

**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 TO EXCLUDE EXHIBIT RX 3118-3130  
EXPEDITED RULING REQUESTED**

Complaint Counsel respectfully moves pursuant to FTC Rule of Practice 3.32 to withdraw and exclude from evidence Respondent's exhibit RX 3118-3130. For the reasons set forth below and in the accompanying memorandum, this motion should be granted.

The Parties' First Amended Joint Stipulation Regarding Admitted Exhibits ("Joint Stipulation"), entered into evidence by this Court on May 5, 2004, plainly states that expert reports and exhibits, including specifically RX 3118-3130 (the Maness expert witness report), "are marked and submitted for identification purposes only."

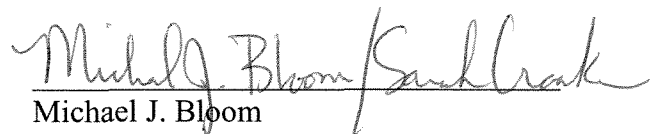
Despite the Joint Stipulation, counsel for Respondent North Texas Speciality Physicians ("NTSP") moved for the admission of numerous exhibits by EX number, including, unbeknownst to Complaint Counsel, the Maness report. A few minutes earlier Respondent's counsel falsely had assured Complaint Counsel that the exhibits to be moved into evidence were on Respondent's exhibit list and that Complaint Counsel had made no objection. In moving those exhibits into evidence, Respondent's counsel assured this Court that Complaint Counsel had no objection. Complaint Counsel, based expressly on opposing counsel's representation, which Complaint Counsel stated for the record, raised no objection and the Court admitted the

documents. Respondent's counsel more than failed to clearly and conspicuously indicate to Complaint Counsel and this Court that it was seeking to admit into evidence an exhibit the inadmissibility of which already governed by the Joint Stipulation; it affirmatively suggested that no objection to admission of any of the offered documents previously had been lodged. Based on these facts, RX 3118-3130 should be withdrawn and excluded from evidence by this Court and JX 3, which was unknowingly partially abrogated, reinstated in its entirety.

Complaint Counsel respectfully request an expedited ruling on this motion. Respondent at times relies on RX3118-3130, the Maness report, in its proposed findings of fact. Complaint Counsel must reply, pursuant to the Court's Order on Post-Trial Briefs, by June 30, 2004, and the content of that reply may vary depending on whether or not this motion is granted. Complaint Counsel has met and conferred with Respondent's Counsel but has been unable to resolve this dispute.

For these reasons, and those set forth in the accompanying memorandum, Complaint Counsel respectfully request that your Honor enter an order withdrawing and excluding exhibit RX3119-3130 from evidence and reinstating the Joint Stipulation in its entirety.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Michael J. Bloom / Sarah Crake".

Michael J. Bloom  
Theodore Zang  
Jonathan Platt  
Alan Loughnan  
Elvia P. Gastelo

Attorneys for Complaint Counsel  
Federal Trade Commission  
Northeast Region  
One Bowling Green, Suite 318  
New York, NY 10004  
(212) 607-2829  
(212) 607-2822 (facsimile)

Dated: June 30, 2004

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of  NORTH TEXAS SPECIALTY PHYSICIANS, a corporation.
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**DOCKET NO. 9312**

**COMPLAINT COUNSEL’S MEMORANDUM IN SUPPORT OF ITS  
MOTION TO EXCLUDE EXHIBIT RX 3118-3130**

For the reasons stated herein, Complaint Counsel respectfully moves for an order of the Court ruling that Respondent North Texas Specialty Physician’s (“NTSP”) expert report RX 3118-3130 should be excluded from evidence.

**I. The Parties’ First Amended First Joint Stipulation Governs the Admissibility of Expert Reports**

On June 16, 2004, Complaint Counsel discovered while reviewing the proposed findings of facts submitted by NTSP Counsel, that expert report RX 3118-3130 had been admitted into evidence by this Court at the request of NTSP Counsel during the proceedings on May 6, 2004. Complaint Counsel was surprised to learn that this exhibit had been offered into evidence on May 6 because the parties had only days earlier entered into Parties’ First Amended Joint Stipulation Regarding Admitted Exhibits (JX0003) (“Joint Stipulation”) which was admitted into evidence at trial on May 5, 2004. (A copy of the Joint Stipulation is annexed as Exhibit A.) Pursuant to the Joint Stipulation “[e]xpert reports and exhibits are marked and submitted for identification purposes only.” Based on this Joint Stipulation, Complaint Counsel reasonably

believed that no expert reports would be offered into evidence by either party at trial except for identification purposes.

**II. The Admission of Expert Report RX 3118-3130 into Evidence at Trial Was Procured through NTSP's Counsel False Representation and Should be Excluded from Evidence**

With the testimony of expert witness Dr. Robert Maness scheduled for the morning of May 6, 2004, NTSP Counsel Nicole Rittenhouse sent an e-mail to Complaint Counsel at 7:20 p.m. on May 5, 2004. The e-mail, a copy of which is annexed as Exhibit B, referred to 37 items identified only by exhibit numbers, that NTSP Counsel represented were on their exhibit list but were not timely objected to by Complaint Counsel. Moreover, the following morning, on May 6, 2004, a few minutes before moving these exhibits into evidence, Respondent's counsel falsely had reassured Complaint Counsel that the exhibits to be offered into evidence were on Respondent's exhibit list and that Complaint Counsel had made no objection. Given these representations, Complaint Counsel took no further action when expert report RX 3118-3130 was offered into to evidence, because we had no reason to believe that the proposed exhibit list contained any exhibits expressly governed by the Joint Stipulation which had been signed days earlier and which had been admitted into evidence the prior day.

In fact, NTSP Counsel's representation in their e-mail and at trial that there was no objection from Complaint Counsel on the admission of any of the exhibits was simply false. Complaint Counsel had numerous times previously made known that we objected to admission of the expert reports into evidence--all of them being palpable hearsay--culminating in the Joint Stipulation. Certainly, NTSP Counsel's e-mail of the May 5th or their reassurance prior to the proceedings on the May 6<sup>th</sup> did not even begin to suggest that they were about to seek to abrogate

a joint stipulation of exclusion (other than for identification) already accepted by this Court earlier in the day.<sup>1</sup>

The May 6<sup>th</sup> trial record makes clear the basis of Complaint Counsel's understanding. NTSP Counsel William Katz offered numerous exhibits, again by exhibit number, and expressly represented to the Court that complaint counsel had no objection. Mr Katz stated:

I just wanted to make it clear for the record, Your Honor, in preparation for Dr. Maness' testimony, there's some exhibits that had not been admitted into evidence. We provided a copy to Complaint counsel. They have had a chance to review them. They have no objection to the list of exhibits I'm going to list off here . . . [m]y understanding is there's no objection from Complaint counsel . . . .  
(a copy of this portion of the trial transcript is annexed as Exhibit C)

In response Complaint Counsel replied that:

[r]espondent has represented to us that these documents were contained on their exhibit list and that we did not make any objection. I've not verified that, I see no need. Based on that understanding, we have no objection.

Having received no reply to the prior evening's email, NTSP Counsel nevertheless made an unwarranted assumption that both parties intended to abrogate the Joint Stipulation's treatment of RX 3118-3130 (the Maness expert report) by its simple inclusion, without more,

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<sup>1</sup> NTSP Counsel queries how Complaint Counsel could "miss" exhibit RX 3118-3130 since it is the first document on the May 5, 2004 e-mail list. The placement of the document on the list is irrelevant absent a clear and conspicuous disclosure that the document was an expert report or subject to the expert report evidence limitations of the Joint Stipulation. If NTSP Counsel was trying to signal a change in the agreed evidentiary treatment of RX 3118-3130 by listing the document first, they chose a grossly ineffective method to do so.

among numerous other exhibits. Moreover, when Complaint Counsel indicated to this Court that it had not verified whether NTSP Counsel's assertion was accurate and was relying on their representation that there were no objections, NTSP Counsel again failed to respond that their "conclusion" was based on the prior night's e-mail. Complaint Counsel did not object to the admission of RX 3118-3130 based solely on NTSP Counsel's false affirmation to this Court that Complaint Counsel had not objected to the admission of *any* of the proffered exhibits. In fact, Complaint Counsel has clearly and consistently maintained the position set forth in the Joint Stipulation that expert reports, including RX 3118-3130, were to be admitted for identification purposes only. NTSP's Counsel more than failed to clearly and conspicuously indicate to Complaint Counsel and this Court that it was seeking to admit into evidence an exhibit the inadmissibility of which already governed by the Joint Stipulation; it affirmatively suggested that no objection to admission of any of the offered documents previously had been lodged.

Complaint Counsel, and its cause of action, have been unfairly prejudiced by these events. Had we not been misled as to the nature of the documents being offered into evidence we surely would have objected to admission of the Maness report, as subject to the Joint Stipulation and as rank hearsay. If notwithstanding that, your Honor had admitted the report, Complaint Counsel would have examined Maness on the stand as to the contents of the report as well as to his direct testimony. Having not known that the report, despite the Joint Stipulation, was among the documents admitted, we could not do so. We hasten to add that Complaint Counsel has carefully adhered to the Joint Stipulation, and that the Maness report, for no good reason, is the sole expert report offered or received into evidence. Based on these facts, RX 3118-3130 should be withdrawn and excluded from evidence by this Court and the Joint Stipulation (JX 3), which was unknowingly partially abrogated, reinstated in its entirety.

**III. Conclusion**

For the reasons stated above, Complaint Counsel respectfully requests that the Administrative Law Judge enter an order excluding from evidence expert report RX 3118-3130.

Respectfully submitted,



Michael J. Bloom  
Theodore Zang  
Jonathan Platt  
Alan Loughnan  
Elvia P. Gastelo

Attorneys for Complaint Counsel  
Federal Trade Commission  
Northeast Region  
One Bowling Green, Suite 318  
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(212) 607-2829  
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Dated: June 30, 2004



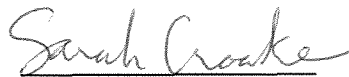
**CERTIFICATE OF SERVICE**

I, Sarah Croake, hereby certify that on June 30, 2004, I caused a copy of the foregoing document to be served upon the following persons:

Gregory Huffman, Esq.  
Thompson & Knight, LLP  
1700 Pacific Avenue, Suite 3300  
Dallas, TX 75201-4693  
Gregory.Huffman@tklaw.com

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

Office of the Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue NW  
Washington, D.C. 20580



Sarah Croake  
Honors Paralegal

**Exhibit A**

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF  
NORTH TEXAS SPECIALTY PHYSICIANS,  
A CORPORATION.

Docket No. 9312

PARTIES' FIRST AMENDED FIRST JOINT STIPULATION REGARDING ADMITTED EXHIBITS

Complaint Counsel and Respondent North Texas Specialty Physicians ("NTSP") (jointly, "parties"), hereby stipulate and agree that the documents on the exhibit lists attached as Exhibit A and Exhibit B are offered and admitted. The parties reserve the right to offer the reserved exhibits at a later time.


This amended joint stipulation is being filed because RX 1331, an exhibit that was objected to, was inadvertently included on Respondent's Admitted Exhibit List, attached as Exhibit B to the original joint stipulation. These exhibit lists are otherwise identical to those submitted to the court as JX-2 in the Parties' First Joint Stipulation Regarding Admitted Exhibits.

The parties agree that all documents marked with an asterisk (\*) are admitted based on the representation that a witness on either party's final witness list will be able to establish the documents' admissibility. If the non-offering party believes that a witness has not established a document's admissibility, that party may object to the document's admissibility. If the Administrative Law Judge sustains the non-offering party's objection, the offering party agrees to withdraw the document from the record in this proceeding. The offering party retains its right to make an offer of proof regarding any documents.

Expert reports and exhibits are marked and submitted for identification purposes only.

These exhibits are CX 1150 - 1158 and RX 3118 - 3130 and 3253 - 3255.

Respectfully submitted,



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Michael J. Bloom  
Theodore Zang, Jr.

Attorney for Complaint Counsel

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212.607.2829  
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Gregory S. C. Huffman  
William M. Katz, Jr.

Attorney for North Texas Specialty  
Physicians.

THOMPSON & KNIGHT LLP  
1700 Pacific Avenue, Suite 3300  
Dallas TX 75201-4693  
214.969.1700  
214.969.1751 - Fax

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SO ORDERED:

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JX0003.002

**Exhibit B**

**Croake, Sarah**

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**From:** Nicole.Rittenhouse@tklaw.com  
**Sent:** Wednesday, May 05, 2004 7:20 PM  
**To:** Bloom, Michael J.; Zang, Theodore; Platt, Jonathan W.; Rose, Christine; Croake, Sarah  
**Subject:** Maness Exhibits

As I told Michael earlier today, there are several exhibits on our list for Maness which were on our exhibit list, but were not objected to timely. Although we are not waiving our position that any objection now would be untimely, we would like to know before Maness's direct begins tomorrow which, if any, of these exhibits you plan to object to. Following is a list of the relevant exhibits:

RX 3118-3130  
RX 3261-3272  
RX 3280-3289  
RX 2325  
RX 295  
RX 2887  
RX 2208-2209  
RX 3238-3240  
RX 3245  
RX 2822  
RX 3252  
RX 3134-3138

Also, the list I sent last night included footnote numbers because I had not had a chance to match up the footnotes to exhibit numbers. Here is a list that has the exhibit numbers (there is no change in substance from last night's e-mail).

RX 3238-40  
RX 3245  
RX 3248  
RX 2822  
RX 3250  
RX 3252  
RX 3133-3138  
RX 3158-3163  
RX 3182-3183  
RX 3168-3171  
RX 3260  
CX 616  
RX 13  
RX 3118-3130  
RX 3261-3272  
RX 10-11  
RX 3280-3289  
RX 9  
RX 2325  
RX 295  
RX 2887  
RX 2208-2209  
CX 1155  
CX 508  
CX 625

Thanks,

Nicole L. Rittenhouse  
Thompson & Knight L.L.P.  
1700 Pacific Avenue  
Suite 3300  
Dallas, TX 75201  
(214) 969-1149  
(214) 999-1508 (desktop fax)

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## **Exhibit C**



1	FEDERAL TRADE COMMISSION				
2	I N D E X (PUBLIC RECORD)				
3	WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
4	VAN WAGNER		1897	1970	
5	MANESS	1982	2093		
6	EXHIBITS		FOR ID	IN EVID	WITHDRAWN
7	CX				
8	195A			1961	
9	RX				
10	3118 - 3130			1981	
11	3261 - 3272			1981	
12	2325			1981	
13	295			1981	
14	2887			1981	
15	2208			1981	
16	2209			1981	
17	3238 - 3240			1981	
18	3245			1981	
19	2822			1981	
20	3252			1981	
21	3134 - 3138			1981	
22	3119			1985	
23	JX - None				
24	DX - None				
25					

1           A           Yes, sir.

2                   MR. HUFFMAN: Your Honor, you'd asked  
3 what the deposition exhibits were for  
4 Dr. Van Wagner. That would be CX1194 through  
5 CX1197.

6                   JUDGE CHAPPELL: Thank you.

7                   MR. HUFFMAN: That's all the redirect  
8 I have, Your Honor.

9                   JUDGE CHAPPELL: Any recross based on  
10 redirect?

11                  MR. ZANG: No, Your Honor.

12                  JUDGE CHAPPELL: Thank you, ma'am.  
13 You're excused.

14                   (The witness stood aside.)

15                  JUDGE CHAPPELL: Next witness?

16                  MR. HUFFMAN: Yes, Your Honor, I'd  
17 like to call Dr. Robert Maness to the stand.

18                   Oh, I'm sorry. Before we do that, we  
19 have an exhibit matter before we call him.

20                  JUDGE CHAPPELL: All right.

21                  MR. KATZ: I just wanted to make it  
22 clear for the record, Your Honor, in preparation  
23 for Dr. Maness' testimony, there's some exhibits  
24 that had not yet been admitted into evidence. We  
25 provided a copy to Complaint counsel. They have

1 had a chance to review them. They have no  
2 objection to the list of exhibits I'm going to  
3 list off here. I just want to make it clear that  
4 we are offering them into evidence. My  
5 understanding is there's no objection from  
6 Complaint counsel, and we will be providing  
7 originals to the court reporter.

8 JUDGE CHAPPELL: Okay, read the list.

9 MR. KATZ: These are all RXs. 3118  
10 through 3130, 3261 through 3272, 2325, 295, 2887,  
11 2208 and 2209, 3238 through 3240, 3245, 2822,  
12 3252, 3134 through 3138.

13 JUDGE CHAPPELL: Any objection?

14 MR. BLOOM: Your Honor, counsel for  
15 Respondent has represented to us that these  
16 documents were contained on their exhibit list and  
17 that we did not make any objection. I've not  
18 verified that, I see no need. Based on that  
19 understanding, we have no objection.

20 JUDGE CHAPPELL: The exhibits just  
21 read into the record by Mr. Katz are admitted.

22 (RX Exhibit Numbers 3118 through 3130,  
23 3261 through 3272, 2325, 295, 2887,  
24 2208, 2209, 3238 through 3240, 3245,  
25 2822, 3252, and 3134 through 3138 were

1 admitted into evidence.)

2 MR. HUFFMAN: Your Honor, I'd like to  
3 call Dr. Robert Maness to the stand.

4 JUDGE CHAPPELL: State your full name,  
5 please.

6 THE WITNESS: Robert Stafford Maness.

7 JUDGE CHAPPELL: Where do you live?  
8 Don't need street address.

9 THE WITNESS: College Station, Texas.

10 DR. ROBERT MANESS

11 was sworn and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. HUFFMAN:

14 Q Dr. Maness, can you tell me what your  
15 profession is, please?

16 A Yes, I'm a Ph.D. economist.

17 Q And where are you a Ph.D. economist?

18 A I work for a firm called LECG. It's a  
19 national firm, but I work here in Texas, in  
20 College Station.

21 Q All right. Can you trace for me  
22 briefly your educational background?

23 MR. HUFFMAN: And, Your Honor, I'm  
24 going to tender into evidence his resume, but I'll  
25 do just a little bit of brief orientation

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**PROPOSED ORDER**

Having considered Complaint Counsel's Memorandum in Support of its Motion to Exclude Exhibit Rx 3118-3130 from evidence,

IT IS HEREBY ORDERED that Complaint Counsel's motion to exclude exhibit Rx 3118-3130 from evidence is granted.

---

D. Michael Chappell  
Administrative Law Judge

Date: \_\_\_\_\_