial in this matter on May 6, 2004.

A.

Complaint Counsel asserts that it realized, on June 16, 2004, that RX 3118-3130 had been admitted into evidence. Complaint Counsel states that it was surprised to learn of the admission of RX 3118-3130 into evidence because the parties had entered into a joint stipulation, Parties' First Amended Joint Stipulation Regarding Admitted Exhibits (JX 0003) ("Joint Stipulation"), which stated "[e]xpert reports and exhibits are marked and submitted for identification purposes only." Complaint Counsel claims that, based on this stipulation, Complaint Counsel understood that no expert reports would be offered into evidence by either party at trial, except for identification purposes.

Complaint Counsel asserts, without a supporting declaration, affidavit, or evidence to support its claim, that it had "numerous times previously made known that [Complaint Counsel] objected to the admission of the expert reports into evidence." Memorandum in support of Motion at 2. Complaint Counsel further asserts that, on the evening prior to the testimony of Dr. Maness, Respondent's counsel provided Complaint Counsel with a list of 37 exhibits that

Respondent represented were on Respondent's exhibit list and not timely objected to by Complaint Counsel. When Respondent's counsel offered numerous exhibits to be used in connection with the expert testimony of Dr. Maness, Respondent's counsel represented that Complaint Counsel had no objection to those exhibits. Complaint Counsel states that, based on Respondent's representation to the Court, Complaint Counsel did not object to the admission of those documents, including RX 3118-3130.

Complaint Counsel now seeks to have RX 3118-3130 excluded from evidence.

B.

Respondent states that the First Revised Scheduling Order required Respondent's counsel to provide its final proposed exhibit list to Complaint Counsel by March 16, 2004, and for Complaint Counsel to provide its objections by April 8, 2004. Respondent further asserts that its March 16, 2004 exhibit list, provided to Complaint Counsel, included RX 3118-3130, and that Complaint Counsel's objections, provided to Respondent on April 8, 2004, did not include objections to RX 3118-3130.

Respondent further states that it sent to Complaint Counsel two e-mails prior to Dr. Maness' anticipated testimony, alerting Complaint Counsel to the fact that Respondent intended to use several documents, including RX 3118-3130, in connection with the testimony of Dr. Maness. One of these e-mails explicitly states, "As I told [Complaint Counsel] earlier today, there are several exhibits on our list for Maness which were on our exhibit list, but were not objected to timely. Although we are not waiving our position that any objection now would be untimely, we would like to know before Maness's direct begins tomorrow, which, if any of these exhibits you plan to object to."

Respondent thus asserts that its statement to the Court – that the exhibits to be moved into evidence, including RX 3118-3130, were on Respondent's exhibit list and that Complaint Counsel had made no objection – was accurate, based on Complaint Counsel's failure to object to RX 3118-3130 on April 8, 2004, and Complaint Counsel's failure to object despite notice from the two e-mails sent by Respondent's counsel to Complaint Counsel.

Respondent further asserts that, in direct contradiction to the statement made by Complaint Counsel in its motion, Complaint Counsel did not object "numerous times," or even one time to RX 3118-3130. First, Complaint Counsel did not object to RX 3118-3130 by the Scheduling Order's April 8, 2004 deadline. Second, Respondent provides sworn declarations of its attorneys declaring that Complaint Counsel did not object to RX 3118-3130 in any conversations with Respondent's counsel at the pre-hearing meeting to discuss the admission of evidence. Third, Respondent states that Complaint Counsel did not object to the admission or use of RX 3118-3130 during the trial. Respondent provides references to the transcript where Respondent's counsel explicitly stated that documents within RX 3118-3130 were in evidence while using such documents to question Dr. Maness; Complaint Counsel did not object at those times.

In addition, Respondent asserts that Complaint Counsel was aware during trial that RX 3118-3130 had been admitted into evidence. Respondent provides numerous references to the transcript where Complaint Counsel used portions of RX 3118-3130 in its cross examination of Dr. Maness. Respondent also provides a reference to the transcript where Complaint Counsel affirmatively represented to the Court that RX 3129 was in evidence.

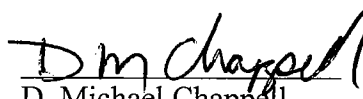
III.

RX 3118-3130 were admitted into evidence on May 6, 2004. The evidentiary hearing in this matter concluded on May 25, 2004. By Order dated June 8, 2004, the record in this case was closed.

A party seeking to exclude evidence must make an objection at the earliest possible opportunity. *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1408-09 (8th Cir. 1994); *Questar Pipeline Co. v. Grynberg*, 201 F.3d 1277, 1289 (10th Cir. 2000). Complaint Counsel failed to object to the admissibility of RX 3118-3130 by the April 8, 2004 deadline for objecting to exhibits. Complaint Counsel failed to object to the admissibility of RX 3118-3130 when they were offered into evidence during trial. Complaint Counsel failed to object to Respondent's use of RX 3118-3130 at trial. Complaint Counsel cannot now, seven weeks after the date RX 3118-3130 were admitted, and two weeks after the close of the record, convincingly claim that it did not realize that RX 3118-3130 were in evidence.

Complaint Counsel, as the party seeking, after the close of the record, to exclude from the record evidence that has been admitted and used by both parties at trial, has failed to sustain its burden of proof. Accordingly, Complaint Counsel's motion is DENIED.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: July 20, 2004