

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

NORTH TEXAS SPECIALITY PHYSICIANS,

a corporation.

Docket No. 9312

**COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE AMENDMENT AND
REPLY IN SUPPORT OF MOTION FOR LEAVE TO
CALL AN EXPERT REBUTTAL WITNESS**

Complaint counsel respectfully moves for leave to file an amendment and a reply brief in support of its motion to call an expert, Dr. Lawrence Casalino, as a rebuttal witness in this matter, and in support of its motion states:

1. On Monday, May 3, 2004, this court ruled that rebuttal witnesses would be permitted only by written motion, except in the case of previously designated rebuttal experts. Written motions were required, by this directive, to include a cite to the record by page and line number to the evidence subject to rebuttal.¹

2. On Monday, May 10, 2004, this court amended its earlier ruling to require a written motion for leave to call designated rebuttal experts in the event that opposing counsel objected to the calling of the rebuttal expert.²

¹ Hearing Transcript at 1251-52 (May 3, 2004).

² Hearing Transcript at 2209-10 (May 10, 2004).

3. On Tuesday, May 11, 2004, the defense rested its case,³ and complaint counsel presented its written Motion for Leave to Call Dr. Casalino As an Expert Witness on Rebuttal.⁴

4. To the extent that the court's directive of May 3 concerning specific citations in the record by page and line number to the evidence subject to rebuttal applies to previously designated rebuttal experts, the relevant transcripts were not available at the time the motion was prepared. Some transcripts were not even available at the time the motion was presented.

5. Complaint counsel now has obtained the complete hearing transcript, and is filing with this motion an amendment to its Motion for Leave to Call Dr. Casalino As an Expert Witness on Rebuttal. This amendment is an index of specific citations in the record by page and line number to the evidence which Dr. Casalino is prepared to rebut.

6. NTSP's Response to Complaint Counsel's Motion for Leave to Call Dr. Casalino As an Expert Witness on Rebuttal raises legal arguments to which Complaint Counsel desires to respond.

7. Federal courts have found that a party who files a motion generally has the right to open and close the briefing.⁵ This principle has been followed in this proceeding.⁶

³ Hearing Transcript at 2734 (May 11, 2004).

⁴ Hearing Transcript at 2692-93; 2734-35 (May 11, 2004).

⁵ *See, e.g.*, Spring Industry, Inc. v. American Motorists Insurance Co., 137 F.R.D. 238, 239 (N.D. Tex. 1991); Dondi Properties Corp. v. Commerce Savings & Loan Ass'n, 121 F.R.D. 284, 292-92 (N.D. Tex. 1988) (en banc).

⁶ *See, e.g.*, NTSP's Motion for Leave to File Reply Brief in Support of Motion for Summary Decision (March 25, 2004); Motion for Leave to File reply Brief in Support of Expedited Motion to Modify Protective Order (March 17, 2004).

For these reasons, complaint counsel requests that the Administrative Law Judge grant it leave to file an amendment and a short reply brief.

Respectfully submitted,

Handwritten signature of Michael J. Bloom and Sarah Crooke in cursive script.

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Dated: May 15, 2004.

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AMENDMENT TO
COMPLAINT COUNSEL'S MOTION FOR LEAVE
TO CALL DR. CASALINO AS AN EXPERT WITNESS ON REBUTTAL

As an amendment to its Motion for Leave to Call Dr. Casalino As an Expert Witness on Rebuttal, complaint counsel submits the index below. This index lists specific citations in the record by witness and page and line number to the evidence Dr. Casalino is prepared to rebut. We also have identified the subject of rebuttal according to the categories in our motion: (1) clinical integration; (2) efficiencies; (3) quality improvement; and (4) ancillarity (reasonable necessity of collective negotiations).

Karen Van Wagner, Ph. D:

Page 1506, lines 5-13: clinical integration; quality improvement

Page 1506, lines 14-22: clinical integration; quality improvement

Page 1507, lines 5-22: clinical integration; quality improvement

Page 1580, line 15 - Page 1581, line 10: clinical integration; quality improvement

Page 1595, line 24 - Page 1596, line 13: efficiencies

Page 1597, line 20 - Page 1599, line 15: efficiencies

Page 1602 line 1 - Page 1605, line 5: efficiencies

Page 1608, lines 7 - Page 1609 line, 13: efficiencies, quality improvement

Page 1614, line 14 - Page 1618, line 25: efficiencies, quality improvement

Page 1635, line 18 - Page 1636, line 13: efficiencies

Page 1637, line 22 - Page 1638, line 20: ancillarity

Page 1646, line 24 - page 1647, line 10: clinical integration

Page 1789, line 16 - Page 1790, line 20: efficiencies

Page 1792, lines 1-24: efficiencies

Page 1793, lines 4-19: efficiencies

Page 1799, line 1- Page 1801, line 25: quality improvement

Page 1802, line 5 - Page 1803, line 11: efficiencies

Robert Maness, Ph. D:

Page 1991, lines 2 - 6: clinical integration; efficiencies

Page 2057, line 13 - Page 2058, line 6: efficiencies

Page 2062, line 16 - Page 2063, line 6: efficiencies

Page 2069, lines 1 - 18: clinical integration; efficiencies

Page 2069, line 20 - Page 2070, line 17: clinical integration; efficiencies

Page 2071, lines 2 - 19: clinical integration; efficiencies

Page 2074, line 16 - Page 2076, line 24: quality improvement; clinical integration; efficiencies

Page 2076, line 25 - Page 2077, line 24: clinical integration; efficiencies

Page 2078, line 22 - Page 2079, line 23: clinical integration; efficiencies

Page 2079, line 24 - Page 2081, line 15: quality improvement; clinical integration; efficiencies; ancillarity

Page 2083, lines 2 - 16: quality improvement; clinical integration; efficiencies; ancillarity

Gail Wilensky, Ph. D:

Page 2158, line 23 - Page 2159 line 22: clinical integration; efficiencies

Page 2162, line 19 - Page 2163, line 15: efficiencies

Page 2163, line 19 - Page 2166 line 13: clinical integration

Page 2172, line 11 - Page 2173, line 2: clinical integration

Page 2178, line 10 - Page 2179, line 3: clinical integration

Dr. Thomas Deas:

Page 2452, line 7 – Page 2453, line 15: quality improvement

Page 2461, lines 16 - 22: efficiencies

Page 2462, line 22 - Page 2465, line 9: clinical integration; efficiencies; quality improvement

Page 2468, line 24 - Page 2483, line 17: clinical integration; efficiencies

Page 2483, line 18 - Page 2485, line 10: efficiencies

Page 2485, line 11 - Page 2486, line 13: clinical integration

Page 2486, line 18 – Page 2487, line 14: quality improvement

Page 2488, line 18 - Page 2490, line 1 : efficiencies

Page 2490, lines 17 - 22: efficiencies

Page 2491, line 24 - Page 2492, lie 21: efficiencies

Page 2494, line 10 - Page 2495, line 13: clinical integration; efficiencies

Page 2495, line 14 - Page 2496, line 1: efficiencies

Page 2497, line 20 - 2498, line 24: efficiencies

Page 2498, line 25 - Page 2500, line 2: clinical integration; efficiencies

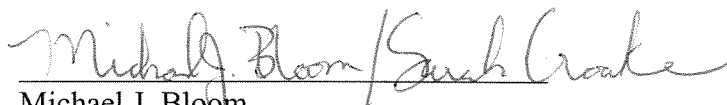
Page 2500, line 8 - Page 2502, line 25: clinical integration

Page 2503, line 1 - Page 2508, line 3: clinical integration

Page 2533, lines 5-13: efficiencies

Page 2534, lines 12 -24: clinical integration; efficiencies

Respectfully submitted,



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TO CALL DR. CASALINO AS AN EXPERT WITNESS ON REBUTTAL**

Complaint Counsel’s motion to call an expert witness in rebuttal to NTSP’s defense is strongly supported by principles of common law as applied in federal courts and FTC adjudicative proceedings. NTSP’s opposition to complaint counsel’s motion not only lacks legal support, but it is untimely under the scheduling order governing this case.

LEGAL ANALYSIS

This court correctly cited Black’s Law Dictionary and Wigmore on Evidence in defining the proper scope of rebuttal.¹ Evidence on rebuttal must “explain, repel, contradict or disprove facts given into evidence by the opposing party. . . . [R]ebuttal evidence is limited to facts made necessary to meet new facts put in by the opponent or to discredit witnesses.”² Wigmore adds that rebuttal is appropriate on issues to which the burden of proof shifts to the defendant.

These principles are consistently applied in federal courts. Although a trial court has

¹ Black’s Law Dictionary 1274 (Bryan A. Garner Rev. 1999); John Henry Wigmore, Evidence at Trials at Common Law § 1873 (James H. Chaddourn Rev. 1976 with 2000 Supp.).

² Hearing Transcript at 1251-52 (May 3, 2004).

discretion to exclude or to permit rebuttal evidence, this broad discretion may not be exercised to require a plaintiff “to anticipate or to negate a defense theory in plaintiff’s case in chief.”³ For example, in a tort case, the plaintiff is not required to anticipate the defense of contributory negligence and incorporate evidence of his lack of contributory negligence into his case in chief.⁴ When the substantive law recognizes a shift in the burden of proof, rebuttal is always appropriate.

In contrast, a plaintiff, in most situations, may not use rebuttal to present additional evidence relating to the defense’s contest of an element of plaintiff’s prima facie case.⁵ All four cases NTSP cites in which rebuttal was denied involve the contest of the elements of plaintiff’s prima facie case, not an affirmative defense.⁶ Interestingly, one of these cases explicitly recognizes that rebuttal would have been proper if the defense had asserted an argument on which it had the burden of proof.⁷

Even when the subject of rebuttal is not technically an affirmative defense, disallowing rebuttal evidence can be reversible error. For example, in a case brought against the government for personal injury from swine flu vaccination, the plaintiff sought to introduce an expert witness on rebuttal to address the government’s factually complex contest of the plaintiff’s causation evidence. The trial court excluded the expert’s testimony as improper rebuttal. The Sixth Circuit reversed,

³ Toth v. Grand Trunk R.R., 306 F.3d 335 (6th Cir. 2002) *quoting* Martin v. Weaver, 666 F.2d 1013, 1020 (6th Cir. 1981).

⁴ Kaczmarek v. Allied Chemical Corp., 836 F.2d 1055, 1061-62 (7th Cir. 1987) (Posner, J.).

⁵ Braun v. Lorillard, 84 F.3d 230, 237 (7th Cir. 1996) (Posner, J.).

⁶ Faigin v. Kelly, 184 F.3d 67, 85 (1st Cir. 1999); Tramonte v. Fibreboard Corp., 947 F.2d 762, 764 (5th Cir. 1991); Lubanski v. Coleco Industries, Inc., 929 F.2d 42, 47 (1st Cir. 1991); Allen v. Prince George’s County, 737 F.2d 1299, 1305 (4th Cir. 1984).

⁷ Allen, 737 F.2d at 1306.

holding that the plaintiff's knowledge of the government defense, learned in discovery, did not compel plaintiff to incorporate rebuttal of the defendant's technical, complex theory into the case in chief.⁸

If the Commission has departed at all from the principles applied to rebuttal evidence in federal courts, it has done so in the direction of being more open to rebuttal. For example, in *Modern Methods, Inc.*, the Administrative Law Judge permitted complaint counsel to introduce rebuttal evidence on the credibility of the defense expert.⁹ The ALJ noted that FTC adjudications are neither "contests of wits nor technical legal exercises."¹⁰ The ALJ reasoned that, after complaint counsel has established the elements of its case, the burden shifts to the respondents, and complaint counsel is entitled to rebut the respondents' evidence.¹¹ The Commission explicitly affirmed the ALJ's decision to admit rebuttal testimony, holding that "rulings in this area should not be unduly restrictive."¹²

In contrast, in *Foster-Milburn Co.*, the ALJ denied complaint counsel's motion to call an expert witness on rebuttal.¹³ On interlocutory appeal to the Commission, this ruling was reversed. The Commission held that the proper scope of rebuttal was ultimately its decision, not that of the

⁸ *Benedict v. United States*, 822 F.2d 1426, 1428 (6th Cir. 1987).

⁹ 60 F.T.C. 309, 331 (1962) (Initial Decision).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 339 (Commission Decision).

¹³ *Foster-Milburn Co.*, 51 F.T.C. 369 (1954).

hearing examiner.¹⁴ Excluding rebuttal on the ground that the evidence could have been presented in complaint counsel's case in chief is, the Commission concluded, reversible error.¹⁵

REBUTTAL IN THIS PROCEEDING

The Commission's legal framework for analyzing horizontal conduct is *Polygram Holding, Inc.*¹⁶ In this matter, the Commission outlined a three-step analysis. In the first step, the plaintiff needs to demonstrate that the conduct at issue is "inherently suspect," that it is of a type that almost always, by the principles of rudimentary economics, harms consumers. Complaint counsel believes that the evidence compels the conclusion that NTSP's non-risk contracting is inherently suspect. Although NTSP contests the elements of complaint counsel's case on the first, "inherently suspect," step of the analysis, much of its evidence relates to the second step of the analysis.

In this step, the issue is whether the defense has a justification for the "inherently suspect" conduct. A justification must be legally cognizable and economically plausible. In addition, the restraint must be ancillary, or reasonably necessary, to the purpose of the defendant's alleged justification. NTSP has introduced evidence of clinical integration, efficiency and quality improvement as justification for its "inherently suspect" pricing. In rebuttal, complaint counsel seeks to contest this evidence.

In its analytical framework, the Commission explicitly recognizes that the plaintiff does not have the burden of persuasion with respect to every step. Chairman Muris states: "If the defendant articulates a legitimate (*i.e.*, cognizable and plausible) justification, then the plaintiff must address

¹⁴ *Id.* at 370.

¹⁵ *Id.* at 371.

¹⁶ ___ F.T.C. ___, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (2003) ("Three Tenors").

the justification”¹⁷ This proceeding is now precisely at this point. NTSP has articulated a vision of clinical integration that if actually true, might tend to justify its inherently suspect pricing behavior if that pricing behavior were reasonably necessary to the accomplishment of the claimed efficiencies. Complaint counsel, however, maintains that NTSP’s alleged clinical integration is merely a vision, and is not actually true; and that in any event horizontal price-fixing is not reasonably ancillary to the accomplishment of the claimed efficiencies.

To rebut NTSP’s alleged justifications, complaint counsel seeks leave to call Dr. Lawrence Casalino of the University of Chicago. Dr. Casalino is an expert in the delivery of physician services through physician organizations. Complaint counsel expects Dr. Casalino to testify that NTSP is not clinically integrated, and, as to its non-risk patients, has achieved minimal efficiencies and has not materially increased the quality of care its member physicians provide. Finally, complaint counsel expects Dr. Casalino to testify that, to the limited extent NTSP has achieved efficiencies or improved the quality of care for non-risk patients, these achievements do not reasonably require joint negotiations with health plans.

TIMELINESS

Without regards to its merit, NTSP’s opposition is untimely, and its argument should be deemed to have been waived. On January 16, 2004, as required by the scheduling order governing this matter, complaint counsel disclosed Dr. Casalino as a rebuttal expert. On February 20, 2004, Dr. Casalino submitted his report, the text of which is 29 pages. On February 27, 2004, NTSP deposed Dr. Casalino for nearly six hours. By the end of February, NTSP knew that complaint counsel planned to call Dr. Casalino in rebuttal and knew the substance of his testimony.

¹⁷ ___ F.T.C. at ___, 5 Trade Reg Rep. (CCH) at ___ (emphasis added).

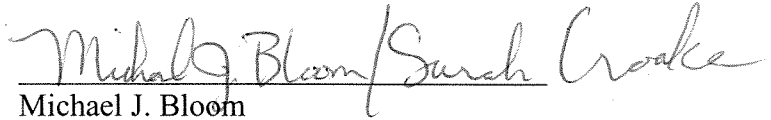
Nevertheless, NTSP did not file a motion in *limine* regarding Dr. Casalino's rebuttal testimony. The deadline for such motions was March 23, 2004, well after Dr. Casalino's designation, report, and deposition. NTSP's lately-expressed opposition to Dr. Casalino's testimony is not a desire for an orderly presentation of the case, but a trick to suppress damaging testimony.

CONCLUSION

The ultimate purpose of this hearing is to provide this court and the Commission, the "tribunal encharged with the ultimate responsibility for conducting the proceeding and determining its merits," with a full and complete record on which it may discharge this responsibility.¹⁸ Accordingly, complaint counsel respectively requests that Dr. Casalino be permitted to testify on this matter. With regards to schedule, complaint counsel is able to present Dr. Casalino in Washington, D.C., on any business day prior to May 26, 2004.

¹⁸ Foster-Milburn Co., 51 F.T.C. at 371.

Respectfully submitted,



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Dated: May 15, 2004.

CERTIFICATE OF SERVICE

I, Sarah Croake, hereby certify that on May 17, 2004, I caused a copy of

(1) COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE AMENDMENT AND REPLY IN SUPPORT OF MOTION FOR LEAVE TO CALL AN EXPERT REBUTTAL WITNESS;

(2) AMENDMENT TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL DR. CASALINO AS AN EXPERT WITNESS ON REBUTTAL; and

(3) COMPLAINT COUNSEL'S REPLY TO NTSP'S OPPOSITION TO MOTION FOR LEAVE TO CALL DR. CASALINO AS AN EXPERT WITNESS ON REBUTTAL

to be served upon the following persons:

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Hon. D. Michael Chappell
Administrative Law Judge
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