

[PUBLIC RECORD]

**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'
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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CERTIFICATE OF SERVICE 73

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Pursuant to the Scheduling Order, Respondent North Texas Specialist Physicians (“NTSP”) proposes the following findings of fact and conclusions of law. These proposals are

¹ These proposed findings do not purport to respond specifically to Complaint Counsel’s proposals. That will be done at a later date when the evidence has been heard.

² Complaint ¶ 1; Answer ¶ 1.

³ TEX. OCC. CODE ANN. § 162.001 (Vernon 2004).

1. Risk Contracting and Spillover

4. NTSP is involved in both risk contracts and non-risk contracts.⁴

5. [REDACTED]

[REDACTED]

⁴ Complaint ¶ 14; Answer ¶ 14.

⁵ Expert Report of Gail R. Wilensky, Ph.D. (“Wilensky Report”) at 10.

⁶ Deposition of Karen Van Wagner, Ph.D., August 30, 2002, at 225, 227-28.

⁷ Expert Report of Robert S. Maness, Ph.D. (“Maness Report”) ¶ 19.

⁸ Maness Report ¶ 4.

⁹ Maness Report ¶ 4.

¹⁰ Deposition of H.E. Frech, Ph.D. at 99.

[REDACTED]¹¹

10. NTSP's business model is designed to achieve efficiencies and quality improvements through clinical integration techniques used on its risk

¹¹ Wilensky Report at 11.

¹² Deposition of William Vance, M.D. at 117-18; Deposition of William Vance, M.D. at 287-88.

¹³ Deposition of Harry Rosenthal, Jr., M.D. at 45-46; [REDACTED].

¹⁴ Hughes Report at 14-15; Wilensky Report at 5-6, 11-15.

¹⁵ Frech Deposition at 104-05, 110-17, 240-41.

¹⁶ Frech Deposition at 104-05; [REDACTED].

it uses the same doctors on both types of contracts.¹⁷

16. Dr. Frech would expect the spillover effects to be greater the more continuous the physicians are who practice under NTSP's risk contracts and its non-risk contracts.¹⁸
17. Dr. Frech admits that spillover occurs from HMO contracts to non-HMO contracts, regardless of whether the non-HMO contracts are being performed by the same physicians or organization performing under the HMO contracts.¹⁹
18. Dr. Frech admits that, based on the literature, he expects there to be some spillover from the NTSP risk panel physicians to the NTSP physicians who are not on the risk panel. In fact, this spillover extends to physicians outside of NTSP who practice in the geographic area in and around Tarrant County.²⁰
19. [REDACTED]
[REDACTED]
[REDACTED]²¹
20. For each NTSP physician on the risk panel, Dr. Frech expects there to be significant spillover effects from that physician's risk practice to the

¹⁷ Frech Deposition at 104-05.

¹⁸ Frech Deposition at 105.

¹⁹ Frech Deposition at 240.

²⁰ Frech Deposition at 240-41.

²¹ Wilensky Report at 13.

physician's non-risk practice.²²

21. [REDACTED]

[REDACTED]²³

22. [REDACTED]

[REDACTED]²⁴

23. This organizational capital benefits patients, for when it is developed, physicians know each other and know the patients. This relationship between physicians and patients leads to medical care rapport and better patient care in terms of cost and quality.

24. [REDACTED]

²² Frech Deposition at 241.

²³ See Wilensky Report at 12-16; Hughes Report at 15-18; Maness Report ¶¶ 83-100.

²⁴ Maness Report ¶ 84.

[REDACTED]

²⁵ Maness Report ¶ 85; FTC/DOJ *Healthcare Guidelines*, § 8.A.4.

²⁶ Maness Report ¶ 87; Deposition of Karen Van Wagner, Ph.D., taken on August 29, 2002 at 19.

²⁷ Deposition of Edward F.X. Hughes, MD, M.P.H., at p. 88.

27. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²⁸

28. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²⁹

29. A large portion of NTSP's budget is dedicated to medical management programs. In fact, medical management expenditures by NTSP are approximately \$2.5 million per year.

30. [REDACTED]
[REDACTED]
[REDACTED]³⁰

31. [REDACTED]
[REDACTED]³¹

²⁸ Hughes Report at 13.

²⁹ Wilensky Report at 11.

³⁰ Hughes Deposition at 17-18, 90-91.

³¹ Wilensky Deposition at 72-75.

32. [REDACTED]
[REDACTED]³²

33. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³³

34. [REDACTED]
[REDACTED]
[REDACTED]

³² Hughes Deposition at 55-56.

³³ Hughes Deposition at 99-102.

³⁴ Hughes Report at 13-14.

³⁵ Maness Report ¶ 88 and Exhibit 11.



³⁹ Hughes Report at 17.

⁴⁰ Maness Report ¶ 93.

⁴¹ Maness Report ¶ 94.

⁴² Maness Report ¶ 95.

42. 

⁴³ Maness Report ¶ 96.

⁴⁴ Maness Report ¶ 97.

⁴⁵ Maness Report ¶ 98.

45. The ability to increase quality and decrease costs has implications to the rates that NTSP might receive in its contracts. As with contracting costs, payors may be willing to pay more to receive the efficiencies that NTSP generates. In an otherwise competitive market, the fact that payors might be willing to pay more to obtain these efficiencies is not evidence that prices are above competitive levels. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁶

46. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁷

⁴⁶ Maness Report ¶ 99.

⁴⁷ Maness Report ¶ 100.

2. Respondent's Poll

47. The Complaint alleges that “NTSP periodically polls its participating physicians” to estimate at what rate levels a majority of the physicians, including those on its risk-capitation panel (the “Risk Panel”), will likely be interested in non-risk contracts.⁴⁸
48. NTSP periodically calculates the mean, median, and mode of the Risk Panel physicians’ poll responses separately for HMO and for PPO types of offers.⁴⁹
49. NTSP’s participating physicians 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,⁵⁰ and, in numerous cases, accept offers below the rates established by NTSP’s board.⁵¹
50. Dr. Frech testified that the response rate for the poll was very poor; only a small percentage (in some cases less than 10%) of the participating physicians respond at the specific rate that is actually used as a threshold by NTSP’s board.⁵²

⁴⁸ See Complaint ¶ 17 (“NTSP periodically polls its participating physicians, asking each to disclose the minimum fee, typically stated in terms of a percentage of RBRVS, that he or she would accept in return for the provision of medical services pursuant to an NTSP-payor agreement.”).

⁴⁹ See Complaint ¶ 17; Van Wagner Deposition taken on November 19, 2003 at 16-19.

⁵⁰ Rosenthal Deposition at 24; Deposition of John Johnson, M.D. at 25-26, 30; Deposition of Mark Collins, M.D., at 36-37 (free to contract directly or through another IPA).

⁵¹ Rosenthal Deposition at 22-23; Johnson Deposition at 25, 27.

⁵² Frech Deposition at 215-16.

51. Not all participating physicians respond to the poll,⁵³ and many physicians do not follow their own poll responses in individual contract decisions.⁵⁴
52. In the 2001 poll for PPO and HMO products, 34% of the full panel of NTSP participating physicians responded, and 57% of the risk panel responded.⁵⁵ In the 2002 poll, 34% of the full panel responded, and 55% of the risk panel responded.⁵⁶
53. The physicians are not informed as to which physicians responded or did not respond.
54. The responses of the approximately 190 physicians who respond to a poll are aggregated into the single statistics of mean, median and mode.
55. The FTC's Statements of Principles provide that five or more data points should be aggregated for reported statistics.⁵⁷ NTSP's reported statistics are 4000% more aggregated than the Statements' guideline.
56. Providing only the mean, median, and mode of the poll responses does not tell a participating physician what any other physician will do with respect to a payor offer.⁵⁸
57. Because NTSP has limited resources and because NTSP does not want to expend its resources or efforts on offers which will not involve a

⁵³ Frech Deposition at 149, 215-18

⁵⁴ Frech Deposition at 82, 215-18.

⁵⁵ RX 14 and RX 15.

⁵⁶ RX 16 and RX 17.

⁵⁷ See DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care, *available at* <http://www.ftc.gov/reports/hlth3s.htm>.

⁵⁸ Frech Deposition at 149, 155.

significant percentage of its Risk Panel physicians, the board of directors has instructed NTSP's staff not to expend their time and resources on payor offers below these two mean/median/mode threshold levels.⁵⁹

58. The their recent Bay Area Physicians advisory opinion, the FTC staff took a neutral position on a third-party messenger's concern about becoming involved in contracts in which less than a majority of its members participate.⁶⁰

59. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶¹

60. [REDACTED]
[REDACTED]
[REDACTED]⁶²

61. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁵⁹ 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.

⁶⁰ Letter from Jeffrey W. Brennan to Martin J. Thompson, September 23, 2003, which can be found at <http://ftc.gov/bc/adops/bapp030923.htm>.

⁶¹ Maness Report ¶ 55.

⁶² Maness Report ¶ 56.

[REDACTED]⁶³

62. NTSP participating physicians are not even aware of the overall response rate, much less within a given specialty. A large percentage of physicians do not respond to the poll. The poll provides no information on the prices that are acceptable to specific physicians or specific specialties of physicians. [REDACTED]

[REDACTED]⁶⁴

63. In a recent Advisory Opinion to a physician group in Dayton, the FTC acknowledged that, “Increasing the amount of information available to patients, employers, physicians, and other interested parties can improve the functioning of markets and foster, rather than hinder, competition and consumer welfare.”⁶⁵

64. Dr. Frech admits that the collection and dissemination of market information, including market prices, can potentially benefit competition.⁶⁶

65. Dr. Frech believes that payors conduct surveys and know what other payors are offering in a given market.⁶⁷

⁶³ Maness Report ¶ 56; Van Wagner Deposition taken on August 29, 2002 at 94.

⁶⁴ Maness Report ¶ 56; Van Wagner Deposition taken on November 19, 2003 at 89; RX 14, 15, 16, and 17.

⁶⁵ Letter from Jeffrey W. Brennan to Gregory G. Binford, February 6, 2003, which can be found at <http://ftc.gov/bc/adops/030206dayton.htm>.

⁶⁶ Frech Deposition at 155-58.

⁶⁷ Frech Deposition at 156.

66. Dr. Frech admits that payors usually have to offer a higher price to get a majority or more of physicians to participate in a contract.⁶⁸
67. Higher prices are especially important to attract physicians that are more sought after and perceived to be of higher quality.⁶⁹
68. Dr. Frech admits that, even where unit costs may be higher in a payor contract, consumers may benefit because of lower utilization rates by physicians that decrease the total cost of care.⁷⁰
69. Dr. Frech admits that physicians commonly look to IPAs to handle discussions with a payor as to the legal terms of a contract,⁷¹ and that IPAs save costs by eliminating multiplicative legal contractual reviews by individual physicians.⁷²

70. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶⁸ Frech Deposition at 182-83.

⁶⁹ Frech Deposition at 202.

⁷⁰ See Frech Deposition at 109.

⁷¹ Frech Deposition at 80.

⁷² See Frech Deposition at 167-68 (discussing diseconomies from having each practice group conduct its own contract review).



⁷³ Maness Report ¶ 75; Letter from Jeffrey W. Brennan to Martin J. Thompson, September 23, 2003, which can be found at <http://ftc.gov/bc/adops/bapp030923.htm>.

⁷⁴ Frech Deposition at 209.

⁷⁵ Van Wagner Deposition taken on August 29, 2002 at 62-63; Deposition of Dave Palmisano at 19.

⁷⁶ Van Wagner Deposition taken on August 29, 2002 at 24-25; Deposition of Dr. Tom Deas taken on October 10, 2002 at 73; Deposition of Leslie Carter at 20-21, 39-40, 44-45, 138, 141.

76. All non-risk offers presented by a payor to NTSP and in which NTSP has chosen to become involved as a contracting party has always then been messengered to NTSP’s participating physicians.⁷⁷ Each physician or physician group then makes an independent decision whether to accept or reject the offer.⁷⁸
77. For those offers that a payor chooses to present through another independent physician association (“IPA”) or directly to physicians, the physicians also have the right to accept those offers on their own.
78. The physicians eligible to participate in NTSP contracts vary greatly in how many contracts they accept. Some are involved in none and some are involved in as many as 21 of the 24 contracts. The average number of contracts is 7.47.⁷⁹
79. The physicians eligible to participate in NTSP contracts vary greatly in how many contracts they accept. Some are involved in none and some are involved in as many as 21 of the 24 contracts. The average number of contracts is 7.47.⁸⁰

80. [REDACTED]

[REDACTED]

⁷⁷ Frech Deposition at 209.

⁷⁸ Frech Deposition at 209; Deposition of Tom Quirk at 54.

⁷⁹ RX 359 (NTSP physician participation chart).

⁸⁰ RX 359 (NTSP physician participation chart).

[REDACTED]⁸¹

81. [REDACTED]

[REDACTED]⁸² [REDACTED]

[REDACTED]

[REDACTED]⁸³ All of

the physicians who participate in one or more NTSP contracts also have individual contracts with the payors with whom NTSP has a contract.⁸⁴

The physicians participate, on average, in only 7.47 of NTSP's 25 contracts.⁸⁵ Of course, the physicians also have numerous other contracts with payors with whom NTSP has no contract.

C. Respondent Has a Right to Refuse to Deal with Payors

82. Operating the messenger model entails costs for NTSP. There are a number of costs that are incurred each time the messenger is approached with a new contract offer. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁸¹ Maness Report at Exhibit 10; *see also* RX 316 [REDACTED]

⁸² RX 26.20

⁸³ RX 26.7 - 26.8

⁸⁴ *See, e.g.*, Deposition of Dr. Jack McCallum, p. 136-137.

⁸⁵ RX 359 (NTSP physician participation chart).

[REDACTED]

[REDACTED]⁸⁶

83. NTSP has limited funds and managerial resources with which to carry out these functions. What funds NTSP does have are generated from two sources—a one-time \$1000 fee when a physician’s application to NTSP is accepted and NTSP’s share of the profits from its risk contracts. Thus, the costs of managing the messenger model are borne directly by NTSP, and ultimately in an indirect sense by all participating physicians, from activities unrelated to its non-risk business.⁸⁷
84. Dr. Frech admits that there are many reasons an entity might refuse to deal with another entity, including legal concerns or even not liking the other entity.⁸⁸
85. Legal reasons why NTSP might refuse to deal with a payor include the following:
- a. Avoiding illegal or potentially illegal or legally risky contracts;⁸⁹
 - b. Avoiding the use of its resources in reviewing and servicing contracts where only a minority of the doctors on its panel are going to be involved;⁹⁰

⁸⁶ Maness Report ¶ 76; Van Wagner Deposition taken on August 29, 2002 at 56-57.

⁸⁷ [REDACTED]; Van Wagner Deposition taken on August 29, 2002 at 13, 56-57; Van Wagner Deposition taken on January 20, 2004 at 9-10; Deas Deposition taken on October 10, 2002 at 30.

⁸⁸ Frech Deposition at 92.

⁸⁹ *See, e.g.*, Deposition of Dr. Paul Grant at 69; Johnson Deposition at 28.

⁹⁰ *See, e.g.*, Deas Deposition taken on October 10, 2002 at 21-22, 25; Hollander Deposition at 27-28; McCallum Deposition at 121-22.

⁹¹ *See, e.g.* Johnson Deposition at 28.

⁹² *See, e.g.*, RX 1536; CX 775; [REDACTED]).

⁹³ *See, e.g.*,

⁹⁶ *See, e.g.*, RX 339; RX 1805; RX 3101; RX 3103; [REDACTED]; CX 586.

⁹⁷ *See, e.g.*, Presley Deposition at 31.

⁹⁸ *See, e.g.*, [REDACTED]

anyone, including payors, can easily accomplish.¹⁰³

D. Respondent Has a Right to Speak

90. NTSP has legitimate reasons to speak out and communicate about payors.

91. Legal reasons why NTSP might speak out about payors include:

- a. Preventing payor deception or violation of a law;
- b. Advising patients and their employers about changes in service and healthcare issues;
- c. Advising physicians about the meaning of contractual terms or background on the contracting process; and
- d. Advising physicians whether NTSP will be involved with a payor's offer and whether the physicians need to anything concerning an offer.

E. Relevant Geographic and Product Markets

1. Complaint Counsel has not defined any relevant market

92. Dr. Frech admits that he has not defined any relevant market.¹⁰⁴

93. Dr. Frech admits that he has not calculated any concentration ratios.¹⁰⁵

94. Dr. Frech admits that, although he has done zip code analysis on physician

¹⁰³ Frech Deposition at 89-91.

¹⁰⁴ Frech Deposition at 120.

¹⁰⁵ Frech Deposition at 136.

¹⁰⁶ Frech Deposition at 134.

this case.¹⁰⁷

2. Any relevant geographic market including Tarrant County would also include Dallas and other counties.

96. [REDACTED]

[REDACTED]¹⁰⁸

97. [REDACTED]

[REDACTED]

[REDACTED]¹⁰⁹

98. [REDACTED]

[REDACTED]

¹⁰⁷ Frech Deposition at 142.

¹⁰⁸ Maness Report ¶ 30.

¹⁰⁹ Maness Report ¶ 22.

¹¹⁰ Maness Report ¶ 23.

¹¹¹ Maness Report ¶ 23.

[REDACTED]¹¹²

101. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹¹³

102. Federal regulations are similar—requiring a PCP within 30 miles or a 30 minute drive, and a specialist within 50 miles.

103. [REDACTED]
[REDACTED]

[REDACTED]¹¹⁴

104. Similarly, there are numerous examples, including the testimony of payors, that the payors consider the Dallas-Fort Worth Metroplex to be the relevant area to consider for determining adequate network coverage. Additionally, there is evidence that Dallas prices are often used to establish prices for Fort Worth physicians. Payors also note that the service area for their plans includes the Dallas-Fort Worth Metroplex, or at least Dallas and Tarrant Counties.¹¹⁵

105. [REDACTED]

¹¹² Maness Report ¶ 24.

¹¹³ Maness Report ¶ 25.

¹¹⁴ Maness Report ¶ 25.

¹¹⁵ [REDACTED]; *see, e.g.*, [REDACTED]; *see also* Quirk Deposition at 29, 46; Roberts Deposition at 60; [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]¹¹⁶

106. Dr. Frech admits that geographic markets tend to become larger the more specialized the specialty.¹¹⁷
107. Dallas is a large city located only about 30 miles from Fort Worth with a large and well-recognized medical community.¹¹⁸
108. According to U.S. News and World Report, two Dallas-based hospitals made the list of Best Hospitals—Baylor University Medical Center and Parkland Memorial Hospital. In fact, these two hospitals are specifically recognized in specialties where NTSP has a high proportion of Tarrant County-based physicians, such as oncology, orthopedics, otolaryngology, cardiovascular surgery, kidney disease (nephrology) and respiratory disorders (pulmonology). In addition, there are a number of “top doctors” recognized in the DFW area, with many being located in Dallas.¹¹⁹
109. Another reference point as to the relevant geographic market boundary is defined by the Dartmouth Atlas of Health Care. The Dartmouth Atlas specifically defines hospital referral regions (HRR) for every state. HRRs are defined as “regional health care markets for tertiary medical care.” Each HRR contained at least one hospital that performed major

¹¹⁶ Maness Report ¶ 27.

¹¹⁷ Frech Deposition at 132-33.

¹¹⁸ [REDACTED]

¹¹⁹ [REDACTED].

cardiovascular procedures and neurosurgery. In a similar fashion, HRRs were defined by assigning HSAs (Hospital Service Areas) to the region where the greatest proportion of major cardiovascular procedures were performed, with minor modifications to achieve geographic contiguity, a minimum population size of 120,000, and a high localization index. █
█
█

¹²⁰ Maness Report ¶ 28.

¹²¹ █.

on,La an, Mconague,eNavemen Beins –DoodR. ur,a

¹²³ █.

124 [REDACTED].

125 Maness Report ¶ 29.

126 [REDACTED]

127

[REDACTED]¹²⁹

119. Dr. Frech admits that the existence of a significant population in eastern Tarrant County (*i.e.*, the Mid-Cities area) on the border of Dallas County would act to tie Dallas and Tarrant Counties together.¹³⁰

120. In their depositions, NTSP physicians report that they draw patients from a wide area, including the Mid-Cities and Dallas.¹³¹

121. The Department of Justice, in its review of the Aetna-Prudential merger concluded that the merger created anticompetitive monopsony power in the purchase of physician services in a relevant geographic market for physician services that it defined as the Dallas-Fort Worth Metropolitan Statistical Area. [REDACTED]

[REDACTED]¹³²

3. Relevant Product Market

122. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹³³

¹²⁹ Maness Report ¶ 29.

¹³⁰ Frech Deposition at 130-31.

¹³¹ [REDACTED]; Deposition of Dr. Susan Blue at 14-15; Collins Deposition at 12.

¹³² Maness Report ¶ 30.

¹³³ Maness Report ¶ 20.

and perhaps gynecologists and pediatricians. Similarly, medical care performed by ear, nose and throat doctors can often be provided by family practice physicians or physicians or physicians long term care, family practice and other

¹³⁸ ██████████; see Amended Complaint, In the Matter of Mesa County Physicians Independent Practice Association, Inc., Docket No. 9284, ¶ 3.

¹³⁹ Frech Deposition at 121-25.

¹⁴⁰ Maness Report ¶ 33.

¹⁴¹ Maness Report ¶ 33; see *Horizontal Merger Guidelines*, § 2.0.

¹⁴² ██████████; see Quirk Deposition at 15, 44-45 and Roberts Deposition at 24, 28-29.

[REDACTED]

[REDACTED]¹⁴³

133. [REDACTED]

¹⁴³ Maness Report ¶ 34 and Exhibit 8.

¹⁴⁴ Maness Report ¶ 35.

¹⁴⁵ Maness Report ¶ 35 and Exhibit 9.

¹⁴⁶ Maness Report ¶ 36.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁴⁷

137. [REDACTED]

[REDACTED] For instance, many types of colon and rectal surgery are also performed by general surgeons; a point recognized by antitrust authorities.¹⁴⁸

138. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁴⁹

139. [REDACTED]

[REDACTED]

¹⁴⁷ Maness Report ¶ 36.

¹⁴⁸ Maness Report ¶ 37; *see also* Health Care Business Review Letters Issued, Current as of 3/4/1999, Department of Justice, p. 18.

¹⁴⁹ Maness Report ¶¶ 37-38.

[REDACTED]

140. [REDACTED]¹⁵⁰

141. When assessing any market power that NTSP might face, it is important to note the network availability requirements that the companies have.

[REDACTED]¹⁵¹

¹⁵⁰ Maness Report ¶ 39; *see also* Health Care Business Review Letters Issued, Current as of 3/4/1999, Department of Justice, pp. 7, 11, 18.

¹⁵¹ Maness Report ¶ 40.

[REDACTED]

[REDACTED]¹⁵²

142. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁵³

143. For example, one physician group with NTSP members has a direct non-risk contract with Cigna and does not participate in NTSP's contract with

Cigna.¹⁵⁴ [REDACTED]

[REDACTED]¹⁵⁵

144. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁵² Maness Report ¶ 41; *see also* RX 2887.012.

¹⁵³ Maness Report ¶ 42.

¹⁵⁴ Deas Deposition taken on October 10, 2002 at 37-39.

¹⁵⁵ *See* RX 9 [REDACTED]; CX 517 [REDACTED].

¹⁵⁶ Maness Report ¶ 42 and Exhibit 10; *see also* RX 2745.001-.004 and RX 295.

145. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ¹⁵⁷

146. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ¹⁵⁸

147. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁵⁷ Maness Report ¶ 45; Report of Dr. H.E. Frech, Exhibit 3.

¹⁵⁸ Maness Report ¶ 47.

¹⁵⁹ Maness Report ¶ 48

¹⁶⁰ Maness Report ¶ 43.

¹⁶¹ [REDACTED]

¹⁶² See RX 282 [REDACTED]

or individually with physicians who are part of the NTSP network.

¹⁶⁶ Wilensky Report at 16.

¹⁶⁷ Frech Deposition at 183.

¹⁶⁸ Frech Deposition at 202.

¹⁶⁹ Frech Deposition at 202.

¹⁷⁰ *See* RX 1708, 1710, 2178, 3177, 3178 and proposed exhibits RX 3285 and 3288.

¹⁷¹ Hughes Report at 4.

comprehensive medical management process involving all segments of the continuum of care, including:

- a. A medical management committee to supervise implementation of quality improvement strategies¹⁷²;
- b. The monitoring of clinical indicators to identify practice pattern outliers and provide appropriate intervention¹⁷³;
- c. The organizing of the physicians into specialty divisions to develop clinical protocols, monitor this implementation, and intervene when deviations from evidence-based medicine based practice patterns are detected¹⁷⁴;
- d. [REDACTED]
[REDACTED]¹⁷⁵;
- e. The implementation of a care management system to monitor care of high-risk patients with complex medical conditions and endeavor to have these patients treated at the appropriate level of

¹⁷² Vance Deposition taken on January 7, 2004, at 48.

¹⁷³ Blue Deposition at 16-17; Grant Deposition at 111-12; Rosenthal Deposition at 16, 42-43.

¹⁷⁴ See RX 1590; Van Wagner Deposition taken on August 29, 2002, at 16-17; Hollander Deposition at 164-65.

¹⁷⁵ Hughes Deposition at 75-77.

¹⁷⁶ Blue Deposition at 16-17; Deas Deposition taken on January 26, 2004 at 104.

- f. Participating in disease management programs developed internally or by payors¹⁷⁷;
- g. Enhancing patient education and professional communication through the development of a sophisticated website replete with information on clinical and referral options and physician education for clinical and professional information on care options.¹⁷⁸

161. The tangible benefits to healthcare from NTSP's business model are shown by recent patient surveys. In these surveys, the quality of care of NTSP's doctors and specialists was rated higher than United, Aetna, Cigna and PacifiCare's non-NTSP networks.¹⁷⁹

G. There is No Evidence of Any Physician Collusion

1. Complaint Counsel cannot identify any collusion by physicians

162. Dr. Frech admits that he knows of no evidence that any physician has ever colluded with anyone else or has ever refused to entertain any payor offer which was tendered to him or her directly by a payor or through another IPA.¹⁸⁰

163. Comp

4 12 1o2249.4(a5(Dr. Fre3.16

¹⁷⁷ Van Wagner Deposition taken on January 20, 2004 at 124-25.

¹⁷⁸ Blue Deposition at 16-17; Rosenthal Deposition at 46.

¹⁷⁹ See Proposed exhibits RX 3182 and RX 3183; see also RX 1801 and proposed exhibit RX 2384 (data for chart).

¹⁸⁰ Frech Deposition at 75-76, 80, 97, 155, 209.

between NTSP and a participating physician to reject a payor offer based on price or any other competitively significant term.¹⁸¹

164. Dr. Frech admits that he cannot identify any specific evidence showing that any of the following things occurred: (1) one or more participating physicians agreed with each other to reject a non-risk payor offer;¹⁸² (2) any participating physician and any other entity agreed to reject a non-risk payor offer;¹⁸³ (3) any participating physician rejected a non-risk payor offer based on a power of attorney granted to NTSP;¹⁸⁴ (4) any participating physician refused to negotiate with a payor prior to a non-risk offer being messengered by NTSP;¹⁸⁵ (5) any participating physician knew what another physician was going to do in response to a non-risk payor offer;¹⁸⁶ (6) any participating physician gave NTSP the right to bind him or her to any non-risk payor offer;¹⁸⁷ or (7) any participating physician gave up his or her right to independently accept or reject a non-risk payor offer.¹⁸⁸

¹⁸¹ 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 of an express request by NTSP that a physician reject a specific payor offer, to which any physician expressly replied, "I agree to reject this offer.").

¹⁸² Frech Deposition at 75-76.

¹⁸³ Frech Deposition at 75-76.

¹⁸⁴ Frech Deposition at 80.

¹⁸⁵ Frech Deposition at 75-76.

¹⁸⁶ Frech Deposition at 155.

¹⁸⁷ Frech Deposition at 209.

¹⁸⁸ Frech Deposition at 209.

165. Dr. Frech has proven that there is no collusion or agreement among NTSP's participating physicians; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁸⁹

H. PacifiCare

166. NTSP has current risk contracts with PacifiCare.¹⁹⁰

167. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁹¹

168. [REDACTED]

[REDACTED]

[REDACTED]¹⁹²

I. Aetna / MSM

169. In 1994, many physicians signed a HMO risk contract and a PPO fee-for-service contract with another IPA, Harris Methodist Select (HMS), to treat Aetna patients. The contracts were exclusive and were not terminable until June 30, 1999.

¹⁸⁹ Report of Dr. H.E. Frech at Exhibits 8A-8C.

¹⁹⁰ [REDACTED]

¹⁹¹ Lovelady Deposition at 54, 64-65, 97

¹⁹² Lovelady Deposition at 59-60, 66-67, 96.

170. NTSP was formed in 1995 as an entity to engage in risk contracts. Many of the physicians who had contracts with HMS signed participating physician agreements with NTSP.
171. NTSP negotiated on two risk contracts with HMS, whereby NTSP was to accept downloaded risk from HMS and Aetna, in 1996 and 1997.¹⁹³
172. In 1997, HMS breached its contractual obligations with physicians by attempting to amend the 1994 contracts without consent, by agreeing to non-exclusivity with Aetna, and by failing to make full payments under the 1994 contract.¹⁹⁴ The 1997 proffered HMS HMO contracts were the equivalent of a risk contract due to rate adjustment clause.¹⁹⁵
173. In 1999, during the time the contract was being breached, HMS became Medical Select Management (“MSM”), and the contracts between the physicians and Harris were assigned to MSM.¹⁹⁶
174. As a result of the continuing breach by HMS, the physicians approached NTSP in 1997 and asked that NTSP attempt to enter into a risk contract to replace HMS. NTSP did so but could not reach agreement with HMS or MSM.
175. NTSP also was appointed by the physicians to represent them in their breach of contract dispute with HMS. A lawsuit was initiated by NTSP in

¹⁹³ See RX 308 (1996 offer); RX 312 (1997 term sheet); [REDACTED]; [REDACTED];

[REDACTED]; see also [REDACTED].

¹⁹⁴ See RX 832 (fax alert detailing situation).

¹⁹⁵ Van Wagner Deposition taken on November 19, 2003 at 180;

¹⁹⁶ See RX 382 (fax alert detailing situation).

June 1999 based on HMS's and MSM's refusal to honor the 1994 contracts with physicians.¹⁹⁷

176. NTSP sued HMS and MSM as the class representative for the physicians.¹⁹⁸ As the class representative, NTSP had a right to be involved in the resolution of the class members' claims.
177. HMS / MSM continued to breach the contract after the lawsuit was filed by continuing not to pay claims.¹⁹⁹ Despite HMS's and MSM's continuing breaches, the physicians until late 2000 continued to perform under the 1994 contract so as not to affect patient care. The parties attempted to conclude the litigation, but HMS wanted the implementation of a new contract to be tied to NTSP's settlement of the lawsuit.²⁰⁰
178. During this time, NTSP was informing Aetna that MSM had ongoing difficulties in paying claims.²⁰¹ Aetna repeatedly claimed that MSM was solvent and able to fulfill its obligations.
179. In July 2001, the Texas Department of Insurance placed MSM under supervision, and a week later MSM filed for bankruptcy.²⁰² An Aetna audit uncovered embezzlement by one of MSM's officers.²⁰³ MSM chief

¹⁹⁷ RX 849 (fax alert detailing situation); Deposition of Mark Collins, pp. 6-9; proposed exhibit RX 3277 (MSM petition).

¹⁹⁸ See proposed exhibit RX 3277 (MSM petition).

¹⁹⁹ Van Wagner Deposition taken on August 29, 2002 at 90.

²⁰⁰ RX 1300 (correspondence with MSM).

²⁰¹ RX 1039.

²⁰² Roberts Deposition at 47-48. See also RX 3102 (TDI press release on supervision); RX 1555 and 1556 (TDI press releases on bankruptcy).

²⁰³ Roberts Deposition at 44-46.

operating officer Frederick C. Miller was convicted of fraud, money laundering, and tax evasion.²⁰⁴

180. Aetna assumed the MSM contracts, but ignored the prior breaches by MSM.

²⁰⁴ See RX 1805 (indictment); RX 3101 (article regarding conviction).

²⁰⁵ RX 1700 (letter from Aetna assuming financial responsibility for MSM's covered services).

²⁰⁶ See CX 656 [REDACTED]; RX 1632 [REDACTED].

²⁰⁷ RX 24 (contract).

²⁰⁸ See RX 38; Van Wagner Deposition taken on August 29, 2002 at 99-100.

²⁰⁹ CX 586.002-.003.

²¹⁰ See RX 38; [REDACTED]; Van Wagner Deposition taken on August 29, 2002 at 99-100.

185. Aetna terminated its contract with NTSP in 2001.²¹¹
186. NTSP and Aetna's contract had a requirement that there be mutual agreement for any contractual changes. Aetna attempted to change the rate under the 2000 contract. NTSP did not consent to the unilateral change and the contract terminated.²¹²
187. The new rate proposed by Aetna fell below the threshold level required to activate NTSP's network. As a result, NTSP did not have the authority to accept such an offer (although Aetna was free to contract with physicians directly).
188. After the termination of the contract, Aetna contracted directly with the NTSP physicians it had formerly contracted with under the 2000 agreement.²¹³
189. Doctors were not prevented from dealing directly with Aetna.²¹⁴ [REDACTED]
[REDACTED]
[REDACTED]²¹⁵
190. Aetna did not need NTSP in 2001 and does not need NTSP now. Aetna does not currently have a contract with NTSP and does not have any network inadequacy problems.²¹⁶

²¹¹ Roberts Deposition at 52.

²¹² CX 504 (letter from Aetna explaining no mutual agreement); Roberts Deposition at 43-44, 49.

²¹³ Roberts Deposition at 18, 58-59.

²¹⁴ See RX 1076 (fax alert attaching Aetna letter).

²¹⁵ RX 13 [REDACTED].

²¹⁶ Roberts Deposition at 28-29; see also RX 305 and 306 (Texas Board of Medical Examiners' data on physicians by county); RX 1 (Aetna physician panel list); RX 9 [REDACTED]; RX 350 [REDACTED]; CX 517 [REDACTED].

²¹⁷ RX 339 (notice of breach from Texas Office of the Attorney General).

²¹⁸ CX 186.032 [REDACTED].

²¹⁹ RX 451.002 (Board minutes reporting telephone conversation with DOJ).

²²⁰ CX 57.003 [REDACTED].

²²¹ CX 56.004 [REDACTED]; RX 3103 (TSI press release on situation); CX 104.002 [REDACTED].

197. NTSP has the right to ensure that a payor's offer and a payor's conduct under a contract do not constitute legal violations.
198. NTSP was exercising its First Amendment right to make statements regarding issues of public importance – in this case, healthcare and legal disputes. NTSP was preventing Aetna's deception and breach of contract.²²²
199. NTSP physicians have the right to advocate for, provide information to, and otherwise advise patients about issues that affect their healthcare.²²³
200. In a recent Advisory Opinion to a physician group in Dayton, the FTC acknowledged that, "The collection and public dissemination of accurate

²²² See note 198, 210 and 211, *supra*.

²²³ CX 540.005 (Aetna primary care physician agreement detailing policy).

²²⁴ Letter from Jeffrey W. Brennan to Gregory G. Binford, February 6, 2003, which can be found at <http://ftc.gov/bc/adops/030206dayton.htm>.

²²⁵ Youngblood Deposition at 13-14.

its eligible physicians every payor contract HTPN participated in. NTSP's eligible physicians could then either opt in or out. One of the contracts HTPN made available to NTSP was a United contract with HTPN.²²⁶

203. United and NTSP had contract discussions in 1998 which did not result in a direct contract.

204. [REDACTED]
[REDACTED]
[REDACTED]²²⁷

205. As a result, NTSP did not act on United's direct proposal and its participating physicians treated United patients through HTPN.²²⁸

206. HTPN is an independent entity.²²⁹ HTPN handles its own contract discussions with payors, including its contract discussions with United.²³⁰

207. In 2001, United submitted a competitive bid to replace risk contracts NTSP had to treat the City of Fort Worth's patients..²³¹

208. Until 2001, the City of Fort Worth was insured through PacifiCare contracts. NTSP was a risk provider under those contracts.²³²

²²⁶ Youngblood Deposition at 24-25, 32, 112.

²²⁷ See CX 87 [REDACTED].

²²⁸ See RX 98 (fax alert regarding United offer and HTPN contract).

²²⁹ Youngblood Deposition at 13-14.

²³⁰ Youngblood Deposition at 49-51.

²³¹ [REDACTED]; RX 84..

²³² Mosley Deposition at 19-20; [REDACTED]; RX 84.

209. The City of Fort Worth sought bids from payors to become the administrator of its health plan. United and PacifiCare were two of the main competitors for that contract.

210. United intended to replace NTSP's risk contract with PacifiCare under which NTSP treated the City's employees with the 1997 contract United had with NTSP through HTPN.²³³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²³⁴ NTSP's

termination affected approximately 100 of the approximately 600

physicians eligible to participate on NTSP's contracts.²³⁵

211. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²³⁷

212. The approximately 100 physicians who had been contracted with United through HTPN initially gave NTSP powers of attorney to try to enter into a new contract with United. The powers of attorney allowed NTSP to

²³³ [REDACTED]; CX 1068 (letter from United to physicians); Van Wagner Deposition taken on August 29, 2002 at 141.

²³⁴ Youngblood Deposition at 123-24.

²³⁵

²³⁶

²³⁷ See RX 44 and RX 233 [REDACTED].

contract with United “in any lawful manner,” which meant that NTSP was able to handle any non-risk offer by United to the physicians only in accordance with the messenger model requirement of the Participating Physicians Agreement.

213. NTSP discussed the possibility the possibility of a non-risk contract. United was not interested in a risk contract and never offered rates on a non-risk proposal which were at or above NTSP’s Board minimums. NTSP was willing to do a contract with United at the minimums whereby it had the authority to activate its network, but United chose not to do so.²³⁸ [REDACTED]

[REDACTED]²³⁹

214. United broke off contract discussions with NTSP and entered into new non-risk contracts through a large Fort Worth IPA, All Saints Integrated Associates (“ASIA”). United also contracted with other medical groups and physicians, including a number of the 109 who had initially given NTSP a power of attorney.

215. [REDACTED]²⁴⁰

[REDACTED]²⁴¹

²³⁸ See CX 1034 (United correspondence regarding offer).

²³⁹ RX 281; RX 283; RX 286 [REDACTED].

²⁴⁰ Quirk Deposition at 108.

²⁴¹ See RX 282 [REDACTED].

216. Doctors were never prevented from dealing directly with United or through another IPA.²⁴² And the powers of attorney were never used.
217. United [REDACTED] does not need NTSP.²⁴³
218. Powers of attorney obtained by NTSP for physicians were subject to the messenger-model requirement of the Participating Physician Agreement, and could only be used “in any lawful way.”²⁴⁴ The powers of attorney were never delivered to United.
219. United was fined by the Texas Attorney General for prompt pay violations and failure to follow state clean claim law.²⁴⁵
220. Subsequent to the time United took over the City of Fort Worth contract, medical costs for the City skyrocketed by approximately ten million dollars over what they had been when the City was using NTSP’s contracts.

K. Blue Cross

221. NTSP tried to negotiate risk contracts with Blue Cross, but the parties never agreed upon terms.²⁴⁶

²⁴² See CX 1074 (fax alert telling members to contact ASIA or United directly for contracting opportunities).

²⁴³ RX 306, 307, and 308 (TBME data for physicians by county); CX 1034 [REDACTED]

²⁴⁴ CX 1051.039 (example power of attorney).

²⁴⁵ CX 1051.054 (correspondence where United rejected NTSP’s concern about United’s non-compliance with state law).

²⁴⁶ See RX 1421 (memo regarding BCBS risk proposal); CX 84 [REDACTED]

222. NTSP participating physicians had access to a Blue Cross contract through

HTPN.²⁴⁷

[REDACTED]

[REDACTED]

[REDACTED]

²⁴⁷ [REDACTED]; RX 1275.

²⁴⁸ See CX 85

[REDACTED].

²⁴⁹ CX 709

[REDACTED].

²⁵⁰ CX 705 (fax alert reporting Blue Cross direct contracts);

[REDACTED]

[REDACTED].

²³⁷ RX 3103.

²³⁸ See CX 763

[REDACTED].

228. [REDACTED]
[REDACTED]²³⁹
229. By March, 2000, Cigna was not paying the NTSP Physicians in accordance with the fee schedules attached to the March 28, 1999 letter agreement, as amended.²⁴⁰
230. On July 17, 2000 NTSP Board was formally advised of Cigna's failure to pay in accordance with the agreed upon fee schedules.²⁴¹
231. Cigna made NTSP aware that specialists would not be allowed to participate in the Cigna contract.
232. NTSP complained to Cigna regarding its continued failure to pay in accordance with the agreed upon schedule and classified same as a material breach.²⁴²
233. Cigna's problems with failing to pay in accordance with agreed fee schedules continues into December, 2000 and NTSP again requests a schedule of compliance.²⁴³
234. In April 2001, Cigna submitted to NTSP a risk proposal.

²³⁹ [REDACTED]
RX1898-01

²⁴⁰ Emails to Cigna (CX0785-001).

²⁴¹ Minutes of North Texas Specialty Physicians Board of Directors Meeting RX0497_001 - 06

²⁴² Various emails (RX 1486-001 - 09)

²⁴³ Various emails (CX0792-003 - 007)

244 [REDACTED] (CX0756-001)

245

Texas Office of the Attorney General also investigated Cigna's payment methodology.²⁵⁰

M. NTSP does not need to show but has shown justification

1. Justification is not necessary

241. NTSP does not engage in collective price negotiation. There is no collective price negotiation to justify.
242. NTSP follows a business model of being involved in payor offers which are likely to activate its existing network of physicians. That is a unilateral refusal to deal which is legal under the Colgate doctrine and needs no justification.
243. NTSP has numerous legal reasons to refuse to be involved with a payor offer, including avoiding illegal or legally risky contracts and refusing to abdicate legal rights of NTSP, the physicians, or their patients. Such reasons are legal decisions which need not be economically justified.
244. NTSP has created a network of physicians who have been organized to work cooperatively with each other. Absent a showing of monopoly power (which Complaint Counsel has not made), NTSP has no legal obligation to make available its network to free riders or anyone else, and hence need not justify economically such a refusal.
245. NTSP's activities as a class representative are Constitutionally-protected and hence need not be economically justified.
246. NTSP's activities in enforcing contracts, preventing legal violations by others, and advising patients and their employers of matters having to do

²⁵⁰ See CX 108.002-.003 [REDACTED].

with healthcare issues is Constitutionally and legally-protected conduct and need not be economically justified.

2. NTSP's spillover model is economically-justified

247. NTSP's spillover model is a credibly-designed effort to achieve and transfer efficiency and quality improvements from NTSP's risk contract medical care to its non-risk medical care.

248. NTSP has established superior performance in providing medical care.

(1) [Redacted]
[Redacted]
[Redacted]²⁵¹

(2) [Redacted]
[Redacted]
[Redacted]²⁵²

(3) [Redacted]
[Redacted]²⁵³

(4) [Redacted]
[Redacted]²⁵⁴

(5) [Redacted]
[Redacted]²⁵⁵

²⁵¹ RX 3176.

²⁵² RX 3288.

²⁵³ RX 3174

²⁵⁴ RX 3280.

²⁵⁵ RX 3280.

(6) [Redacted]
[Redacted]

[Redacted] ²⁵⁶

(7) [Redacted]
[Redacted]
[Redacted] ²⁵⁷

(8) [Redacted]
[Redacted]
[Redacted] ²⁵⁸

(9) [Redacted]
[Redacted]
[Redacted] ²⁵⁹

(10) [Redacted]
[Redacted] ²⁶⁰

(11) [Redacted]
[Redacted] ²⁶¹

(12) [Redacted]
[Redacted] ²⁶²

²⁵⁶ RX 3177 and RX 3287.

²⁵⁷ RX 3139.

²⁵⁸ RX 3162.

²⁵⁹ RX 3162.

²⁶⁰ RX 3162.

²⁶¹ RX 3167.

²⁶² RX 3134 and 3173.

(13) [REDACTED]
[REDACTED]²⁶³

(14) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

II. Conclusions of Law and Analysis

A. Jurisdiction

1. Interstate Commerce

1. Complaint counsel must show that NTSP's actions affect interstate commerce. 15 U.S.C. § 45. To satisfy this jurisdictional requirement, Complaint Counsel must show that the actual conduct of NTSP at issue affected interstate commerce or that NTSP operates in interstate commerce. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980). Further, this effect must be considered in proportion to NTSP's business as a whole. *Musick v. Burke*, 913 F.2d 1390, 1395 (9th Cir. 1990).

²⁶³ RX 3183.

²⁶⁴ RX 3130 [REDACTED].

²⁶⁵ Maness report ¶ 95.

²⁶⁶ Maness affidavit ¶ 7 and Attachment 1.

2. Complaint Counsel concedes that NTSP does not operate in interstate commerce and can provide no evidence of such allegations.
3. To meet the effect on commerce theory, a specific aspect of interstate commerce must be identified and it must be proven that NTSP's actions had a substantial effect on that aspect of commerce. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994). Complaint Counsel must show a factual nexus between the alleged restraint and the effect on commerce, and the effect on commerce must either be shown to actually exist or be present as a matter of practical economics. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 331 (1991). Miller & Smith Holding Co.

5. Complaint Counsel must prove that NTSP is an association acting for the pecuniary interest of its participating physicians. 15 U.S.C. § 45. NTSP is a memberless, nonprofit corporation, however, and makes no money from the non-risk contracts entered into by its participating physicians – the contracts at issue in this case. TEX. REV. CIV. STAT. ANN. Art. 1396-1.02(A)(6). Therefore, the FTC does not have jurisdiction over NTSP under the FTC Act.
6. Furthermore, even if NTSP was considered to be organized to act for the profit of its members, this case concerns only NTSP’s refusals to act. Such refusals to act do not constitute “acting” for the pecuniary interest of NTSP’s participating physicians and, therefore, jurisdiction cannot be proven.

B. Burden of Proof

7. An initial decision must be supported by “reliable, probative, and substantive evidence.” Commission Rule 3.51(c); 16 C.F.R. § 3.51(c)(1). “Substantial evidence is more than a mere scintilla. It means such evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain, or irrelevant matter. It implies a quality and character of proof which induces conviction and makes a lasting impression on reason.” *Carlay Co. v. FTC*, 153 F.2d 493, 496 (7th Cir. 1946).
8. “[T]he antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was [an anticompetitive] agreement.”

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763 (1984). The government bears the burden of establishing a violation of antitrust law.

United States v. E.I. duPont de Nemours & Co., 366 U.S. 316, 334 (1961).

C. Relevant Geographic and Product Market

9. The determination of the relevant market is essential to Complaint Counsel's case. Establishing the relevant market is the starting point in a rule of reason case. *California Dental Ass'n v. FTC*, 224 F.3d 942, 952 (9th Cir. 2000) (proof of relevant geographic and product market necessary for proving injury to competition in rule of reason case).
10. The plaintiff bears the burden of proof of defining the relevant market. *Jayco Sys., Inc. v. Savin Bus. Machs. Corp.*, 777 F.2d 306, 319 (5th Cir. 1985) (“[A] showing of relevant market is also necessary to assess anticompetitive effects in rule of reason analysis under § 1.”); *Hornsby Oil Co. v. Champion Spark Plug Co.*

12. Complaint Counsel has not even attempted to prove a relevant market in this case. The following has been determined regarding the relevant market:

1. Product Market

13. In defining a relevant product market, courts look to determine if products are “reasonably interchangeable.” Courts consistently look to reasonable interchangeability as the primary indicator of a product market. *See United States v. Continental Can Co.*, 378 U.S. 441, 453-57 (1964).

14. Another relevant product market inquiry is whether certain products are sufficiently substitutable that they could constrain each others prices. *See, e.g., Int’l Assoc. of Conference Interpreters*, 123 F.T.C. 465, 640 (1997) (Section 2 case) (the Commission generally examines what products are reasonable substitutes for one another through a consideration of price, use, and qualities).

15. Relevant product markets in this case include a primary care physician market and a number of specialty area markets. One medical specialty is not necessarily a good substitute for another. And an increase in prices by one specialty may not cause patients to switch to another specialty.

2. Geographic Market

16. The relevant geographic market is the region “in which the seller operates, and to which the purchaser can practicably turn for supplies.” *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

17. NTSP has participating physicians in eight counties in and around the Dallas-Fort Worth metropolitan area. Other physicians within this

metropolitan area are also viable substitutes for NTSP physicians. NTSP physicians draw patients from a wide area, and it is easy for patients to switch physicians within Dallas and other close counties.

18. Therefore, any relevant geographic market is at least as large as the Dallas-Fort Worth metropolitan area. Further, any relevant geographic market including Tarrant County must also include Dallas and other counties.

D. Violations of the Complaint

1. **The Legal Framework for Analysis of Horizontal Restraints**

Sys., Inc., 441 U.S. 1, 9 (1979); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977) (the per se rule should only apply to conduct that has a “pernicious effect on competition” and “lack[s] ... any redeeming virtue”). *California Dental* advocates “considerable inquiry into market

plausibility of competing claims about the effects of NTSP's conduct, the obvious anticompetitive effect that triggers abbreviated analysis has not been shown. *California Dental Ass'n v. FTC*, 526 U.S. 756, 778 (1999).

4. Under the Rule of Reason, Complaint Counsel Has Not Demonstrated That the Challenged Conduct Is Illegal.

a. Complaint Counsel has not proven a relevant market.

26. To prevail in a rule of reason case, Complaint Counsel "must define the market and prove that [NTSP] had sufficient market power to adversely effect competition." *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1392 (5th Cir. 1983).

27. Complaint Counsel has not proven a relevant market in this case.

Complaint Counsel's expert report did not posit a relevant market. Further, Complaint Counsel's expert did not calculate any concentration ratios, did not perform zip code analysis, and did not perform any type of entry analysis. Therefore, liability against NTSP under a rule of reason analysis fails.

b. Complaint Counsel has not proven a net anticompetitive effect on competition.

28. In a rule of reason case, Complaint Counsel must prove that the challenged conduct had the effect of injuring competition. "The Supreme Court has made clear that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect." *In re California Dental Ass'n*, 121 F.T.C. 190, 308 (1996). "An analysis of the reasonableness of particular restraints includes

consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.” *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 607 (1972).

29. The fact that a case proceeds under Section 5 of the FTC Act does not alter the requirement that anticompetitive effects must be proved with evidence. *See California Dental Assoc. v. FTC*, 224 F.3d 942, 958-59 (9th Cir. 2000) (FTC’s failure to demonstrate substantial evidence of a net anticompetitive effect resulted in remand with direction that the FTC dismiss its case).
30. The burden is on the complaining party to demonstrate that the challenged conduct has a net anticompetitive effect. *Viazis v. Am. Ass’n of Orthodontists*, 314 F.3d 758, 766 (5th Cir. 2002).
31. Complaint Counsel has not shown a net anticompetitive effect. Its conjecture of anticompetitive effects does not outweigh the procompetitive effects and efficiencies of NTSP’s conduct. Further, Complaint Counsel has not demonstrated that a “great likelihood of anticompetitive effects” from NTSP’s conduct “can easily be ascertained.” Therefore, the burden has not shifted to NTSP to come forward with plausible procompetitive justifications. *California Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999).
32. Although not necessary, NTSP has shown justifications for its conduct based on its efficiency-directed “spillover” business plan and NTSP’s legal reasons for refusing to be involved in payor’s offers.

c. Complaint Counsel has not proven collusion among NTSP and its participating physicians.

33. Regardless of the method of analysis employed, Complaint Counsel must prove some form of collusion or concerted action to establish an antitrust violation. “Section 1 of the Sherman Act [like Section 5 of the FTC Act] does not proscribe independent conduct.” *Viazis v. Am. Ass’n of Orthodontists*, 314 F.3d 758, 761 (5th Cir. 2002); *see also In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999).
34. To prove there was “concerted action” or collusion, Complaint Counsel must submit either direct or circumstantial evidence of an agreement between competitors. *In re Baby Food Antitrust Litig.* 166 F.3d 112, 117 (3d Cir. 1999). Complaint Counsel concedes there is no direct evidence of conspiracy.
35. Circumstantial evidence of conduct that is as consistent with lawful

37. The evidence is consistent with lawful competition because the collection and dissemination of market information, including market prices, can potentially benefit competition. *See* FTC Staff Advisory Opinion Letter, dated November 3, 2003, from Jeffrey W. Brennan to Gerald Niederman regarding Medical Group Management Association.
38. The evidence is also consistent with lawful competition because NTSP's refusals to deal are proper under the *Colgate* doctrine. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (cited by *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) for the proposition that "[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently").
39. NTSP's conduct in exercising its *Colgate* right to refuse to deal need not be economically justified because that is a legal right.
40. NTSP's conduct in refusing to deal based on its legal concerns about possible liability need not be economically justified because that is a legal right.
41. NTSP's conduct in refusing to make available its network need not be economically justified because that is a legal right. NTSP has created a network of physicians who have been organized to work cooperatively with each other. Absent a showing of monopoly power (which Complaint Counsel has not made), NTSP has no legal obligation to make available its network to free riders or anyone else. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 880-81 (2004).

42. NTSP's conduct in representing physicians in their legal disputes as a class representative need not be economically justified because that is a legal right and Constitutionally-protected.
43. NTSP's conduct in enforcing contracts, preventing legal violations by others, and advising patients and employers of matters having to do with healthcare issues is Constitutionally and legally-protected conduct and need not be economically justified. FTC Advisory Opinion regarding

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 to be served upon the following persons:

Office of the Secretary (original and 2 copies via Federal Express)

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