

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

IN THE

on April 8, 2004. NTSP's March 14, 2004 exhibit list unquestionably **included** RX 3118-3130.<sup>1</sup> Complaint Counsel's April 8, 2004 objections unquestionably **did not include** any objections to RX 3118-3130.<sup>2</sup> For this reason alone, the Administrative Law Judge should deny Complaint Counsel's motion.

## **II. Complaint Counsel's Accusation That Respondent's Counsel Made Misrepresentations is Patently False.**

Complaint Counsel's motion contains the following inaccurate accusation: "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."<sup>3</sup> NTSP's counsel did make that representation<sup>4</sup> – and it was entirely accurate. As discussed above, RX 3118-3130 were on NTSP's exhibit list, which was provided to Complaint Counsel on March 16, 2004, and Complaint Counsel did not object to those exhibits either when it served its objections on April 8, 2004, or at trial. Accordingly, both parts of that representation — that the exhibits were on NTSP's exhibit list and that Complaint Counsel did not object — are indisputably accurate.

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<sup>1</sup> Respondent North Texas Specialty Physicians' Proposed Exhibit List dated March 16, 2004. The relevant portions of this exhibit list are attached as Exhibit A.

<sup>2</sup> Complaint Counsel's Objections to North Texas Specialty Physicians' Final Proposed Exhibit List dated April 8, 2004, attached as Exhibit B.

<sup>3</sup> Complaint Counsel's Motion to Exclude at 1.

<sup>4</sup> Respondent's counsel (Mr. Katz) stated at pages 1980-1981 of the record: "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 . . . ."

The real inaccuracy is Complaint Counsel's failure in the Motion to Exclude to address NTSP's exhibit list and the lack of any timely objections to RX 3118-3130. Complaint Counsel has now concocted a claim that it has "numerous times previously made known that [it] objected to admission of the expert reports into evidence."<sup>5</sup> But Complaint Counsel does not provide evidence (either through a declaration, document, or citation to the record) of even **one** of those "numerous times" or any basis as to why any such untimely comment would have mattered in light of Complaint Counsel's failure to object.

In fact, the following undisputed facts conclusively prove that Complaint Counsel did not object "numerous times," or even one time, for that matter. First, Complaint Counsel did not object to RX 3118-3130 by the scheduling order's April 8, 2004 deadline.<sup>6</sup> Second, Complaint Counsel did not object to RX 3118-3130 in any conversations with Respondent's Counsel at the pre-hearing meeting to discuss the admission of exhibits.<sup>7</sup> Finally, Complaint Counsel did not object to RX 3118-3130 at trial, either before or after those exhibits were admitted into evidence

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<sup>5</sup> Complaint Counsel's Memorandum in Support of Motion to Exclude ("Memorandum") at 2.

<sup>6</sup> See Exhibit B, Complaint Counsel's Objections.

<sup>7</sup> Exhibit C, Declaration of William M. Katz, Jr. at ¶ 6; Exhibit D, Declaration of Nicole L. Rittenhouse at ¶ 6.

<sup>8</sup> Tr., 1980-81 (RX 3118-3130 admitted into evidence with no objection), attached as Exhibit E; Tr., 1985 (RX 3119 admitted into evidence again with no objection after Complaint Counsel provided with a copy), attached as Exhibit F; Tr., 2294-2301 (Complaint Counsel uses RX 3129 in cross-examination of Dr. Maness and affirmatively represents to the Court that the document is in evidence), attached as Exhibit G; Tr., 2022-24, 2076, 2339 (RX 3123, 3124, 3125, 3126, 3127, and 3130 used by Respondent's counsel in examination of Dr. Maness with no objection raised by Complaint Counsel); Tr., 2093-94 (Complaint Counsel uses RX 3119 in cross-examination of Dr. Maness); Tr., 2117-2121 (Complaint Counsel uses RX 3128 in cross-

The indisputable written evidence is even more damning as to Complaint Counsel's lack

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examination of Dr. Maness); Tr., 2294-2301, 2309-2310 (Complaint Counsel uses RX 3129 in cross-examination of Dr. Maness); Tr., 2324-29, 2372-73 (Complaint Counsel uses RX 3130 in cross-examination of Dr. Maness).

<sup>9</sup> A copy of this e-mail is attached as Exhibit H.

<sup>10</sup> A copy of this e-mail is attached as Exhibit I.

<sup>11</sup> Exhibit D, Rittenhouse Declaration at ¶ 8.

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 . . . ."<sup>12</sup>

Because Complaint Counsel had not responded to the May 5 conversation or e-mail by the morning of May 6, Ms. Rittenhouse approached Mr. Bloom before trial, showed him a list of the exhibits from the May 5 e-mail, and asked him if Complaint Counsel planned to object. Mr.

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<sup>12</sup> Exhibit I.

<sup>13</sup> Exhibit D, Rittenhouse Declaration at ¶ 10 .

<sup>14</sup> JX 3 is attached as Exhibit A to Complaint Counsel's motion.

purposes only. These exhibits are CX 1150-1158 and RX 3118-3130 and 3253-3255.” That statement accurately reflects the agreement reached between Complaint Counsel and Respondent’s counsel at the pre-trial meeting on April 27, 2004 — the expert reports would be marked for identification purposes only at that time.<sup>15</sup>

Complaint Counsel now tries to improperly characterize that agreement and the one sentence in the stipulation as a “joint stipulation of exclusion.”<sup>16</sup> But the stipulation says nothing about exclusion of RX 3118-3130, any objection (hearsay or otherwise) to those exhibits, or any agreement that those exhibits could not be offered into evidence at a later time. The stipulation is silent on those issues because they were *never* discussed and certainly never agreed to by NTSP’s counsel.<sup>17</sup> Obviously, a document “marked for identification” is almost always to be the subject of later testimony and possible admission. Otherwise, why mark a document for identification in the first place?

**IV. ~~02289 Answer by 2/27/2012 re 9ed for 5 TD -0.055 splacon of e8hibit C, vion t TDoag on.25 TD /F7 12 Tf 0~~**

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<sup>15</sup> Exhibit C, Katz Declaration at ¶ 5; Exhibit D, Rittenhouse Declaration at ¶ 5

<sup>16</sup> Memorandum at 3.

<sup>17</sup> Exhibit C, Katz Declaration at ¶¶ 5,6; Exhibit D, Rittenhouse Declaration at ¶¶ 5,6.

testimony.<sup>18</sup> As discussed above, NTSP sent two e-mails to Complaint Counsel that identified exhibits, including RX 3118-3130, to be used with Dr. Maness. Contrary to Complaint Counsel's allegation, NTSP sent the first e-mail on May 4, 2004 (not May 5), and addressed it to **five** of the Commission's representatives (three lawyers and two paralegals).<sup>19</sup> The first exhibits listed in the May 4 e-mail were RX 3118-3130.<sup>20</sup>

The second e-mail, which is the only one mentioned by Complaint Counsel in its motion, was sent at 6:19 p.m. (Central)<sup>21</sup> on May 5, 2004, just 30 minutes after Court adjourned at 5:49 p.m. on May 5, 2004.<sup>22</sup> The first exhibits listed in that e-mail were (again) RX 3118-3130.<sup>23</sup> NTSP sent the second e-mail to reiterate that certain exhibits were not yet admitted into evidence because Complaint Counsel had tried to assert untimely objections during the May 5 trial session to some other exhibits.<sup>24</sup>

Very tellingly, Complaint Counsel has provided no explanation as to what the **five** recipients of each of the two e-mails containing notification of RX 3118-3130 did in the 36 hours

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<sup>18</sup> Memorandum at 2.

<sup>19</sup> Exhibit H.

<sup>20</sup> Exhibit H.

<sup>21</sup> Respondent's counsel can only assume that Complaint Counsel's copy of this e-mail reflects a time of 7:20 p.m. because Complaint Counsel's office and e-mail system are located in New York, which is in the Eastern Time Zone. The e-mail, as reflected in Exhibit I, was actually sent at 6:19 p.m. Central Standard Time. 6:19 p.m. is the proper time to use because Fort Worth is in the Central Time Zone, and Complaint Counsel was in Fort Worth when it received the e-mail.

<sup>22</sup> Exhibit I. Court adjourned at 5:49 p.m. on May 5, 2004. (Tr., 1890).

<sup>23</sup> Exhibit I.

<sup>24</sup> Tr., 1625-28.

between the May 4 e-mail and Dr. Maness's testimony on May 6. Complaint Counsel has not submitted any evidence (in the form of declarations or otherwise) explaining who was responsible for retrieving and reviewing the exhibits to be used by Respondent with Dr. Maness and whether those persons, in fact, retrieved and reviewed the exhibits. Complaint Counsel has failed to provide this information even though NTSP told Complaint Counsel prior to filing this motion that it would be a mischaracterization of the record not to reveal what Complaint Counsel did with the information provided by Respondent.<sup>25</sup>

Complaint Counsel incredibly complains that NTSP provided it with a list of exhibits, identified by number only, and that this somehow prevented Complaint Counsel from properly preparing for trial. Complaint Counsel fails to inform the Administrative Law Judge (again) that NTSP based the form of its list on the lists that Complaint Counsel had been providing to NTSP since the beginning of trial and that disclosed **only exhibit numbers!**<sup>26</sup> It is ridiculous for Complaint Counsel to suggest at this point that the form of its lists was somehow inappropriate when used by NTSP's counsel. And, of course, Complaint Counsel never complained about the form of NTSP's lists during the trial.

Even more damning of Complaint Counsel's credibility on this motion, and generally in this case, is that the record at trial shows that Complaint Counsel was fully aware on May 6 that

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<sup>25</sup> See e-mails to and from Gregory Huffman and Michael Bloom on Monday, June 21, 2004, and Thursday, June 24, 2004, attached as Exhibit K. Complaint Counsel filed its motion on Friday, June 25, 2004. These e-mails from Complaint Counsel and the filing of Complaint Counsel's motion overlapped, possibly not coincidentally, with Respondent's time to prepare its responses to Complaint Counsel's post-trial findings of fact and brief, which had a deadline of June 30, 2004.

<sup>26</sup> A copy of one of Complaint Counsel's notifications to Respondent's counsel is attached as Exhibit J.



the Maness documents had been admitted in evidence. After their admission, Respondent's counsel used RX 3119, 3123, 3124, 3125, 3126, 3127, and 3130 while questioning Dr. Maness and explicitly mentioned that they were in evidence; Complaint Counsel **did not object**.<sup>27</sup> During Complaint Counsel's cross-examination of Dr. Maness, Mr. Bloom even used several of the exhibits Complaint Counsel now seeks to exclude.<sup>28</sup> At one point, Complaint Counsel affirmatively represented to the Court that RX 3129 was in evidence,<sup>29</sup> even though it now claims to have been unaware that the document was admitted into evidence until reviewing NTSP's post-trial proposed findings of fact.<sup>30</sup>

## **V. Conclusion**

The evidence in this case is now closed. To conclude the Fort Worth phase of this proceeding in an expedited fashion, NTSP relied on the admission of Dr. Maness's report for certain details of his work. Complaint Counsel failed to timely object under the Administrative Law Judge's scheduling order, failed during trial to try to assert any (untimely) objection, affirmatively stated that the exhibits were in evidence and not objected to, and actually used some of the exhibits in its own cross-examination. Based on the record, NTSP requests that the Administrative Law Judge (a) deny in whole Complaint Counsel's Motion to Exclude Exhibit RX 3118-3130; (b) deny in whole Complaint Counsel's request to reinstate JX 3 because it was never

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<sup>27</sup> Tr., 1985, 2022-2024, 2076, 2339.

<sup>28</sup> Tr., 2093-94 (Complaint Counsel uses RX 3119 in cross-examination of Dr. Maness); Tr., 2117-2121 (Complaint Counsel uses RX 3128 in cross-examination of Dr. Maness); Tr., 2294-2301, 2309-2310 (Complaint Counsel uses RX 3129 in cross-examination of Dr. Maness); Tr., 2324-29, 2372-73 (Complaint Counsel uses RX 3130 in cross-examination of Dr. Maness).

<sup>29</sup> Tr., 2294-95, attached as Exhibit G.

<sup>30</sup> Memorandum at 1.

abrogated, and, therefore, reinstatement is unnecessary; and (c) grant and order such other and further relief to which NTSP may be justly entitled.<sup>31</sup>

Respectfully submitted,

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<sup>31</sup> Federal Rule of Civil Procedure 11 would protect NTSP in a federal lawsuit from a situation like this where Complaint Counsel makes knowing misstatements and omissions in its motion. Rule 11 allows a party to recover “some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation” of Rule 11. FED. R. CIV. P. 11(c)(2).

**CERTIFICATE OF SERVICE**

I, Nicole L. Rittenhouse, hereby certify that on July 6, 2004, I caused a copy of the foregoing to be served upon the following persons:

Michael Bloom (via Federal Express and e-mail)  
Senior Counsel  
Federal Trade Commission  
Northeast Region  
One Bowling Green, Suite 318  
New York, NY 10004

Barbara Anthony (via certified mail)  
Director  
Federal Trade Commission  
Northeast Region  
One Bowling Green, Suite 318  
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Hon. D. Michael Chappell (3 copies via Federal Express)  
Administrative Law Judge  
Federal Trade Commission  
Room H-104  
600 Pennsylvania Avenue NW  
Washington, D.C. 20580

Office of the Secretary (original and 2 copies via Federal Express and e-mail)  
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and by e-mail upon the following: Ted Zang (tzang@ftc.gov) and Jonathan Platt (jplatt@ftc.gov).

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Nicole L. Rittenhouse