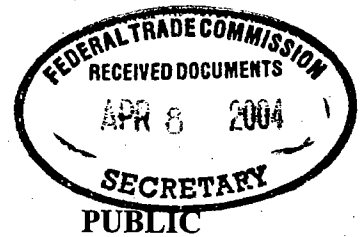


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of

NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

DOCKET NO. 9312

**COMPLAINT COUNSEL'S OBJECTIONS AND COUNTER DESIGNATIONS
IN RESPONSE TO RESPONDENT'S FIRST SET OF DEPOSITION DESIGNATIONS**

Complaint Counsel objects to Respondent North Texas Specialty Physicians' ("NTSP") attempt to proffer deposition testimony for use at trial from four witnesses, Dr. David Ellis, Jim Mosley, David Roberts, and Cherise Webster. As a general matter, of course, deposition testimony is hearsay, and NTSP has not shown why this testimony falls into any hearsay exception, such as witness unavailability or party admissions. Incredibly, of these four witnesses, three of them appear on NTSP's final proposed witness list, and the fourth, Ms. Webster, is a former NTSP employee. Moreover, as set forth with particularity below, NTSP's designations include testimony that otherwise lacks a proper foundation for admissibility. For these reasons, Complaint Counsel objects to the admission of any of the deposition testimony from these four witnesses, but if the deposition testimony is admitted, Complaint Counsel respectfully submits its own list of counter-designated deposition testimony.

GENERAL OBJECTIONS

1. Complaint Counsel objects to each of NTSP's designations as hearsay not subject to any exception. As a general matter, Rule 3.33(g) prohibits admission of a witness's deposition testimony at trial unless the witness is an adverse party or unavailable to testify at trial. Federal Rule of Civil Procedure 32, the counterpart to Rule 3.33(g), codifies "the long-established

principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person.” Wright & Miller, 8A Fed. Prac. & Proc. Civ.2d § 2142; *In re Herbert R. Gibson, Jr.*, 1978 FTC LEXIS 375, at *2, n.1 (May 3, 1978) (Federal Rules of Evidence are “persuasive authority” in FTC adjudicative hearings). For example, *In Six West Retail Acquisition, Inc. v. Loews Cineplex Entertainment Corp.*, 286 B.R. 239, 250 (S.D. N.Y. 2002), a party tried to introduce deposition testimony of a witness “located in Japan.” The court excluded the testimony because there was no indication that the witness was unavailable to testify or that his statements were made against his interest. *Id.*

None of NTSP’s designations fall into a hearsay exception. Of the four witnesses whose deposition testimony NTSP has designated, NTSP has listed three of them on its final proposed witness list, and the fourth, Ms. Webster, is a former NTSP employee. NTSP cannot, therefore, claim that any of these witnesses are unavailable to testify at trial, and NTSP has not provided any evidence showing that any of the witnesses are in fact unavailable. In addition, NTSP does not claim, and cannot claim, that any of the witnesses are adverse parties to it in this litigation. *See Mark IV Prop., Inc. v. Club Development & Mgt. Corp.*, 12 B.R. 854, 859 (S.D. Cal. 1981) (equating “adverse party” with a party to the litigation). All of the witnesses are third parties or affiliated with NTSP.

2. Complaint Counsel objects to each of NTSP’s designations to the extent they include inadmissible testimony, such as testimony that lacks a proper foundation or testimony that makes a legal conclusion.

PARTICULAR OBJECTIONS AND COUNTER DESIGNATIONS

<u>Dr. David W. Ellis</u>	<u>FTC Counter-Designation</u>	<u>FTC Objection</u>
24:23 - 25:6	25:7 - 25:8 (Restricted Confidential)	Lack of foundation
31:6 - 31:11	31:12 - 31:22 (Restricted Confidential)	Lack of foundation
<u>Jim C. Mosley</u>	<u>FTC Counter-Designation</u>	<u>FTC Objection</u>
78:15 - 78:18	78:19 - 79:12	Lack of foundation
41:3 - 41:4	41:22 - 42:1; 44:4 - 45:1	Lack of foundation
52:22 - 53:19	51:25 - 52:21	Lack of foundation
<u>David Roberts</u>	<u>FTC Counter-Designation</u>	<u>FTC Objection</u>
86:18 - 86:24	86:25 - 87:11	Lack of foundation
<u>Cherise Webster</u>	<u>FTC Counter-Designation</u>	<u>FTC Objection</u>
26:25 - 26:25		Lack of foundation

Respectfully submitted,

Michael J. Bloom / Carolyn R. Cleveland

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Dated: April 8, 2004

CERTIFICATE OF SERVICE

I, Carolyn R. Cleveland, hereby certify that on April 8, 2004, I caused a copy of Complaint Counsel's Objections and Counter Designations in Response to Respondent's First Set of Deposition Designations to be served upon the following persons:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Gregory S. C. Huffman, Esq.
Thompson & Knight, LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693

and by email upon the following: William Katz (William.Katz@tklaw.com), and Gregory Binns (binmsg@tklaw.com).

Carolyn R Cleveland