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' FIRST AMENDED RESPONSE TO COMPLAINT COUNSEL'S BENCH MEMORANDUM REGARDING EVIDENCE OF SPECIFIC EXTRINSIC CONDUCT

The Federal Rules of Evidence expressly allow Respondent North Texas Specialty Physicians ("NTSP")to cross-examine third-party payor witnesses about specific conduct and to introduce extrinsic evidence of such conduct. Rule 401 defines relevant evidence as evidence having "any tendency" to make a fact of consequence "more probable or less probable." The standard for relevance is a liberal one, as recognized by the Supreme Court. The specific conduct of third-party payors that NTSP seeks to introduce is relevant to this proceeding because it goes directly to the conduct of NTSP and its participating physicians that is challenged by Complaint Counsel. Further, the evidence is relevant because it goes to the bias of the third-party payor witnesses. According to the Supreme Court and the Federal Rules of Evidence, Rule 608(b), cited by Complaint Counsel in support of its position, is not applicable to a showing of bias. Finally, Rule 611(b) requires that NTSP be allowed to cross-examine third-party payor witnesses on subject matters addressed by Complaint Counsel in direct examination. In the case of Mr. Quirk, Complaint Counsel addressed in direct examination conduct of NTSP related to the specific acts NTSP seeks to introduce into evidence through cross-examination.

ARGUMENT AND AUTHORITIES

Federal Rule of Evidence 401 defines relevant evidence as evidence having "any tendency to make the existence of a fact that is of consequence . . . more probable or less probable. . . ." In its *Daubert* opinion, the Supreme Court noted that the basic standard of relevance is a liberal one.[1] Other courts have similarly noted that relevance is a "low barrier to admissibility."[2]

Here is a situation where not only is the standard for relevance low, but the relevance of the information is also high. In its opening statement, Complaint Counsel listed the three actions of NTSP it alleges prove its claim. One of these actions is "NTSP's and its members' stratagems to bolster their own pricing power," and Complaint Counsel asserted that to support this allegation it would offer the testimony of health plan managers (like Mr. Quirk).[3] Complaint Counsel even admits in its bench memorandum on this issue that "this case is about NTSP's . . . other collective action." Some of that "other collective action" was taken by NTSP in reponse to and in relation to the specific conduct of third-party payors. For example, Mr. Quirk was asked in direct examination about NTSP's communications with physicians and customers, communications which NTSP contends were in response to conduct of third-party payors, including violations of various state regulatory requirements. Further, NTSP's conduct in raising issues about reviewing contract proposals for its participating physicians, conduct also challenged by Complaint Counsel, relates directly to this same type of conduct of third-party payors.

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[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993).

[2] *Iacobucci v. Boulter*, 193 F.3d 14, 20 (1st Cir. 1999); *see also Failla v. City of Passaic*, 146 F.3d 149, 159 (3d Cir. 1998) ("The test of relevance under the Federal Rules of Evidence is low. . . . evidence is irrelevant only when it has *no tendency* to prove the fact.") (emphasis added).

[3] *See* Transcript of Hearing, April 27, 2004, at p. 17-18 (Complaint Counsel's Opening Statement).

This evidence of third-party payor conduct is also relevant to a showing of bias. Complaint Counsel asserts that Rule 608(b) bars NTSP's use of this evidence. But the Supreme Court has recognized that Rule 608(b) specifically does not prevent the introduction of evidence that proves bias.[4] The Supreme Court has also stated that evidence of bias is relevant evidence under the Rule 401 standard.[5] Evidence of specific conduct of third-party payors goes directly to bias because NTSP, in response to this conduct of payors, took appropriate action against the payors that could cause payor witnesses to be biased against NTSP.

Complaint Counsel has also waived any objection to this evidence because it raised the issue in direct examination. Rule 611(b) allows cross-examination on any "subject matter of the direct examination." Case law also recognizes that "[c]ounsel should be given wide latitude in cross-examination."[6] In its direct examination of Mr. Quirk, Complaint Counsel specifically addressed conduct of NTSP and its participating physicians related to discussions with the government, patients, and consumers about United HealthCare's rates and methods of payment. This conduct related directly to the specific conduct of third-party payors that NTSP seeks to

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[4] *United States v. Abel*, 469 U.S. 45, 50-51, 56 (1984) (addressing the argument that Rule 608(b) barred bias evidence, the court stated, "It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar."); *see also United States v. Fusco*, 748 F.2d 996, 998 (5th Cir. 1984) (evidence of bias is "not 'extrinsic' as those terms are used in Federal Rule of Evidence 608. Bias, as opposed to general veracity, is not a collateral issue."); *United States v. Lindemann*, 85 F.3d 1232, 1243 (7th Cir. 1996) ("[B]ecause the attack at issue was on Burns' bias, and not on his character for truthfulness in general, Lindemann's contention that the limitations of Rule 608 should have applied is incorrect. Moreover, because bias is not a collateral issue, it was permissible for evidence on this issue to be extrinsic in form.").

[5] *Abel*, 469 U.S. 45, 50-51 (1984) (showing bias on the part of a witness would have a tendency to make a fact less probable and, therefore, relevant).

[6] *United States v. Wallace*, 722 F.2d 415, 416 (8th Cir. 1983).

introduce into evidence.[7] Because Complaint Counsel raised the issue in direct examination, NTSP should be allowed to address this same issue in cross-examination. Complaint Counsel has admitted to the relevance of specific conduct of third-party payors not only by bringing up the issue during direct examination of its own witnesses, but also by stipulating to the admissibility of documents related to such conduct.[8]

In light of Complaint Counsel's own actions, the testimony of Mr. Quirk, and the standards of relevance and cross-examination under the Federal Rules of Evidence, NTSP should be allowed to introduce evidence of specific conduct by third-party payors.

Respectfully submitted,

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[7] *See* Transcript of Hearing, April 28, 2004, at p. 303-05, 308-10 (Complaint Counsel's Direct Examination of Quirk).

[8] *See* various legal documents and Texas Department of Insurance press releases related to conduct of third-party payors, on Respondent's Admitted Exhibit List at RX 3098 through RX 3106.

CERTIFICATE OF SERVICE

I, William M. Katz, Jr., hereby certify that on April 29, 2004, I caused a copy of the foregoing to be served upon the following persons via hand delivery:

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