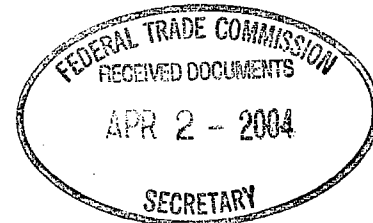


PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of
NORTH TEXAS SPECIALITY PHYSICIANS,

a corporation.

Docket No. 9312

COMPLAINT COUNSEL'S OPPOSITION TO
NTSP'S MOTION *IN LIMINE*

Complaint Counsel hereby submits its opposition to Respondent's motion *in limine*, and respectfully requests that Your Honor deny that motion in its entirety.

Respondent North Texas Specialty Physicians ("NTSP") contends that some unspecified nonparty documents were not produced to it, and that some other unspecified nonparty documents were produced to NTSP by Complaint Counsel only belatedly. NTSP then moves to exclude at trial evidence that "refers to" or "discusses" unspecified matters relating to those documents. Neither we nor, we respectfully suggest, Your Honor can discern from NTSP's filing what it is talking about and asking for. NTSP does not identify the specific documents that are the subject of its motion; it does not describe the circumstances surrounding or timing of Complaint Counsel's production of those unspecified documents; it does not explain how it has been prejudiced by any unspecified belated production of those unspecified documents; it does not explain with any particularity what it wishes this Court to exclude from evidence at trial; and it does not cite authority for, or make any effort to justify, imposition of the draconian remedy of

exclusion to redress the unspecified wrongs it alleges.

Complaint Counsel wishes, however, to be perfectly clear. Whatever NTSP is talking about, Complaint Counsel has provided NTSP with every document to which NTSP is entitled, and with one exception this was true prior to NTSP's having filed its motion.¹ With respect to NTSP's allegations of belated production, both Complaint Counsel and NTSP have occasionally been late in producing material due to the exigencies of litigation.² Complaint Counsel has at all times acted in good faith, seeking to make production accurately and timely. Complaint Counsel does not believe that NTSP has been prejudiced by any belated production. NTSP has never so advised Complaint Counsel. Nor, for example, has NTSP sought from Complaint Counsel any accommodation of discovery or discovery schedule because of any belated production. NTSP should not now be heard to cry foul, and certainly not without having provided any meaningful information as to the identity and nature of that alleged foul, the harm allegedly caused thereby, and the propriety of the relief sought. Accordingly, its motion *in limine* should be denied.

¹ In late February-early March of 2004 counsel for the parties conferred to make certain that each side had received all required productions. At that time it appeared that Respondent had not received a relatively small number of documents. Those documents were emailed by Complaint Counsel to Respondent's attorneys on March 5, 2004. Apparently due to email system problems, that email was not received by NTSP. NTSP did not notify Complaint Counsel that it had not received the promised materials, and Complaint Counsel heard nothing further from Respondent NTSP concerning production problems until March 22, 2004, when NTSP filed its motion *in limine*. As soon as Complaint Counsel learned that its March 5th email had not been received, we sent the remaining material on disk to NTSP.

² For example, NTSP provided Complaint Counsel with several inches of material relating to and including treatment protocols (NTSP 090684-091489)—an aspect of NTSP's defense—for the first time on March 16, 2004.

NTSP's motion is vague, nonspecific, speculative, and overly broad. NTSP's motion does not identify any specific documents that it contends were not produced or not produced on a timely basis (such as deposition testimony referring to certain unproduced documents). Indeed, NTSP does not even list or identify the documents that it wishes to exclude from use at trial. NTSP's proposed order is no more than a hypothetical, "blank check" exclusion of documents that NTSP may at some time in the future wish to exclude. Such a motion, dependent on clairvoyance and speculation, is not ripe for decision.

Complaint Counsel has at all times attempted in good faith to comply with the Court's Order concerning the production of documents obtained from third parties, which are subject to procedures set forth in the Court's Protective Order. Complaint Counsel was able to meet these deadlines for virtually all third party materials, but admits that in a few instances it inadvertently produced, out of tens of thousands of documents, a few documents somewhat later. There may also have been instances when a third party itself made a late production to both Complaint Counsel and NTSP. NTSP itself admits that certain third party documents were not produced because of the Court's own ruling that third-party payors did not have to provide claims data that had been provided to the Texas Attorney General.

Furthermore, NTSP's motion does not merely seek the exclusion of the unidentified documents, but apparently asks the Court to order Complaint Counsel and every witness not to "mention, ask any question about, refer to or discuss" not the documents themselves, but the evidence contained in the documents—even if the same evidence was contained in other documents in NTSP's possession. NTSP does not cite any specific document nor identify what "matters" are discussed in such documents that may not be mentioned by witnesses. Such a

restriction on the ability of witnesses to testify fully and truthfully about matters within their knowledge improperly limits the ability of the Court to obtain a complete factual record on the key issues of the case. For example, the motion refers primarily to certain “cost and quality of care information” from third-party payors, evidence that is of particular relevance to NTSP’s own defense that its conduct was efficient and pro-competitive. The Court will undoubtedly hear considerable testimony from both sides on this issue, and should not artificially limit the scope of testimony merely because of a technical deficiency in the production of a few documents.³

Finally, it is striking that NTSP does not cite a single instance in which the allegedly late production of a document prejudiced its ability to prepare and present its own case. Had it done so, we and the Court could consider the best means of alleviating any such prejudice. In the absence of any prejudice to NTSP, evidence that is material and relevant to key issues in the case should not lightly be excluded from the Court’s factual record. Courts have held that exclusion of evidence is an “extreme” sanction, not generally to be used except when there has been a showing of bad faith, “willful deception,” or “flagrant disregard” of a court order. *See, e.g., Meyers v. Pennypack Woods Home Ownership Ass’n*, 559 F.2d 894, 904-05 (3rd Cir. 1977); *see also Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1341 (1st Cir. 1988); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F. 2d 1365, 1369 (9th Cir. 1980). The Court here should thus not order preclusion of evidence due to a limited, inadvertent, and non-prejudicial delay in the production of a few documents.

³ Complaint Counsel, in presenting testimony from third parties, has no intention of eliciting testimony about documents that will not be in the record and fully available to both sides.

CONCLUSION

For the reasons stated above, Complaint Counsel respectfully requests that NTSP's motion be denied in its entirety.

Respectfully submitted,

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Dated: April 2, 2004

CERTIFICATE OF SERVICE

I, Carolyn R. Cleveland, hereby certify that on 19 March, 2004, I caused a copy of the foregoing document to be served upon the following:

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