[PUBLIC RECORD]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

North Texas Specialty Physicia,ENlhR..HR.TeBA. FEDERSorporation.peci19.5 3.49T4 1 T585 -. FEDDocket

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Complaint Counsel has brought suit against North Texas Specialty Physicians ("NTSP"), a memberless, non-profit corporation. NTSP is the only entity still participating in risk contracts in the Dallas-Fort Worth Metroplex. Complaint Counsel alleges that NTSP has collectively fixed prices in violation of Section 5 of the FTC Act.[1] But Complaint Counsel cannot prove the essential elements of its case, including collusion among physicians, the relevant market, and anticompetitive effects. Instead, Complaint Counsel presents a hodge-podge of assertions about NTSP's risk contracts, litigation efforts, and contacts with governmental authorities – none of which supports Complaint Counsel's case.

The rule of reason is the prevailing standard that is applied to most claims and is the appropriate analysis in this case. The conduct of NTSP that Complaint Counsel is challenging "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition"[2] – hence any lesser analysis is inappropriate. The burden is on Complaint Counsel to prove that NTSP's conduct has a net anticompetitive effect. Complaint Counsel fails because of the clear procompetitive effects and efficiencies of NTSP's business model.

Complaint Counsel has also failed to prove that any actual collusion occurred. To prevail on their theory of antitrust liability, regardless of whether a rule of reason or other analysis is used, Complaint Counsel will first have to prove that NTSP has been involved in collusion among participating physicians. But even Complaint Counsel's own expert has admitted under oath that he has not seen any evidence of actual collusion by NTSP's participating physicians. And there is no evidence in the record, direct or circumstantial, to support such a finding. Any

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[1] Complaint ¶ 12.

[2] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999).

[3] A more complete understanding of the facts expected

the past five years it has had capitation or othe

(E) instruct the general public in medical science, public health, and hygiene and provide related instruction useful to individuals and beneficial to the community;

(2) is organized and incorporated solely by persons licensed by the board; and

(3) has as its directors and trustees persons who are:

(A) licensed by the board; and

(B) actively engaged in the practice of medicine.

[6] Deposition of Karen Van Wagner, taken on January 20, 2004 at 15; Van Wagner Deposition taken on August 29, 2002 at 14.

[7] Van Wagner Deposition taken on August 29, 2002 at 14.

[8] Complaint ¶ 14; Answer of Respondent North Texas Specialty Physicians to Complaint of Federal Trade Commission ¶ 14.

[9] Expert Report of Gail R. Wilensky, Ph.D. ("Wilensky Report") at 10.

[10] Deposition of Peter Casalino, M.D., Ph.D. at 148.

[11] NTSP has approximately 300 physicians on its Risk Panel and approximately 275 additional physicians eligible to participate in one or more non-risk contracts. Van Wagner Deposition taken on August 30, 2002 at 225, 227-28. These physicians are located in Tarrant, Dallas and at least eight contiguous counties. Van Wagner Deposition taken on August 29, 2002 at 15. [redacted] Expert Report of Robert S. Maness, Ph.D. ("Maness Report") ¶ 19. On average, the eligible physicians participate in 7.47 of NTSP's risk and non-risk contracts. RX 359 (NTSP physician participation chart).

[12] Deposition of William Vance, M.D., Volume 1, at 117-18; Vance Deposition, Volume 2, at 287-88.

[redacted][13] Complaint Counsel's economic expert admits that NTSP generates efficiencies and improves quality of care through spillover from its risk contracts to its non-risk contracts.[14] Spillover occurs because physicians normally do not change their practice patterns patient-by-patient once they have developed an improved technique.[15]

[redacted][16]

B. NTSP's physicians act independently, and payors also have the ability to contract with NTSP physicians directly or through other entities.

NTSP cannot and does not bind any participating physicians to non-risk contracts.[17]

[redacted][18]

NTSP reviews payor offers before deciding whether to accept and become a party to an offer.[19] Because NTSP does not want to expend its limited resources in reviewing and handling

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[13] Expert Report of Edward F.X. Hughes, M.D., M.P.H. ("Hughes Report") at 14-15; Wilensky Report at 5-6, 11-15. Dr. Wilensky was appointed by President (G.H.W.) Bush to be the Administrator of the Health Care Financing Administration, overseeing the Medicare and Medicaid programs from 1990 to 1992. She also served as a Presidential advisor on health care issues and is one of the nation's top authorities in that area. Dr. Hughes is also a nationally-known authority and serves as professor of health industry management at Northwestern University.

[14] Deposition of H.E. Frech, Ph.D. at 104-05, 110-17, 240-41.

[15] Frech Deposition at 104-05; Deposition of Harry Rosenthal, Jr., M.D. at 45.

[16] *See* Wilensky Report at 12-16; Hughes Report at 15-18; Maness Report ¶¶ 83-100; Frech Deposition at 104-05.

[17] Frech Deposition at 209.

[18] *See* RX 26 (NTSP Physician Participation Agreement).

[19] Van Wagner Deposition, taken on November 19, 2003 at 114-15.

offers likely to involve or interest only a minority of its physicians,[20] NTSP's Board of Directors sets a threshold limit on the offers. That threshold is set based on the mean/median/mode of the Risk Panel's responses to a periodic confidential poll as to what HMO and PPO contract rates the individual physician would accept through NTSP. The Board then authorizes NTSP's staff to consider offers which meet those thresholds.[21] The responses of those individual physicians who respond to the poll are never shared with any other physician or any member of the Board.[22] Many of the physicians never respond to the poll.[23]

The staff uses these thresholds for both risk and non-risk offers. If a payor presents an offer meeting the threshold, NTSP will then review the offer's contractual terms, after which the Board will decide if NTSP will participate.

If the offer is for a non-risk contract and NTSP chooses to participate, the offer is then messengered to NTSP's participating physicians.[24] Each physician or physician group can choose to accept or reject participating in the offer through NTSP.[25] On average, the physicians reject more contracts than they accept.[26]

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[20] A physician who is interested in a payor offer may choose to participate through NTSP or enter into a contract directly or through another entity with the payor. NTSP's poll in no way commits a physician to choose which way the physician may eventually decide to contract.

[21] Deposition of Tom Deas, M.D., October 10, 2002, at 21-22, 25; Deposition of Tom Deas, M.D., January 26, 2004, at 37-38; Deposition of Jack McCallum, M.D., at 121-22, 124; Deposition of Ira Hollander, M.D., at 27-28; Rosenthal Deposition at 25.

[22] Deposition of John Johnson, M.D. at 36.

[23] Frech Deposition at 149, 215-18; RX 14, 15, 16, and 17 (NTSP poll results).

[24] Frech Deposition at 209.

[25] Frech Deposition at 209; Deposition of Tom Quirk at 54.

[26] *See* RX 359 (NTSP physician participation chart).

Physicians also can accept contracts through another independent physician association ("IPA") or directly with the payor. And physicians do accept such offers.[27] The evidence in this case shows that those NTSP physicians who participate in one or more NTSP contracts almost invariably have a significant number of other contracts in which they participate outside of NTSP.[28] The evidence also shows that some NTSP physicians accept direct contracts that are below NTSP's thresholds.[29]

[redacted][30] [redacted],[31] NTSP's eligible physicians are only 10 % of the physicians in the Metroplex.[32] Of course, the eligible physicians also have their own contracts independent of NTSP, and participate, on average, in less than a third of NTSP's available contracts.[33] In effect, if one were to adjust the physician percentages by the proportion of contracts those physicians actually accept through NTSP, NTSP's potential effect on the market would be less than 4 %. Complaint Counsel's argument that NTSP constitutes some sort of widespread group boycott

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[27] *See, e.g.*, RX 13 [redacted].

[28] Maness Report at Exhibit 10. [redacted] *See also* RX 9 [redacted].

[29] Rosenthal Deposition at 22-23; Johnson Deposition at 25-26; Frech Deposition at 82, 215-18.

[30] Frech Report at Exhibit 3.

[31] *See* Maness Report ¶ 30.

[32] This number is even overestimated because it was calculated only using the total number of doctors in Dallas and Tarrant County compared to NTSP physicians in the entire metroplex. *See* RX 305 and 306 (TBME data for doctors in Dallas and Tarrant County).

[33] *See* RX 359 (NTSP physician participation chart).

to raise rates above this threshold.[39] In fact, NTSP has refused to negotiate in this way despite invitations to do so.

Complaint Counsel also challenges NTSP's disclosure of the Board's threshold rate levels for non-risk HMO and PPO offers to its panel of eligible physicians.[40] Of course, such disclosures are needed so physicians will know when NTSP will be involved in reviewing a payor's offer. Complaint Counsel alleges that this facilitates collusion among physicians. Yet this information cannot be used by individual physicians to coordinate or raise rates. Only a limited number of physicians respond to the NTSP poll, and no individual data is ever disclosed to the participating physicians.[41] [redacted][42] Further, the evidence in this case shows that physicians use a number of factors when making

[39] Van Wagner Deposition taken on August 29, 2002 at 24-25; Deposition of Leslie Carter at 20-21, 39-40, 44-45, 138, 141; Deas Deposition taken on October 10, 2002 at 73.

[40] Complaint ¶ 17 ("NTSP then reports these measures back to its participating physicians, confirming to the participating physicians that these averages will constitute the minimum fee that NTSP will entertain as the basis for any contract with a payor.").

[41] *See* Deposition of John Johnson, M.D. at 36; Frech Deposition at 149, 215-18; RX 14, 15, 16, and 17 (NTSP poll results).

[42] Maness Report ¶ 55.

[43] Rosenthal Deposition at 24; Johnson Deposition at 25-26, 30; Collins Deposition at 36-37.

[44] Deposition of Chris Jagmin at 74;

Commission's Statements of Principles to negotiate and compete vigorously as a group for risk contracts.[45]

Complaint Counsel has challenged NTSP's communications with physicians related to

[45] *See* Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care.

[46] *See* Deposition of Karen Van Wagner, August 29, 2002, at 89 (discussing NTSP's role in events leading up to and during Cause No. 352-178824-99 in the 352nd District Court of Tarrant County, Texas); *see also* RX 832 (fax alert detailing situation).

[47] *See* Roberts Deposition at 44-48; RX 3102 (TDI press release on supervision); RX 1555 and 1556 (TDI press releases on bankruptcy).

[48] *See* RX 1805 (indictment); RX 3101 (article regarding conviction).

[49] *See, e.g.*, Complaint Counsel's Pretrial Brief at 8, 10-11, 15, 20, 23, 27.

[50] *See, e.g.*, Complaint Counsel's Pretrial Brief at 33-34.

scope of § 1 of the Sherman Act aimed at prohibiting restraint of trade."[55] The Commission relies on Sherman Act law when deciding cases alleging unfair competition.[56]

A. Under the appropriate rule of reason analysis, NTSP has not committed an antitrust violation because it has not unreasonably restrained trade.

Restraints of trade can be unlawful under section 1 of the Sherman Act under three separate theories: (1) *per se*, (2) rule of reason, or (3) truncated or "quick look" rule of reason.[57] Complaint Counsel alleges that NTSP's conduct should be judged as *per se* unlawful because "this adjudicative proceeding is about horizontal price fixing, among other things."[58] But the rule of reason is the prevailing standard that applies to most claims and is the appropriate analysis in this case.[59]

1. The appropriate analysis for this case is a rule of reason analysis because NTSP's conduct has plausible procompetitive effects.

Aysis because

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[55] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 763 n.3 (1999) (citations omitted).

[56] *See id.* (stating that "the Commission relied upon Sherman Act law in adjudicating this case").

[57] *See id.* at 763 (identifying three theories of liability); *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 765 (5th Cir. 2002) (discussing rule of reason, *per se* rule, and quick-look analysis).

[58] Complaint Counsel's Response and Objections to North Texas Specialty Physicians' First Request for Admissions to Complaint Counsel at 3.

[59] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[60] *Cal. Dental Ass'n*, 526 U.S. at 771.

through the clinical integration techniques used for its risk contracts and to then extend those same efficiencies to non-risk patients. By limiting its involvement to non-risk offers which will likely be of interest to most of the Risk Panel physicians, NTSP hopes that those same physicians will remain involved in NTSP's non-risk contracts, enabling the continuing use (spillover) of the referral and treatment patterns developed for the risk contracts. [redacted][61]

The model is also designed to limit the expenditure of NTSP's resources on offers not likely to be of interest to a significant number of NTSP's eligible physicians. That such a resource-allocation purpose can be legitimate is shown by the Commission staff's own advisory letter taking a neutral stance on an IPA's refusal to be involved in offers which fall below the IPA's minimum number of participants.[62] Staff went on to point out that "[s]o long a payers have an effective opportunity to contract with physicians individually," the IPA's "refusal to administer contracts to which fewer than half its members subscribe is less likely to have anticompetitive effects."[63] In the present case, Complaint Counsel inexplicably tries to avoid any need to show market effects.

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[61] *See* Wilensky Report at 12-16; Hughes Report at 15-18; Maness Report ¶¶ 83-100.

[62] *See* Bay Area Preferred Physicians Advisory Opinion, letter from Jeffrey W. Brennan to Martin J. Thompson, dated September 23, 2003.

> You asserted that the medical societies forming BAPP do not wish to fund the servicing of contracts in which only a minority of BAPP members participate, because it would "impose an excessive cost" on the non-participants, and that this is a rational, cost-based business decision. The staff offers no view on the commercial or economic reasonableness of this decision, or on whether a participation threshold of 50% or less is a justifiable demarcation for determining whether to service a payer contract.

[63] *Id.*

California Dental advocates "considerable inquiry into market conditions" before "application of any so-called '*per se*' condemnation is justified."[64] Under *California Dental*, there is no doubt that NTSP's conduct "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," for which reason a full rule of reason analysis must be used.

Complaint Counsel urges the Administrative Law Judge to use at most a "quick look" rule of reason analysis. But this is appropriate only in limited circumstances that are not present here. To utilize that analysis, Complaint Counsel must show that "the great likelihood of anticompetitive effects can easily be ascertained."[65] As discussed above, the evidence in this case shows that NTSP's conduct is consistent with lawful competition and procompetitive efficiencies. Based on all that evidence, there is no "great likelihood of anticompetitive effects," and, even if there were, they cannot "easily be ascertained."

Even more inappropriate in light of the evidence is Complaint Counsel's assertion that *per se* rules apply, resulting in no analysis at all. Complaint Counsel's view is that a refusal by NTSP to participate in a contract is *ipso facto* a collective boycott and an antitrust violation. Yet, if NTSP chooses to participate in the contract with the payor and the doctors, Complaint Counsel says that is a collective price-fixing agreement and an antitrust violation if the payor chooses to complain. But if that were the law, then any entity involved in a team or network situation is doomed from the start. Teams and networks would be able to arise only where the entity is able to hire all of the various participants as employees. Of course, there would be many fewer teams and networks in that kind of world – which would decrease both innovation

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[64] 526 U.S. at 779.

[65] *Id.* at 770.

When the rule of reason analysis is applied, there is no antitrust violation in this case. Any restraint of trade is evaluated by weighing its probable anticompetitive effects against any procompetitive benefits.[68] The burden is on the complaining party to demonstrate that the challenged conduct has a net anticompetitive effect.[69] Complaint Counsel cannot meet its burden. Complaint Counsel does not really try to do so.

The slight conjecture of anticompetitive effects that Complaint Counsel will present does not outweigh the actual and admitted procompetitive effects and efficiencies of NTSP's conduct as proven by an abundance of evidence and expert opinions, including the opinion of Complaint Counsel's own expert.[70]

Further, Complaint Counsel cannot rely, as it attempts to, on the mere fact that NTSP refuses to messenger some payor contracts. In *Viazis v. American Association of Orthodontists*, the Fifth Circuit rejected the idea that a trade association is "by its nature a 'walking conspiracy'."[71] A plaintiff cannot show competitive harm "merely by demonstrating that the defendant "refused without justification to promote, approve, or buy the plaintiff's product."[72] This case is very similar to *Viazis* in that NTSP is making a decision whether or not it wants to be involved in ("approve") a payor's offer.

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[68] *Viazis v. Am. Assoc. of Orthodontists*, 314 F.2d 758, 765 (5th Cir. 2002).

[69] *Id.* at 766.

[70] Frech Deposition at 99, 104-05, 110-17, 240-41; *see generally* Wilensky Report, Hughes Report, and Maness Report.

[71] 314 F.2d at 764 ("Despite the fact that '[a] trade association by its nature involves collective action by competitors[,] . . . [it] is not by its nature a "walking conspiracy", its every denial of some benefit amounting to an unreasonable restraint of trade." (quoting *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988)).

[72] *Id.* at 766.

[73] *Levine v. Cent. Fla. Med. Affiliates, Inc*., 72 F.3d 1538, 1555 (11th Cir. 1996); *accord Doctor's Hospital*,

that geographic markets tend to become larger the more specialized the specialty;[78] this fact is important because NTSP's participating physicians are mostly specialists. He also testified that the existence of a significant population in eastern Tarrant County on the border of Dallas County would act to tie Dallas and Tarrant Counties together;[79] this testimony would defeat any attempt Complaint Counsel might have made to limit the relevant market to only Tarrant County or its county seat, Fort Worth. Finally, Dr. Frech admits that there can be significant crossovers of services between specialties.[80]

Even if Complaint Counsel had attempted to show a relevant market, no type of rule-of-reason violation can be made out against NTSP because the overlapping patterns of physician practices in the Metroplex make impossible a relevant market limited to the city limits of Fort Worth.[81] Dr. Frech admits that the large population in the "Mid-Cities Area" between Fort Worth and Dallas ties Dallas and Tarrant Counties together as a market.[82] There is also no evidence that a payor was unable to find enough local physicians available to it outside of NTSP. In fact, the payors' testimony is to the contrary,[83] which is consistent with the physicians'

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[78] Frech Deposition at 132-33.

[79] Frech Deposition at 130-31. [redacted] Maness Report ¶ 29.

[80] Frech Deposition at 121-25.

[81] If Complaint Counsel were correct, there would be hundreds of supermarket relevant markets in every metropolitan area, because a shopper normally goes to his or her neighborhood store. Yet that is not the law. A relevant geographic market must be economically significant, which requires containing an "appreciable segment of the product market" as well as following the rule of reasonable interchangeability. *See Apani Southwest, Inc. v. Coca-Cola Enter., Inc.*, 300 F.3d 620, 627-628 (5th Cir. 2002) (rejecting a relevant georgraphic market of 27 facilities selling bottled water).

[82] Frech Deposition at 130-31.

[83] Roberts Deposition at 28-29 (stating that Aetna has a adequate network without NTSP); RX 9 [redacted]; CX 1034 [redacted]; CX 709 [redacted].

testimony that they have belonged to IPAs other than NTSP and have also entered into direct contracts with payors.[84]

Based on all of this evidence or lack thereof, Complaint Counsel cannot show a relevant market. Accordingly, any attempt to establish liability against NTSP under a rule-of-reason analysis fails.

B. Under any analysis, there is no antitrust violation because there is no collusion among NTSP and any of its participating physicians.

Regardless of the method of analysis employed, Complaint Counsel must prove some form of "concerted action" to establish an antitrust violation.[85] "Section 1 of the Sherman Act [like Section 5 of the FTC Act] does not proscribe independent conduct."[86]

To prove there was "concerted action" or collusion, Complaint Counsel must submit either direct or circumstantial evidence of an agreement between competitors (*i.e.*, the physicians).[87] But conduct that is as consistent with lawful competition as with conspiracy will not support an inference of conspiracy.[88] Complaint Counsel "must present evidence that tends

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[84] *See, e.g.*, Collins Deposition at 36-37.

[85] *See Viazis*, 314 F.3d at 761 ("So, to establish a § 1 violation, a plaintiff must demonstrate concerted action."); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999) (finding that liability under section 1 of the Sherman Act "is necessarily based on some form of 'concerted action'").

[86] *Viazis*, 314 F.3d at 761.

[87] *In re Baby Food Antitrust Litig.*, 166 F.3d at 117 ("The existence of an agreement is the hallmark of a Section 1 claim."); *see also Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1436-37 (5th Cir. 1984) ("The pharmacy agreements do not constitute a *per se* illegal horizontal combination . . . because the agreements do not run between competitors in the pharmaceutical industry, nor between competitors in the insurance industry, but between individual pharmacies and Blue Shield, which does not compete with pharmacies.").

[88] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

[89] *Id.* (citations omitted).

[90] Complaint Counsel's Second Supplemental Responses to Respondent's First Set of Interrogatories at 1-2 ("Complaint Counsel is not aware of communications between NTSP and any other person or entity taking the form

(5) any participating physician knew what another physician was going to do in response to a non-risk payor offer;[95]

(6) any participating physician gave NTSP the right to bind him or her to any non-risk payor offer;[96] or

(7) any participating physician gave up his or her right to independently accept or reject a non-risk payor offer.[97]

2. Circumstantial evidence does not support an inference of collusion because any alleged conduct is consistent with independent action.

Complaint Counsel's expert, Dr. Frech, has actually proven that there is no collusion or agreement among NTSP's participating physicians. [redacted][98] This is consistent with physician testimony that they do not rely on the mean/median/mode of NTSP's aggregated poll results and make their own independent decisions whether to accept an offer individually,[99] and, in some cases, accept offers below the rates established by NTSP's board.[100]

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[95] Frech Deposition at 155.

[96] Frech Deposition at 209.

[97] Frech Deposition at 209.

[98] Report of H.E. Frech at Exhibits 8A-8C.

[99] Rosenthal Deposition at 24; Johnson Deposition at 25-26, 30; Collins Deposition at 36-37.

[100] Rosenthal Deposition at 22-23; Johnson Deposition at 25, 27.

Dr. Frech also testified that the response rate for the poll was very poor, which explains why only a small percentage (in some cases less than 10%) of the participating physicians respond at the rate that is actually used as the threshold by NTSP's board.[101] Such a low response rate and low correlation make it impossible to have an effective price-fixing

[101] Frech Deposition at 215-16.

[102] Frech Deposition at 149, 215-18.

[103] Frech Deposition at 82, 215-18.

[104] Frech Deposition at 149, 155.

[105] Frech Deposition at 81, 237-40.

benefit competition.[106] In fact, Dr. Frech believes that payors conduct surveys and know what other payors are offering in a given market.[107] Dr. Frech also admits that physicians commonly

[106] Frech Deposition at 155-58; *see also* FTC Staff Advisory Opinion Letter, dated November 3, 2003, from Jeffrey W. Brennan to Gerald Niederman regarding Medical Group Management Association:

> The survey will seek information regarding several aspects of physicians' contractual relationships with third-party payers, including information about amounts that health plans pay for physician services. MGMA will publish the information obtained through the survey only on an aggregated basis; it will not disclose information about individual payers. As discussed below, it does not appear likely that publication of the survey results, in the manner described in your letters, will prompt coordinated anticompetitive behavior by physicians. Accordingly, the Commission staff has no intention to recommend law enforcement action regarding the proposed conduct.

[107] Frech Deposition at 156.

[108] Frech Deposition at 80.

[109] *See* Frech Deposition at 167-68 (discussing diseconomies from having each practice group conduct its own contract review).

[110] Frech Deposition at 182-83.

[111] Frech Deposition at 202; *see Doctor's Hospital, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 310 (5th Cir. 1997) ("In medical care, it must be remembered, a provider's higher prices are not necessarily indicative of a less competitive market; they may correlate with better services or more experienced providers.").

[112] *See* Frech Deposition at 109.

[113] Frech Deposition at 104-05, 110-17, 240-41.

And NTSP's maintaining continuity of personnel — in this case, the participating physicians — is important to achieving these efficiencies.[114]

An absence of collusion is also supported because NTSP has no authority to accept non-risk contracts on behalf of the participating physicians.[115] Every non-risk contract which NTSP decides to sign is then messengered to physicians who individually decide whether each wants to participate. Dr. Frech and the payors admit this undisputed fact.[116] NTSP does not bind anyone other than itself to a non-risk contract.[117] NTSP's "refusal to deal" is, therefore, only its own refusal *qua* NTSP, not the individual physicians' refusal.[118]

And this refusal to deal by NTSP is proper under the *Colgate* doctrine. NTSP's right to follow its own business model and to refuse to sign and messenger contractual offers outside that model falls squarely within the Supreme Court's repeated reaffirmations of the *Colgate* doctrine.[119] That right has been recently reiterated by the Fifth Circuit in its *Viazis* decision.[120]

> In *Consolidated Metal Products*, 846 F.2d at 296, we held that where an association's product recommendations were nonbinding and the association did not coerce its members to abide by its recommendations, its refusal to sanction plaintiff's product did not show that plaintiff was excluded from the market. Nor

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[114] Frech Deposition at 104-05.

[115] Frech Deposition at 209.

[116] *See, e.g.,* Frech Deposition at 209; Deposition of Tom Quirk at 54.

[117] Frech Deposition at 209.

[118] *See* Frech Deposition at 209; Rosenthal Deposition at 24; Johnson Deposition at 25-26, 30; Collins Deposition at 36-37.

[119] *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

[120] *Viazis*, 314 F.3d at 763 n.6 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984), which cites *Colgate* for the proposition that "[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever is likes, as long as it does so independently").

can a plaintiff show competitive harm merely by demonstrating that the defendant "refused without justification to promote, approve, or buy the plaintiff's product." *Id.* at 297.[121]

Although NTSP's decision is well-justified based on its efficiency-directed "spillover" business plan, under Fifth Circuit authority NTSP does not even need a justification to refuse to messenger a payor's offer. Complaint Counsel seeks to impose a duty on NTSP to messenger all payor offers. That contention is dead on arrival in the Fifth Circuit.

In the normal situation, horizontal competitors have little reason to come together and "plus"-type inferences can be drawn when they do. Where a network of complementary medical practitioners comes together, the network is a necessity to provide the full range of treatments by the various types of generally non-competitive practitioners to the patient population. There is nothing sinister to presume when the network entity does what one would expect be done in operating a network.[122] That is the point being made by the Fifth Circuit's decision in *Viazis v. American Association of Orthodontists*.[123]

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[121] *Id.* at 766.

[122] The Supreme Court's recent rejection of a duty to make one's network available under an essential facility or similar argument in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 880-81 (2004) is apposite here.

[123] 314 F.3d 758, 764 (5th Cir. 2002) (finding that trade association's action, in and of itself, was not conspiratorial because plaintiff failed to prove association's members "were conspiring among themselves" and that association was not a "walking conspiracy"). Complaint Counsel make an extraordinary suggestion, without any supporting authority, that Fifth Circuit law does not govern this proceeding. Complaint Counsel's Memorandum in Opposition to NTSP's Motion for Summary Decision ("Complaint Counsel's Opposition") at 14 n.33. That argument is wrong. *See* 15 U.S.C. § 45(c) ("Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business . . . ."). In this case, NTSP "resides" and "carries on business" in the Fifth Circuit and that is the circuit in which "the method of competition or the act or practice in question" was used. Accordingly, any appeal of an adverse order

from the Commission would go to the Fifth Circuit for determination and that circuit's law is controlling here.

[125] In addition to focusing only on NTSP, Complaint Counsel misconstrues and mis-cites much of the evidence it relies upon to oppose NTSP's motion for summary decision. *See, e.g.* Complaint Counsel's Opposition at 2 (alleging that NTSP's primary purpose is negotiating on behalf of participating physicians, but citing evidence that says nothing about negotiating contracts), 6 (alleging that NTSP used powers of attorney, but citing no evidence to support that proposition), 7 (citing portion of Dr. Frech's report as support for allegation that NTSP's activities likely stabilized and raised prices, when cited portion contains no such assertion), 9 (alleging that NTSP enlisted employer's assistance to obtain higher fees, but citing no evidence referring to any such activities). There is little reason, however, to parse these many errors because, as explained previously, Complaint Counsel has failed to provide evidence of collusion among the participating physicians and has not defined any relevant market.

[126] Complaint Counsel cites a Third Circuit case, *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), which actually supports Respondent on this point; a summary judgment for defe13.0as

[127] TEX. REV. CIV. STAT. ANN. Art. 1396-1.02(A)(6) (Vernon 2004).

[128] *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980).

[129] *Id.*; *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994).

but if it is not proven, then the nexus must exist as a matter of "practical economics."[130] Complaint Counsel cannot show any effect under this standard.

Complaint Counsel's facts consist of NTSP's dealing with insurers and, indirectly, employers, with offices outside Texas, even though NTSP only has contact with often independently-operated Texas offices, and out-of-state [illegible]

[130] *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 331 (1991); *McLain*, 444 U.S. at 246.

[131] *Mitchell v. Howard Mem'l Hosp.*, 853 F.2d 762, 764 (9th Cir. 1988) (no effect on interstate commerce despite some out-of-state insurance and out-of-state supplies); *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613 (6th Cir. 1986) (no effect on interstate commerce despite hospital having out-of-state funding, out-of-state suppliers, and out-of-state patient income).

Respondent prays that Complaint Counsel's case be dismissed for lack of jurisdiction, or in the alternative, for lack of merit, and for such other and further as to which Respondent may be justlyentitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on April 22, 2004, I caused a copy of the foregoing document to be served upon the following persons:

Michael Bloom (via Federal Express and e-mail)
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and by e-mail upon the following: Theodore Zang (tzang@ftc.gov) and Jonathan Platt (jplatt@ftc.gov).

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