

[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'
POST-TRIAL BRIEF**

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

¹ Complaint ¶ 12.

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

Counsel must first prove that NTSP has been involved in collusion among participating physicians. But Complaint Counsel's economic expert, Dr. H. E. Frech, admitted that he has seen no 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.

Moreover, Complaint Counsel has failed to prove a relevant market — or any effect on a relevant market — to establish liability under a rule-of-reason analysis. Dr. Frech admitted that he has not defined any relevant market or performed any concentration or entry analyses. That failure is fatal to Complaint Counsel's case. NTSP's expert underlines Complaint Counsel's failure by showing how modest a presence NTSP has in the Dallas/Fort Worth Metroplex.

Additionally, much of the conduct challenged by Complaint Counsel cannot possibly establish antitrust liability. As shown by the evidence, many of the contractual issues about which Complaint Counsel complains related to risk contracts or fee-for-service contracts that are tied to and part of risk contracts. Complaint Counsel has also improperly asserted that NTSP's right to sue or threaten to sue a payor or other entity for violating a contract is somehow illegal. Many of the communications Complaint Counsel challenges also arise in the context of horizontal competition between NTSP and payors for contracts or medical or utilization management activities. And, although Complaint Counsel originally criticized NTSP for communicating with the City of Fort Worth and others, Complaint Counsel ultimately stipulated that NTSP has the right — as recognized by Texas law — to communicate with patients and employers about network adequacy issues and compensation rates.

Finally, Complaint Counsel cannot establish jurisdiction over NTSP under the FTC Act. NTSP is not an association acting for the profit of its members in regard to the challenged conduct, and NTSP's challenged conduct did not affect interstate commerce. NTSP is merely a

memberless, nonprofit corporation organized under Texas law that declines offers outside its business model.

II.

ARGUMENT AND AUTHORITIES³

Complaint Counsel alleges that NTSP violated section 5 of the FTC Act by fixing “the price of fee-for-service medical services,” and facilitating, coordinating, and acting “as the ‘hub’ of concerted action by its participating physicians,” who are alleged to compete with each other.⁴ For the Administrative Law Judge to find such a violation, Complaint Counsel must prove: (1) the existence of a contract, combination, or conspiracy among two or more separate entities, which entities are subject to the antitrust law, that (2) unreasonably restrains trade, and that (3) the acts or practices are in or affecting interstate or foreign commerce.⁵ As the Supreme Court has noted, “[t]he FTC Act’s prohibition of unfair competition and deceptive acts or practices overlaps the scope of § 1 of the Sherman Act aimed at prohibiting restraint of trade.”⁶ The Commission relies on Sherman Act law when deciding cases alleging unfair competition.⁷

³ Because NTSP is relying upon the facts in its proposed findings of fact, which are being filed concurrently with this brief, NTSP has not prepared a separate statement of facts for this brief. Instead, NTSP will cite to relevant facts from its proposed findings of fact when making its legal arguments.

⁴ See Complaint ¶ 12 (stating that NTSP acts as “combination of competing physicians”); Complaint Counsel’s Second Supplemental Responses to Respondent’s First Set of Interrogatories at 6.

⁵ *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990).

⁶ *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 763 n.3 (1999) (citations omitted).

⁷ See *id.* (stating that “the Commission relied upon Sherman Act law in adjudicating this case”).

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

⁸ 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).

⁹ Complaint Counsel’s Response and Objections to North Texas Specialty Physicians’ First Request for Admissions to Complaint Counsel at 3.

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

¹¹ *Cal. Dental Ass’n*, 526 U.S. at 771.

¹² Complaint ¶ 14; Answer of Respondent North Texas Specialty Physicians to Complaint of Federal Trade Commission ¶ 14.

¹³ NTSP’s Proposed Findings of Fact 18 (hereinafter, “RPF”).

¹⁴ RPF 24-27.

¹⁵ In 2003, NTSP had approximately 300 physicians on its Risk Panel and approximately 275 additional physicians eligible to participate in one or more non-risk contracts. RPF 21. These physicians are located in Tarrant, Dallas and at least eight contiguous counties. RPF 209-10. The 575 eligible physicians are referred to as “participating physicians” under the NTSP Physician Participation Agreement. RPF 9. On average, the eligible

of 50% or less is a justifiable demarcation for determining whether to service a payer contract.

³⁶ *Id.*

³⁷ 526 U.S. at 779.

as proven by the evidence and testimony in the record,⁴⁴ including testimony from Complaint Counsel’s experts.⁴⁵

Further, Complaint Counsel cannot rely 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’.”⁴⁶ A plaintiff cannot show competitive harm “merely by demonstrating that the defendant “refused without justification to promote, approve, or buy the plaintiff’s product.”⁴⁷ This case is very similar to *Viazis* in that NTSP is making a decision whether or not it wants to be involved in (*i.e.*, “approve”) a payor’s offer.

Physicians can accept contracts through another independent physician association (“IPA”) or directly with the payor – and the evidence shows that they do so with regularity.⁴⁸ 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.⁴⁹ The evidence also shows that some NTSP physicians accept direct contracts that are below NTSP’s

⁴⁴ See, RPF 23-24, 29, 41, 85-87, 92, 96, 101, 103, 113-118, 122, 140.

⁴⁵ See, *e.g.*, RPF 23, 86-87, 114, 117-18.

⁴⁶ 314 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)).

⁴⁷ *Id.* at 766.

⁴⁸ RPF 162, 267, 271-75.

⁴⁹ RPF 162, 271-75.

A. That's correct.⁵⁵

Because he has not defined a relevant market, Dr. Frech admits that he has not calculated any concentration ratios or performed any concentration analysis.⁵⁶ Likewise, he has not performed any type of entry analysis in this case.⁵⁷ Dr. Frech also conceded that geographic markets tend to become larger the more specialized the specialty;⁵⁸ this fact is important because NTSP's participating physicians are mostly specialists.⁵⁹ 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;⁶⁰ 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. Testimony and evidence from payors confirms that the market here is broader than Fort Worth.⁶¹

Finally, Dr. Frech admits that there can be significant crossovers of services between specialties.

⁵⁵ RPF 197; Frech, Tr. 1393-94.

⁵⁶ RPF 198.

⁵⁷ RPF 199.

⁵⁸ RPF 214.

⁵⁹ RPF 10-11.

⁶⁰ RPF 204. The Mid-Cities area constitutes approximately 40% of Tarrant County's population. RPF 201, 203.

⁶¹ *See, e.g.*, RPF 226, 228-235, 258.

⁶² RPF 240.

⁶³ RPF 242-43.

evidence also shows that patients seek medical care near where they live and that many people who work in Fort Worth live outside the city, either in Tarrant County or outlying areas.⁷¹ This impacts the scope of the geographic market and expands it beyond Fort Worth's city limits. Testimony from Drs. Deas and Lonergan confirms that a Fort Worth market is too narrow because they draw patients from a wide geographic area.⁷²

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 tond eno138uTcwy,J7.2 0 0 7.2 496.5401 545 T

⁷¹ RPF 223-25.

⁷² RPF 212-13.

⁷³ RPF 277-83, 369-70, 388, 448.

⁷⁴ *See, e.g.*, RPF 267-69, 287.

⁷⁵ RPF 197.

⁷⁶ *See, e.g.*, RPF 200, 202, 204, 207-10, 212-14, 233-34.

B. The lack of collusion among NTSP and any of its participating physicians disproves an antitrust violation under any analysis.

Regardless of the method of analysis employed, Complaint Counsel must prove some form of “concerted action” to establish an antitrust violation.⁸² “Section 1 of the Sherman Act [like Section 5 of the FTC Act] does not proscribe independent conduct.”⁸³

To prove “concerted action” or collusion, Complaint Counsel must submit either direct or circumstantial evidence of an agreement between competitors (*i.e.*, the physicians).⁸⁴ But conduct that is as consistent with lawful competition as with conspiracy will not support an inference of conspiracy.⁸⁵ Complaint Counsel “must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.”⁸⁶ Based on this standard, Complaint Counsel cannot prove any collusion that would establish an antitrust violation.

1. Complaint Counsel concedes there is no direct evidence of collusion.

Complaint Counsel, after being ordered to respond to contention interrogatories, admitted that there is no direct evidence of any agreement between NTSP and a participating physician to reject a payor offer based on price or any other competitively significant term.⁸⁷ Furthermore,

⁸² 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’”).

⁸³ *Viazis*, 314 F.3d at 761.

⁸⁴ *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.”).

⁸⁵ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

⁸⁶ *Id.* (citations omitted).

⁸⁷ 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.’”).

Complaint Counsel's expert 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;⁸⁸
- (2) any participating physician and any other entity agreed to reject a non-risk payor offer;⁸⁹
- (3) any participating physician rejected a non-risk payor offer based on a power of attorney granted to NTSP;⁹⁰
- (4) any participating physician refused to negotiate with a payor because of NTSP's Physician Participation Agreement;⁹¹
- (5) any participating physician knew what another physician was going to do in response to a non-risk payor offer;⁹²
- (6) any participating physician gave NTSP the right to bind him or her to any non-risk payor offer;⁹³ or
- (7) any participating physician gave up his or her right to independently accept or reject a non-risk payor offer.⁹⁴

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

⁸⁸ RPF 153.

⁸⁹ RPF 158.

⁹⁰ RPF 156.

⁹¹ RPF 157.

⁹² RPF 136, 159.

⁹³ RPF 137-38.

⁹⁴ RPF 155.

⁹⁵ RPF 137-38.

⁹⁶ RPF 139, 145, 285.

⁹⁷ *See, e.g.,*

justification for NTSP's refusal is supported by its spillover model and its right to avoid expending time and effort on proposals not likely to activate NTSP's team of physicians.⁹⁹

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.¹⁰⁰ Of course, those disclosures enable physicians to know when NTSP will be involved in reviewing a payor's offer. Complaint Counsel alleges that this facilitates collusion among physicians. But this information cannot be used by individual physicians to coordinate or raise rates because only a limited

⁹⁹ *See, e.g.*, RPF 85-87, 91-92, 95-96, 103-04.

¹⁰⁰ 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.").

¹⁰¹ RPF 129, 133, 135.

¹⁰² RPF 130-133, 136, 150-51.

¹⁰³ RPF 161, 286.

¹⁰⁴ RPF 286.

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, and, in some cases, accept offers below the rates established by NTSP's board.¹⁰⁵

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.¹⁰⁶ Such a low response rate and low correlation make it impossible to have an effective price-fixing conspiracy. Indeed, it is undisputed that many of the participating physicians do not respond,¹⁰⁷ and Dr. Frech has further opined that many physicians do not follow their own poll responses in their individual business decisions even when they do respond.¹⁰⁸ Likewise, providing only the mean, median, and mode of all of the poll responses does not tell a participating physician what any other physician will do with respect to a payor offer.¹⁰⁹

Taken together, all of this evidence (or lack thereof) does not tend "to exclude the possibility that the alleged conspirators acted independently."

3. The evidence shows that NTSP's conduct is consistent with lawful competition.

In addition to being unable to exclude independent action, Complaint Counsel also cannot prove that the evidence is inconsistent with lawful competition. Dr. Frech admits that the collection and dissemination of market information, including market prices, can potentially

¹⁰⁵ RPF 161, 286.

¹⁰⁶ RPF 135.

¹⁰⁷ RPF 129.

¹⁰⁸ RPF 286.

¹⁰⁹ RPF 133, 136, 151.

maintaining continuity of personnel — in this case, the participating physicians — is important to achieving these efficiencies.¹¹⁷

An absence of collusion is also supported because NTSP has no authority to accept non-risk contracts on behalf of the participating physicians.¹¹⁸ It is an undisputed fact that every non-risk contract that NTSP decides to sign is then messengered to physicians who individually decide whether each wants to participate.¹¹⁹ NTSP does not bind anyone, other than itself, to a non-risk contract.¹²⁰ NTSP’s “refusal to deal” is, therefore, only its own refusal *qua* NTSP, and is not the individual physicians’ refusal.

The *Colgate* doctrine confirms the propriety of NTSP’s refusal to deal. 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.¹²¹ That right has been recently reiterated by the Fifth Circuit in its *Viazis* decision.¹²²

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 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 297.¹²³

¹¹⁷ RPF 114.

¹¹⁸ RPF 138.

¹¹⁹ *See, e.g.*, RPF 145, 152-58, 161, 275.

¹²⁰ RPF 137-39, 166, 275.

¹²¹ *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

¹²² *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”).

¹²³ *Id.* at 766.

are qualified enough to be part of NTSP's limited panel. Among the legitimate reasons NTSP may refuse to messenger a payor contract are (1) avoiding illegal or potentially illegal contracts; (2) avoiding use of its resources in reviewing and servicing contracts when only a minority of its physicians will be involved; (3) avoiding credentialing and other activities in situations where NTSP does not want that burden; (4) avoiding situations that will drain NTSP's and its physicians' time and resources through the use of incomprehensible compensation methodologies; (5) avoiding payors who are discriminating against NTSP's physicians; (6) avoiding payors who are not financially sound; (7) avoiding medical plans that appear risky from a medical treatment standpoint; (8) avoiding situations that appear legally risky to NTSP from a financial, administrative, or standard-of-care standpoint; (9) avoiding payors who are undercutting a NTSP risk contract; (10) avoiding payors who are breaching an existing contract; (11) avoiding payors who have engaged in deceit or other conduct condemned by state officials; (12) avoiding payors who refuse to share medical data with NTSP to assist in NTSP's medical management goals; and (13) avoiding situations where NTSP is not given time to make a knowledgeable decision on the offer.¹²⁸ Even 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.¹²⁹ NTSP's refusals to deal are lawful under the *Colgate* doctrine and do not support an inference of collusion.

All of the payors on whom Complaint Counsel has based this case have engaged in conduct falling within one or more of the above thirteen reasons. Many payors — including United Healthcare, Aetna, Cigna, and Blue Cross — have been fined millions of dollars and

¹²⁸ See, e.g., RPF 165-66, 168-75, 177-82.

¹²⁹ RPF 163, 169, 171.

reprimanded by the Texas Department of Insurance (“TDI”) for engaging in improper activities.¹³⁰ One of Aetna’s witnesses, Dr. Jagmin, was personally censured by the TDI for making improper misrepresentations.¹³¹ Complaint Counsel has tried to argue that these types of “bad acts” are irrelevant and that NTSP has not tied these acts to its allegedly anticompetitive conduct. Both arguments are incorrect.

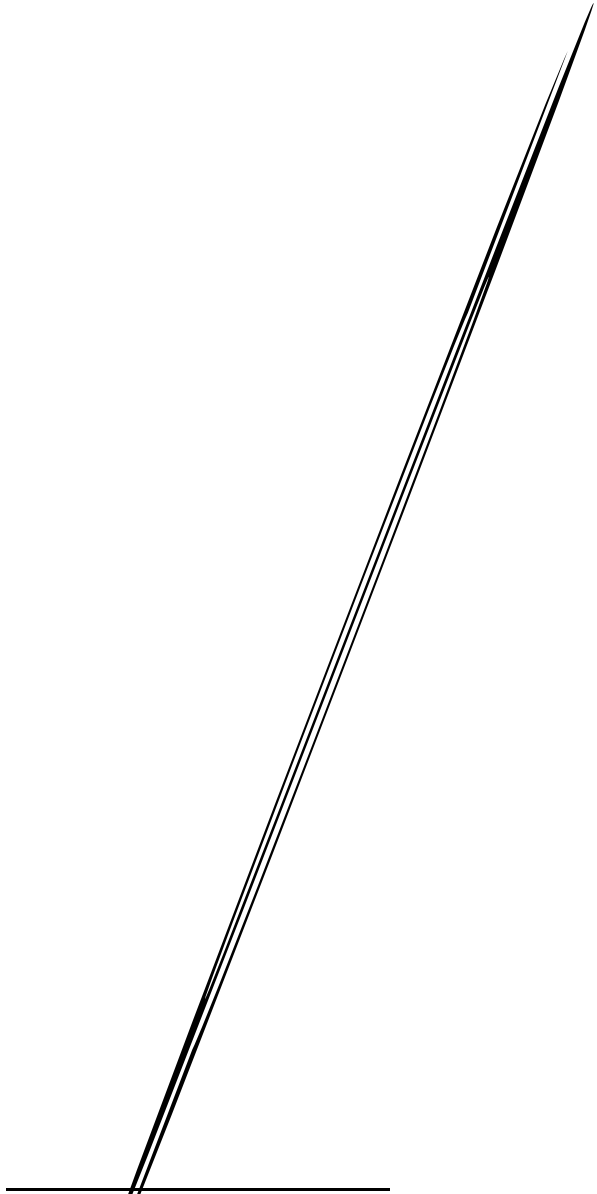
As noted by the Administrative Law Judge, the payors’ conduct goes to the bias and credibility of any witness testifying at the hearing. The conduct is also important to put into context many of the communications between NTSP and the participating physicians that Complaint Counsel challenges. Because the payors have a history of violating the law, NTSP has a legitimate basis — unrelated to any allegedly anticompetitive conduct — to advise the physicians to be cautious about hard-to-understand contractual language or payment methodologies. In fact, Dr. Frech opened the door to the relevance of the payors’ conduct by claiming that NTSP acted improperly by advising physicians to take time to review payors’ offers and to be wary of non-RBRVS compensation methodologies.¹³² NTSP has a right at trial

¹³⁰ RPF 175, 190-91, 193, 358-59, 365, 374, 376, 403, 440-41, 450.

¹³¹ RPF 175, 190, 358-59.

¹³² *See, e.g.*, Frech, Tr. 1309-11, 1314-16, 1342-43, 1450-51.

¹³³ *See* FED. R. EVID. 404(b) (stating that evidence of other crimes, wrongs, or acts is admissible to show “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”).



¹³⁴ See, e.g., RPF 189, 194, 364, 378, 403, 441.

¹³⁵ RPF 182, 384-85.

¹³⁶ RPF 389-91, 393-94.

¹³⁷ RPF 418-20, 422-23, 426-28, 432, *in camera*.

making its own decisions and managing its own resources, the more critical point is that the cited activities are not what the physicians did. Any theory of conspiracy and collusion – which is a required showing for Complaint Counsel’s case – must show what the physicians actually did and why. Complaint Counsel not only does not do that, but Dr. Frech admits that the physicians

¹³⁹ RPF 270.

¹⁴⁰ RPF 268-69.

¹⁴¹ RPF 311, 329, 333-34, 336-38, 342, 346, 355, 411-12, 415-16, 425, 433-34, 443-44.

contracts.¹⁴² This principle also applies to tied offers, which are ones where a risk offer and a fee-for-service offer are linked together and an IPA must take both or neither.¹⁴³

Complaint Counsel also challenges NTSP's communications with physicians related to NTSP's service as a class representative in litigation against Medical Select Management ("MSM"), an IPA that failed to pay the physicians in a timely and full manner.¹⁴⁴ The Texas Department of Insurance eventually took over MSM, and MSM later filed for bankruptcy following disclosure of financial malfeasances by its management.¹⁴⁵ One of MSM's former executives is currently serving a prison term for some of that malfeasance.¹⁴⁶ NTSP eventually made a substantial recovery in the bankruptcy court on behalf of the physicians in the class action.¹⁴⁷

Competitive tensions also exist among NTSP and the payors, and those tensions explain the context of many communications challenged by Complaint Counsel. In other words, instead of NTSP and the payors always being in a vertical relationship, NTSP and the payors often compete horizontally for contracts or to manage the provision of health care services, including utilization or medical management. The United situation with the City of Forth Worth is an example of the former situation, where NTSP was competing with a payor to continue to provide health care services under a risk contract. NTSP had a risk contract under which it was

¹⁴² See Fed. Trade Comm'n and U.S. Dept. of Justice, Statements of Antitrust Enforcement Policy in Health Care, statements 8 and 9 (1996).

¹⁴³ RPF 336-37.

¹⁴⁴ RPF 339, 343, 346-47, 353.

¹⁴⁵ RPF 350-52.

¹⁴⁶ RPF 352.

¹⁴⁷ RPF 353.

providing services to the city's employees, retirees, and their dependents.¹⁴⁸ United tried to

¹⁴⁸ RPF 384.

¹⁴⁹ RPF 385, 394.

¹⁵⁰ *See* TEX. INS. CODE ANN. § 843.363 (Vernon 2004).

¹⁵¹ RPF 384-85, 388-93.

¹⁵² RPF 183.

¹⁵³ RPF 371.

¹⁵⁴ RPF 26, 53, 74, 81-83, 85-87, 92, 96, 101, 106-07, 118.

¹⁵⁵ RPF 111.

¹⁵⁶ RPF 371.

¹⁵⁷ RPF 371-73, 377.

and pharmacy costs.¹⁶³ A physician, especially a specialist physician, can have an impact on controlling all three types of costs.¹⁶⁴ As noted by Dr. Wilensky, the quantity and mix of services provided, not physician reimbursement rates, are the biggest drivers of health care costs.¹⁶⁵ Unit cost, which is what Complaint Counsel has focused on here, is not the proper outcome measure.¹⁶⁶ NTSP's business model and risk contracts motivate participating physicians to become concerned about utilization and to control total medical expense, including facility and pharmacy costs.¹⁶⁷ NTSP's model reduces overall medical costs on risk contracts through the development of a comprehensive medical management process involving all segments of the continuum of care, including physician, facility, and pharmacy costs.¹⁶⁸

By offering to keep its team of risk panel physicians together when contracting, NTSP creates and fosters organizational capital that benefits patients because physicians have developed teamwork improvements.¹⁶⁹ This teamwork fosters close relationships and daily interactions that generate greater medical care rapport and information sharing that improve the quality and lower the cost of patient care.¹⁷⁰ Peer pressure and peer morale are important factors that impact a physician's behavior.¹⁷¹ It is more likely NTSP will be able to carry over the efficiencies gained on its risk contracts to non-risk contracts if the same physicians are involved

¹⁶³ RPF 304.

¹⁶⁴ RPF 304.

¹⁶⁵ RPF 302.

¹⁶⁶ RPF 302.

¹⁶⁷ RPF 305.

¹⁶⁸ RPF 25.

¹⁶⁹ RPF 81.

¹⁷⁰ RPF 81.

¹⁷¹ RPF 83.

in both types of contracts.¹⁷² In other words, spillover effects will be greater if there is more continuity among the physicians who practice under NTSP's risk contracts and non-risk contracts.¹⁷³

Dr. Wilensky confirmed that the data and logic show that spillover occurs from NTSP's risk-contracting activities to its fee-for-service activities that are at issue in this proceeding.¹⁷⁴ For each NTSP physician on the risk panel, there are expected to be — and there are — significant spillover effects from the physician's risk practice to the physician's fee-for-service practice.¹⁷⁵ Many of the techniques that allow NTSP to maintain low medical costs in its risk contracts directly carry over to its non-risk contracts.¹⁷⁶ This comports with the recognition that managed care programs are desirable not only for the effects they produce for their own enrollees but also for the effects they have on the communities in which they are located.¹⁷⁷ Because NTSP's conduct is beneficial for patients and the community at large, it should not be forced to change its behavior in this proceeding.

¹⁷² RPF 114.

¹⁷³ RPF 113-14.

¹⁷⁴ RPF 86-87.

¹⁷⁵ RPF 87.

¹⁷⁶ RPF 87.

¹⁷⁷ RPF 91.

The “Commission has only such jurisdiction as Congress has conferred upon it by the Federal Trade Commission Act.”¹⁷⁸ When the jurisdiction of the Commission is challenged, the Commission bears the burden of establishing its jurisdiction.¹⁷⁹

1. NTSP is not an association acting for the profit of any members.

Under Section 5 of the FTC Act, the Commission has jurisdiction to prevent only “corporations” from using unfair methods of competition.¹⁸⁰ The FTC Act defines “corporation” to include “any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members.”¹⁸¹ In addition to proving that NTSP is a “corporation” under the FTC Act, Complaint Counsel must also show that NTSP is an association acting for the pecuniary interest of its participating physicians.¹⁸²

Complaint Counsel cannot meet its burden of proof for at least two reasons. First, NTSP is incorporated under Section 162.001 of the Texas Occupations Code, formerly Section 5.01(a) of the Texas Medical Practice Act, as an organization with no members.¹⁸³ That statute allows for the corporate practice of medicine by non-profit entities involved in research, medical education, or the delivery of health care to the public.¹⁸⁴ Because NTSP is a memberless

¹⁷⁸ *Community Blood Bank v. FTC*, 405 F.2d 1011, 1015 (8th Cir. 1969).

¹⁷⁹ *Id.*

¹⁸⁰ 15 U.S.C. § 45.

¹⁸¹ 15 U.S.C. § 44.

¹⁸² *See* 15 U.S.C. § 45.

¹⁸³ TEX. OCC. CODE ANN. § 162.001 (Vernon 2004).

¹⁸⁴ *Id.* Specifically, the text of the statute directs the Texas State Board of Medical Examiners to approve the formation of an organization if it meets these requirements:

- (b) The board shall approve and certify a health organization that:
 - (1) is a nonprofit corporation under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq.,

organization, it falls outside the definition of a “corporation” under the FTC Act. The Commission, therefore, lacks jurisdiction over NTSP.

Second, NTSP is a nonprofit corporation that makes no money from the non-risk contracts entered into by its participating physicians – the contracts at issue in this case.¹⁸⁵ What funds NTSP does have are generated from two sources: (1) a one-time \$1000 fee when a physician’s application to NTSP is accepted, and (2) NTSP’s share of the profits from its risk contracts.¹⁸⁶ NTSP was formed in order to enter into risk contracts for medical care; in the past five years it has had capitation or other risk-type contracts with Amcare, Cigna, and PacifiCare.¹⁸⁷ Subsequent to its formation, NTSP has also messengered some non-risk contracts to its participating physicians.¹⁸⁸ Its foremost motivation, however, is to be involved in contracts that activate the network NTSP created and uses for risk contracts, with the goal that payors will eventually allow the network to take on additional risk contracts.¹⁸⁹

Vernon’s Texas Civil Statutes) organized to:

- (A) conduct scientific research and research projects in the public interest in the field of medical science, medical economics, public health, sociology, or a related area;
 - (B) support medical education in medical schools through grants and scholarships;
 - (C) improve and develop the capabilities of individuals and institutions studying, teaching, and practicing medicine;
 - (D) deliver health care to the public; or
 - (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.

¹⁸⁵ See TEX. REV. CIV. STAT. ANN. Art. 1396-1.02(A)(6).

¹⁸⁶ RPF 127.

¹⁸⁷ RPF 5.

¹⁸⁸ RPF 4.

¹⁸⁹ RPF 4, 18-19, 27-28, 106, 121-22, 164-65.

To determine whether a nonprofit entity is organized to carry on business for its own profit or that of its members, there is no “threshold percentage of activity” of the nonprofit entity’s total activities which must be aimed at its members’ pecuniary benefit.¹⁹⁰ Courts look to the pecuniary benefit received by members of nonprofit organizations.¹⁹¹ Thus, if it were determined that NTSP had any members (even though that would conflict with applicable law), Complaint Counsel must still prove that NTSP provided pecuniary benefits to its “members.” But there is no evidence in the record that NTSP provided any tangible, pecuniary benefits to them.

Finally, even if NTSP was considered to be organized for the profit of its “members,” NTSP still does not come within the jurisdiction of the Federal Trade Commission because there is no evidence of collusion among NTSP and the participating physicians; accordingly, the only potential basis for liability would be NTSP’s refusals to act. But a refusal to act does not

¹⁹⁰ *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 766 (1999).

¹⁹¹ *See, e.g., In re Mich. State Med. Soc’y*, 101 F.T.C. 191 (1983).

¹⁹² *See, e.g., RPF* 150-62.

¹⁹³ 15 U.S.C. § 45.

¹⁹⁴ 15 U.S.C. § 44.

jurisdiction under Section 5, the Commission has applied the same legal standards as federal courts have applied under the Sherman Act.¹⁹⁵

Complaint Counsel has the burden to show that the actual conduct of NTSP at issue affected interstate commerce or that NTSP operates in interstate commerce.¹⁹⁶ Further, this effect must be considered in proportion to NTSP's business as a whole.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ Because NTSP has contested jurisdiction, Complaint Counsel "must

¹⁹⁵ See *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241-42 (1980).

¹⁹⁶ *Id.* at 242.

¹⁹⁷ *Musick v. Burke*, 913 F.2d 1390, 1395 (9th Cir. 1990).

¹⁹⁸ *McLain*, 444 U.S. at 242; *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994).

¹⁹⁹ *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 331 (1991).

²⁰⁰ *McLain*, 444 U.S. at 242 (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 202 (1974)).

purchases from vendors located outside the state of Texas. Complaint Counsel cannot prove an effect on interstate commerce under any of its four theories.

First, there is no evidence of any collusion among NTSP and participating physicians. Accordingly, there are no collective price negotiations or similar joint conduct that could affect interstate commerce.

Second, there is no evidence that the actions of the participating physicians can be attributed to NTSP. What evidence Complaint Counsel presents does not connect the actions of NTSP with any effects on interstate commerce. Instead, Complaint Counsel attempts to show an effect on interstate commerce by evidence of isolated instances of out-of-state equipment purchases, patients, and insurance carriers for individual physicians while failing to show evidence of any conspiracy or collusive action by physicians connecting them with the alleged anti-competitive conduct of NTSP. This evidence relates only to individual physicians, not NTSP. Any individual conduct of physicians which may meet the requirements for interstate commerce is irrelevant in this action against NTSP because, as discussed previously, Complaint Counsel has not shown as a matter of law that the individual physicians are involved in the alleged anticompetitive conduct.

Third, there is no evidence that NTSP the entity has provided any medical services to patients outside the state of Texas. Again, those services are provided by the participating physicians and cannot be attributed to NTSP.

Finally, there is no evidence that NTSP's out-of-state purchases or dealings with Texas insurers confer jurisdiction. Courts have recognized that out-of-state purchases and insurance are only factors to be considered and do not necessarily compel a finding of effects on interstate

²⁰¹ *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

nature of the relevant markets. During opening statements, Complaint Counsel admitted that the failure to messenger a contract, without more, is not an antitrust violation.²⁰⁵ Complaint Counsel on the other hand indicated that it would seek relief that “broadly requir[es] NTSP to messenger contracts.”²⁰⁶ But as shown by the evidence and the briefing, there are many legitimate reasons why NTSP should not be mandatorily enjoined to become party to and messenger payor contracts.²⁰⁷

A mandatory injunction is an extraordinary remedy that should be granted in only compelling circumstances.²⁰⁸ A party seeking a mandatory injunction must make a higher showing of clear entitlement to the relief under both the facts and the law.²⁰⁹ Mandatory injunctions are not favored because they compel a person to act.²¹⁰ Complaint Counsel’s requested remedy would do exactly that which is disfavored by the courts – compel NTSP to act by becoming a party to and messenger contracts.

To issue a mandatory injunction to become party to and messenger contracts would subject NTSP to crippling liability and risk. NTSP would also be forced into contracts well outside its team-centered business model. Some of the numerous problems raised by Complaint Counsel’s proposed relief can be seen from the following list:

²⁰⁵ Complaint Counsel’s Opening Statement, Tr. at 60.

²⁰⁶ Complaint Counsel’s Opening Statement, Tr. at 60.

²⁰⁷ *See, e.g.*, RPF 163-82.

²⁰⁸ *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980); *Justin Indus., Inc. v. Choctaw Sec., L.P.*, 747 F. Supp. 1218, 1220 (N.D. Tex. 1990), *aff’d*, 920 F.2d 262 (5th Cir. 1980).

²⁰⁹ *Justin Indus., Inc.*, 747 F. Supp. at 1220.

²¹⁰ *Id.*

²¹¹ In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

250 U.S. at 307.

²¹² In *Consolidated Metal Products, Inc. [v. Am. Petroleum Inst.]*, 846 F.2d [284 (5th Cir. 1988)] 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 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. . . . Moreover, [defendant] GAC has, at most, a 20% market share in orthodontic brackets. Therefore, GAC's refusal to market on behalf of Viazis could not significantly impede his ability to market the brackets, either independently or through GAC's competitors.

314 F.3d at 766. NTSP as a non-profit entity has an even greater right to refuse than did the association in *Viazis*.

²¹³ There are many legal prohibitions which can come to play in payor proposals. *See, e.g.*, 28 TEX

5. Forcing NTSP into providing credentialing, utilization management, or other services under a contract which Respondent NTSP does not wish to provide;²¹⁵
4. Requiring use of a compensation methodology or inconsistent contractual terms which are not readily understood or easily able to be monitored for contractual compliance;²¹⁶

²¹⁵ Complaint Counsel has conceded that NTSP is not an essential facility. Complaint Counsel's Opening Statement, Tr. 9-10; Frech, Tr. 1398. The Supreme Court has also refused to acknowledge the validity of the essential facility doctrine. *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004).

²¹⁶ Unclear contractual terms engender disputes and increase transaction costs. The agencies recognize the need for clarity of proposed contractual terms.

The agent also may help providers understand the contracts offered, for example by providing objective or empirical information about the terms of an offer (such as a comparison of the offered terms to other contracts agreed to by network participants).

Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, Statement 9.

At the request of a participating provider, the messenger may communicate objective information to that provider about a proposed payer contract or its terms, including objective comparisons with terms offered to that participating provider by other payers. "Objective information" or "objective comparison" constitutes empirical data that is capable of being verified or a comparison of such data.

Midwest Behavioral Healthcare LLC, DOJ Business Review Letter (Feb. 4, 2000) at <http://www.usdoj.gov/atr/public/busreview/4120.htm>.

Further Provided That nothing in this order shall be construed to prohibit BPHA from continuing to function as a physician-hospital organization that is not a risk-sharing or otherwise integrated entity, as long as each of the following conditions is met:

* * *

(b) BPHA's role in the contracting process between third-party payers and physician members of BPHA is limited to:

* * *

(iii) soliciting or receiving from a third-party payer, and conveying to a physician member of BPHA, clarifications of proposed contract terms;

(iv) providing to a physician member of BPHA objective information about proposed contract terms, including comparisons with terms offered by other third-party payers;

* * * *

Montana Associated Physicians, Inc., 123 FTC 62, 71-72 (1997).

²¹⁷ Weiss ratings are ratings on the financial security and resources of insurers and HMOs.

²¹⁸ *See* TEX. CIV. PRAC. & REM. CODE § 88.002(a) (“A health insurance carrier, health maintenance organization, or other managed care entity for a health care plan has the duty to exercise ordinary care when making

operations,²¹⁹ 2) the Constitutional and statutory propriety of NTSP's monitoring and preventing misconduct by payors,²²⁰ and 3) the mandate under Texas law to keep patients and their representatives advised as to information and opinions regarding the terms and services of the patient's health care plan; the termination of the provider's contract with the patient's health care plan; or any other reasons for the provider's no longer providing services under the patient's health care plan.²²¹ NTSP will address these points in more detail after it reviews Complaint Counsel's post-trial brief.

III.

CONCLUSION

Respondent's prediction in its pretrial briefs has turned out to be correct – Complaint Counsel's case at trial was little more than a mish-mash of miscellaneous facts mentioning NTSP, without any proof as to actual collusion by physicians, the contours of a realistic relevant market, or actual anticompetitive effects. Respondent accordingly 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 justly entitled.

²¹⁹ *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 765 (5th Cir. 2002).

²²⁰ *See Video Int'l Prod., Inc. v. Warner-Amex Cable Communications*, 858 F.2d 1075, 1082-83 (5th Cir. 1988) (explaining *Noerr-Pennington* antitrust immunity for interactions with the government).

²²¹ TEX. INS. CODE ANN. § 843.363 (Vernon 2004).

Respectfully submitted,

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