

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

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Docket No. 9312

**NORTH TEXAS SPECIALTY PHYSICIANS' RESPONSE TO COMPLAINT COUNSEL'S MOTION FOR
LEAVE TO CALL DR. CASALINO AS AN EXPERT WITNESS ON REBUTTAL**

Respondent North Texas Specialty Physicians ("NTSP") files this response to oppose Complaint Counsel's Motion for Leave to call another expert witness in this case. This rebuttal evidence should not be allowed by the Court.

First, Complaint Counsel's motion does not make the necessary showing to justify rebuttal evidence under the Court's explicit instructions for rebuttal evidence. Second, the testimony of Dr. Casalino is improper rebuttal evidence because it does not counter new or unexpected facts presented by Respondent. Finally, Dr. Casalino is an improper rebuttal witness because he cannot even meaningfully address the facts identified by Complaint Counsel. Under the guise of rebuttal, Complaint Counsel merely seeks to have the last word in this case by presenting an expert witness that should have been timely presented during its case in chief.

¹ Hearing Transcript at 1252.

II. The Testimony of Dr. Casalino is Improper Rebuttal Evidence Because It Is Not Necessary to Meet New or Unexpected Facts.

Even if Complaint Counsel's Motion had attempted to make the showing required by this Court's instructions, w021 (court d19115 Tc(Id.)a"f CoD02, by this-3-

⁴ See Hearing Transcript at 1251-52; *Allen v. Prince George's County, Maryland*, 737 F.2d 1299, 1305 (4th Cir. 1984) (court did not allow rebuttal testimony because there was no new factual evidence discovered during trial).

⁵ *Tramonte v. Fibreboard Corp.*, 947 F.2d 762, 764 (5th Cir. 1991).

⁶ *Id.*

⁷ *Fajgin v. Kelly*, 184 F.3d 67, 85 (1st Cir. 1999).

⁸ Complaint Counsel deposed Respondent's witnesses concerning NTSP's efficiencies. *See, e.g.*, Maness Deposition at 13-17 and 32-41; Wilensky Deposition at 46-47. Complaint Counsel deposed Respondent's witnesses concerning NTSP's clinical integration. *See, e.g.*, Van Wagner Deposition taken on August 29, 2002, Volume 1, at 11-13, 145-47; Van Wagner Deposition taken on August 30, 2002, Volume 2, at 215-225; Maness Deposition at 50-62. Complaint Counsel deposed Respondent's witnesses concerning NTSP's quality of care. *See, e.g.*, Deas Deposition at 102-03; Johnson Deposition at 37-38. These discussions also addressed the fourth topic of the relationship between these activities and the allegations of collective negotiation.

⁹ *See* Section II.A. of Respondent's Pretrial Brief, entitled "NTSP's business model promotes efficiency and improves quality of care." There were similar discussions on all four topics in Respondent's Proposed Findings of Fact at 3-12 and 58-60. *See also* Complaint Counsel's Proposed Findings of Fact at

Rebuttal is improper when the same evidence was available to the Plaintiff during its case in chief and when the testimony the Plaintiff seeks to rebut was not unexpected.¹² That is the situation here. Under the guise of rebuttal, Complaint Counsel seeks to place at the end of the evidence the last word on topics clearly known prior to Respondent's evidence. In fact, Complaint Counsel offered evidence on these same topics with its Tj-ucrypt Tc-0sd the aee, e.l8 srf2 tot of Frxpe

¹² *Lubanski v. Coleco Indus., Inc.*, 929 F.2d 42, 47 (1st Cir. 1991) (court did not allow rebuttal testimony to counter defendant's expert witness because the evidence was previously available to plaintiff and the expert's testimony was not unexpected).

¹³ Complaint Counsel addressed NTSP's clinical integration during its case in chief. *See, e.g.*, Opening Statement, Hearing Transcript at 9, 57-63; Direct of Grizzle, Hearing Transcript at 695; Direct of Jagmin, Hearing Transcript at 112-115; Direct of Frech, Hearing Transcript at 1351-55. Complaint Counsel addressed NTSP's efficiencies during its case in chief. *See, e.g.*, Opening Statement, Hearing Transcript at 9, 53-59; Direct of Roberts, Hearing Transcript at 496-97; Direct of Frech, Hearing Transcript at 1280-81 and 1343-50. Complaint Counsel addressed NTSP's quality of care during its case in chief. *See, e.g.*, Opening Statement, Hearing Transcript at 59; Direct of Jagmin, Hearing Transcript at 1001-02 and 1101-03; Direct of Frech, Hearing Transcript at 1334-35, 1343-44 and 1354-55. These discussions also addressed the fourth topic of the relationship between these activities and the allegations of collective negotiation.

¹⁴ *See* Complaint Counsel's Opening Statement, Hearing Transcript at 58.

¹⁵ Casalino Deposition at 86 (“Q. Is it correct to say you didn’t find – I’m sorry – you didn’t draw any definitive conclusion from the data concerning the numbers? A. Right. Q. And that you haven’t really drawn any definitive opinion concerning the numbers. A. I would say that’s correct.”; Casalino Deposition at 88 (“Q. So if I understand your testimony, you’re not really drawing any conclusions from data. You’re really looking at what you understand NTSP does in utilization management and quality improvement. Is that correct? A. Yes. That’s primarily correct. I mean, I paid attention to that data. If I had seen...”).

¹⁶ Casalino Deposition at 148 (“Q. Have you ever done an analysis of any medical entity providing medical care in Texas as to either utilization management or quality of care? A. No.”).

¹⁷ Casalino Deposition at 58 (“A. I don’t know how many patients want to go to Brown & Toland. I don’t know what people do in Texas, but other places I’ve been, the IPA brand name doesn’t seem to do

North Texas area concerning either their utilization management or their quality of care techniques? A. No, I do not. The North Texas area is not an area that I'm familiar with.”).

¹⁸ Casalino Deposition at 84 (“Q. Is it fair to say that you draw – you have not analyzed, in drawing any hard conclusions, as to how NTSP compares to other groups in the North Texas area as far as quality of care or costs? A. Well, there’s two questions there. One, did I – what kind of analysis, if any, did I do;

²³ Casalino Deposition at 105 (“Q. Is it true that you have not either attended NTSP meetings or

It is clear the Dr. Casalino is not able to offer a meaningful or relevant opinion on conduct specific to NTSP because he admits he has not studied NTSP or any physician groups or payors in the North Texas area. Given that the allegedly-unexpected evidence in Respondent's case involved NTSP and the North Texas area, there is nothing for Dr. Casalino to rebut. If Dr. Casalino intends now to address NTSP-specific facts, then Dr. Casalino will be doing so well after the Court's deadlines for pretrial disclosure and deposition have expired. As to the topics described by Complaint Counsel for rebuttal, Dr. Casalino is not a proper rebuttal witness.

CONCLUSION

Respondent respectfully requests that Complaint Counsel's Motion for Leave to allow the rebuttal testimony of Dr. Casalino be denied. Complaint Counsel's motion deliberately ignores this Court's standard for showing the necessity of rebuttal evidence because it provides no cites to the record in support and does not show that the testimony it seeks to rebut was unexpected. Further, the testimony Complaint Counsel seeks to rebut was not unexpected. Those topics were the subject of argument by both parties in pretrial briefing and opening statements. Complaint Counsel also addressed these topics during its own case in chief and already with an expert witness. Finally, Dr. Casalino himself is an improper rebuttal witness because he chose not to rely on the types of facts presented by Respondent on the topics identified by Complaint Counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William M. Katz, Jr., hereby certify that on May 14, 2004, I caused a copy of the foregoing to be served upon the following persons:

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