

**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 MOTION TO QUASH DEPOSITIONS**

On November 11, 2003, Respondent filed an expedited motion for a protective order and to stay depositions, or in the alternative to quash depositions. (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 (filed Nov. 11, 2003)). On November 12, 2003, this Court ordered Complaint Counsel to respond to the expedited motion for a protective order and to stay depositions on or before November 13, 2003 and to respond to the motion to quash depositions on or before November 19, 2003. (Order Requiring Expedited Response (filed Nov. 12, 2003)). On November 13, 2003, Complaint Counsel filed an opposition to Respondent's Expedited Motion for a Protective Order and to Stay Depositions (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 (filed Nov. 13, 2003)). On November 14, 2003, this Court declined to enter the stay requested by Respondent, subject to a provision on use of third party documents. (Order on Respondent's Motion for Protective Order and Motion to Quash (filed Nov. 14, 2003)). Complaint Counsel files this opposition to the motion to quash in response to the Court's request.

The FTC Rules of Practice for Adjudicative Proceedings (“Rules of Practice” or “Rules”) state that “[a]ny party may take a deposition . . . provided that such deposition is reasonably expected to yield information within the scope of discovery under § 3.31(c)(1).”¹ 16 C.F.R. § 3.33(a). The Rules provide that a party can move to quash depositions, and the moving party must “set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation.” 16 C.F.R. § 3.34(c). In its motion of November 11, 2003, Respondent cites no precedent supporting a quashing of depositions, and Complaint Counsel is aware of no instances where a judge has used this rule to quash a Complaint Counsel’s Part III depositions of key fact witnesses employed by or representing Respondent.

As the party resisting discovery, Respondent bears the burden of showing that quashing is justified. As the Rules of Practice set forth in the context of motions to compel depositions, discovery shall proceed unless “the objecting party sustains its burden of showing that the objection is justified.” 16 C.F.R. § 3.38 (1)(a). This Court has held that “[p]arties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied.” *In the Matter of Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products Corporation*, Order Denying Schering-Plough Corporation’s Motion for a Protective Order (Jul. 6, 2001) (Attachment A). Instead of meeting this burden, Respondent

¹ Section 3.31(c)(1) states “Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1).

has failed to cite any legal or logical justification for why the Court should intervene to stop fact discovery in this case.²

The only substantive basis articulated by Respondent in support of its motion to quash (as well as its motion to stay) is Respondent's contention that Complaint Counsel should not be permitted to conduct fact depositions of Respondent's witnesses until after it had answered two "contention interrogatories" propounded by Respondent, and had produced third party documents.³ As Complaint Counsel noted in full in its November 13, 2003 submission to this Court, Respondent does not cite a single authority for its novel theory that fact discovery should not proceed until its contention interrogatories have been answered.⁴ Complaint Counsel,

² 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."

³ Complaint Counsel has since produced most of the third party documents referred to in Respondent's motion. Respondent also made certain objections relating to the scheduling and location of the noticed depositions, but—pointed out in Complaint Counsel's response of November 13, 2003—Complaint Counsel has at all times been willing to negotiate mutually convenient times and places for the depositions, and thus there is no impasse that requires the intervention of this Court, as this Court acknowledged when it denied Respondent's motion on these matters.

⁴ See 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 (filed Nov. 13, 2003). (Attachment B). In that response, Complaint Counsel explained that 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). Complaint Counsel also indicated that 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 a brief period for fact discovery, as reflected in this Court's Scheduling Order of October 16, 2003.

however, provided extensive case law showing that contention interrogatories are typically not permitted until the end of fact discovery.

In addition to opposing Respondent's attempt to condition our right to conduct fact discovery on the provision of responses to its contention interrogatories, Complaint Counsel has objected to the contention interrogatories themselves on several grounds, including Complaint Counsel's position that such interrogatories are premature at this early stage of the Court-ordered fact discovery process. Respondent made a motion to compel responses to the contention interrogatories, and Complaint Counsel filed its response on November 17, 2003. *See* Complaint Counsel's Opposition to Respondent's Motion to Compel Interrogatory Responses (filed Nov. 17, 2003) (Attachment C).

For the reasons set forth above, and the reasons provided in Complaint Counsel's November 13 and November 17, 2003 responses, Complaint Counsel respectfully requests that this Court deny Respondent's motion to quash depositions, and permit Complaint Counsel to continue to develop the factual record in this case through these depositions.

Dated: November 19, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christine Rose, hereby certify that on November 19, 2003, I caused a copy of the foregoing document to be served upon the following persons:

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