[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 REPLY BRIEF

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Complaint Counsel has staked its entire case on the Administrative Law Judge overlooking two huge holes in its case — (1) the failure to prove actual collusion among or with physicians, and (2) the failure to address and prove what anticompetitive effects the actions of Respondent North Texas Specialty Physicians ("NTSP") had on competition among physicians in the relevant markets. Accordingly, Complaint Counsel's case fails, *inter alia*, on the central issues of conspiracy and unreasonable restraint of trade.

Complaint Counsel seems to argue that NTSP is a "walking conspiracy." But that argument conflicts directly with the Fifth Circuit's decision in *Viazis v. American Ass'n of Orthodontists*.[1]

Complaint Counsel purports to base its case on the Commission's decision in *In re Polygram Holding, Inc.*,[2] which is now on appeal to the D.C. Circuit. *Polygram* comes into play, however, only after collusion has been proven and, consistent with the Supreme Court's decision in *California Dental Ass'n v. FTC*,[3] still requires, in a situation like NTSP's, proof of actual anticompetitive effects in a relevant market. Complaint Counsel has proven neither collusion nor anticompetitive effect in a relevant market in this case.

Complaint Counsel must try to establish liability under some form of rule-of-reason analysis,[4]

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[1] 314 F.2d 758, 764 (5th Cir. 2002).

[2] Docket No. 9298 (July 24, 2003).

[3] 526 U.S. 756 (1999).

[4] Although Complaint Counsel suggests a *per se* approach as mentioned in the Commission's *Polygram* decision, the Commission has now abandoned that approach in the *Polygram* appeal in favor of "an abbreviated rule of reason analysis." *See* Final Brief for the Respondent Federal Trade Commission at 14, *Polygram Holding, Inc. v. FTC*, No. 03-1293 (D.C. Cir. 2003).

but has chosen to duck the issue for obvious reasons. Because NTSP's conduct "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," a quick-look rule of reason approach does not apply.[5] And Complaint Counsel has not (and cannot) prove liability under any approach,[6] much less a full rule-of-reason analysis, because — among other things — Complaint Counsel's economist admits that he has not defined ***any*** relevant market in this case.

In sum, Complaint Counsel cannot carry its burden of proof to establish liability under any theory — because there is no proof of actual collusion and because Complaint Counsel has not proven actual anticompetitive effects in a relevant market.

In addition to rejecting Complaint Counsel's liability theories based on the *per se* rule and *Polygram*, the Administrative Law Judge should also reject Complaint Counsel's invitation to analyze NTSP's documents in a vacuum outside their proper context. During the ten days of hearings in this matter, NTSP introduced exhibits and elicited testimony from numerous witnesses, including the payors' representatives, about the proper context of the communications among NTSP, the payors, participating physicians, and patients (like the City of Fort Worth's employees). Despite all that evidence — about how NTSP has reported the payors to regulators for improper contracting activities, about how those regulators agreed with NTSP and fined the payors *millions of dollars*, about how Texas law gives physicians a right to communicate with patients about network adequacy issues and

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[5] *Cal. Dental*, 526 U.S. at 771.

[6] In fact, the failure to define any relevant market also undermines Complaint Counsel's ability to rely on the *per se* rule. *See Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) ("The categories of *per se* illegal practices are an approximation, a shortcut to reach conduct that courts can safely assume would surely have an anticompetitive effect. Thus, it is an element of a *per se* case to describe the relevant market in which we may presume the anticompetitive effect would occur."); *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 558-59 (8th Cir. 1998) ("Thus, a plaintiff alleging a horizontal restraint must at least define the market and its participants, which, for reasons discussed below, Double D has failed to do."); *Goss v. Mem'l Hosp. Sys.*, 789 F.2d 353, 355-56 (5th Cir. 1986) (finding that *per se* rule cannot apply to group boycott unless plaintiff shows market power).

compensation rates, and about how NTSP was involved in litigation with the payors or entities closely related to them, just to name a few — Complaint Counsel continues to incorrectly suggest that those communications create antitrust liability.

The most egregious example of Complaint Counsel ignoring what transpired during the ten days of hearings is the continued suggestion that NTSP acted improperly by meeting and communicating with

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[7] CPF 182-203, 206-08; Post-Trial Complaint Counsel's Brief at 18-21.

[8] Tr. 1149-50 (emphasis added).

[9] *See Community Blood Bank v. FTC*

independently whether to enter into a contract with a health plan and whether to do so through NTSP or another avenue.[16] Complaint Counsel also challenges alleged refusals to deal by NTSP, but such a refusal cannot provide a pecuniary benefit to any participating physicians.

Complaint Counsel also has not shown that NTSP's activities satisfy the commerce requirement of the FTC Act. Any unilateral refusal to deal by NTSP would not qualify as "commerce among the several states."[17] Complaint Counsel improperly focuses on conduct by participating physicians rather than NTSP the entity.[18] Complaint Counsel's reliance on allegations of "collective price negotiations"[19] fails because there is no evidence of any collusion involving physicians. Complaint Counsel then tries to rely on NTSP's contacts with "national insurers" that are "doing business in the Fort Worth area,"[20] even though NTSP deals only with Texas subsidiaries, located in Texas, and no evidence shows any impact NTSP has on the interstate commerce of an insurer, rather than an insurer engaged in interstate commerce.[21] Complaint Counsel suggests that NTSP's conduct impacted "national and multinational corporations, with local operations in Fort Worth."[22] But no evidence supports these claims. The Administrative Law Judge sustained NTSP's objections to any such evidence because Complaint Counsel failed to call any of those corporations as a witness.[23]

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16 RPF 137-38, 159-62, 267, 271-76.

17 15 U.S.C. §§ 44-45.

18 *See* CC's Post-Trial Brief at 67-68.

19 CC's Post-Trial Brief at 67.

20 CC's Post-Trial Brief at 67.

21 *Page v. Work*, 290 F.2d 323, 330 (9th Cir. 1961).

22 CC's Post-Trial Brief at 67.

23 Tr. 477-80.

> of purpose are engaged in concerted action, whether or not they act under one name. As we explained in *Nanavati*, in the absence of a co-conspirator, ***an association's actions satisfy the concerted action requirement only when taken in a group capacity***.[28]

Instead of citing to this portion of the Third Circuit's analysis, Complaint Counsel instead cites to a parenthetical in footnote 11 of *Alvord-Polk*, which contains a quote from a twenty-four-year-old article published in the *Antitrust Law Journal*, which is hardly binding authority. , what Tj -197431 -30 TD -0.49439

[28] *Alvord-Polk*, 37 F.3d at 1009 (emphasis added).

[29] *See Alvord-Polk*, 37 F.3d at 1009 n.11 (citing Stephanie W. Kanwit, *FTC Enforcement Efforts Involving Trade and Professional Associations*, 46 ANTITRUST L.J. 640, 640 (1977) ("Because trade associations are, by definition, organizations of competitors, they automatically satisfy the combination requirements of § 1 of the Sherman Act.")).

[30] 37 F.3d at 1013.

[31] *See Alvord-Polk*, 37 F.3d at 1014 ("It is simple syllogistic reasoning that if FSC was aware that most of its dealers were conventional retailers, and believed that its products sold better in the conventional setting, it would conclude that it was in its economic interests to keep the conventional retailers satisfied. That FSC may have foregone some short-term opportunity for sales to 800-number dealers does not suffice to show it acted contrary to its self-interests when its actions clearly would benefit it economically in the long term.").

[32] *See* 15 U.S.C. § 45(c) ("Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business . . . .").

five types of unilateral conduct by NTSP: (1) "polling and disseminating averaged price data on future prices, and collectively setting and sharing minimum contract prices based thereon"; (2) "negotiating prices with health plans on behalf of" physicians; (3) "collecting powers of attorney from" physicians; (4) "campaigning among" physicians "to press employers to assist NTSP in negotiating higher physician fees with health plans"; and (5) "threatening to terminate and terminating existing contracts with health plans."[36] None of this conduct, even if true, can support *per se* liability.

In looking at each alleged type of conduct, Complaint Counsel's expert will be quoted as to the allegation, and the allegation will then be further discussed.

> Q. Let's turn to the poll. It's correct, is it not, that the people who respond to the poll do not know the responses by any other responder?

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[36] CC's Post-Trial Brief at 60-61.

[37] Frech, Tr. 1436.

[38] RPF 121, 124-26, 164-65.

[39] RPF 133, 136, 150-51, 159.

[40] RPF 140.

if so, what that response was.

[41] RPF 130-133, 136, 150-51.

[42] RPF 129, 135.

[43] RPF 286.

[44] RPF 155, 161, 284, 286.

[45] *See, e.g.*, RPF 137-39, 160-61, 267.

[46] RPF 161, 286.

[47] Frech, Tr. 1370.

[48] Frech, Tr. 1365.

> isn't it true that you have no knowledge of any doctor that refused to participate in a contract offer by a payor because of a PPA?
> A. That's true.[49]
>
> Q. Have you found any doctor in all of your work that adhered to the NTSP board minimum when it came time for him to individually contract?
> A. I hadn't seen evidence that would bear on that.[50]
>
> Q. Have you ever seen any instance in which NTSP has gone to a payor to talk about a price that was above its minimum?
> A. No, hadn't seen that.[51]

The evidence shows that NTSP does not negotiate prices on non-risk contracts. Instead, NTSP uses the poll to set its own internal threshold levels for NTSP's being involved in non-risk HMO and PPO offers. If a payor wants to activate NTSP, the payor can do so by offering rates that meet those thresholds; if the payor does not want to do so, the payor can then contract directly with participating physicians or through entities besides NTSP.[52] The evidence shows that each physician or physician group makes its own independent decision whether to accept or reject an offer messengered by NTSP,[53] and each physician or physician group also can and does contract with payors directly or through other IPAs.[54] In other words, even if Complaint Counsel could prove that NTSP negotiates prices (and it does not), NTSP cannot bind the physicians to those prices — which is consistent with the lack of direct or circumstantial evidence of collusion discussed above.

Complaint Counsel's apparent theory borders on the ludicrous – if NTSP decides to participate

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[49] Frech, Tr. 1368.

[50] Frech, Tr. 1372-73.

[51] Frech, Tr. 1370.

[52] RPF 267-69, 271-76.

[53] RPF 155, 161, 284, 286.

[54] RPF 267, 271-76.

[55] Frech, Tr. 1368-69.

[56] RPF 149 (emphasis added).

[57] CC's Post-Trial Brief at 8 ("In addition to the Participation Agreement, at various times, NTSP has collected 'powers of attorney' from its member physicians, giving NTSP the right to negotiate contract terms– including price

participating physicians from making independent decisions on payor contracts;[61] (5) the powers of attorney did not commit a physician to accept or reject an offer;[62] and (6) in at least one case, the powers of attorney were never delivered to the payor or used.[63]

> Q. Were you aware that NTSP had a contract with the City of Ft. Worth that it, United, was trying to supplant?
> A. NTSP had a contract with the city itself? I wasn't aware of that.
> Q. Through PacifiCare.
> A. Oh, PacifiCare? Well, okay, I'm sorry, I had it wrong. They were trying to – United was trying to compete with PacifiCare is my understanding, and I know NTSP had a contract with PacifiCare.

Physicians contacting employers does not give rise to any antitrust liability. As mentioned in the introduction to this brief, Complaint Counsel has stipulated to the participating physicians' right toincludwas t the

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61 RPF 289.

62 RPF 289.

63 RPF 401.

64 Tr. 1149-50 (emphasis added).

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

require – a theory Complaint Counsel never supports logically, empirically, or legally.

> Q. You mentioned at one point in your direct examination that you believe that NTSP had terminated an Aetna contract?
> A. No, I believe it had threatened to terminate the Aetna contract. My understanding is they didn't actually terminate.
> Q. Were you aware that the contract that was terminated was an MSM contract?
> A. I believe they got -- I don't know exactly the connection. I think it may have been through -- originally through MSM.
> Q. Were you also aware that NTSP had filed a litigation saying that MSM had been breaching that contract for several years?
> A. I don't know the details. I know they had filed some litigation against MSM.[66]

Complaint Counsel's allegations about terminating or threatening to terminate contracts with health plans (once again) float with no mooring in the record evidence of what actually occurred. Complaint Counsel has not addressed the undisputed evidence showing that the terminations or threats at issue concerned NTSP exercising its rights under the contracts at issue. The Cigna situation is a perfect example of how ignoring record evidence can create a misimpression about the legality of NTSP's conduct. The contract between Cigna and NTSP expressly applied to **[**

][67]

During cross-examination, Rick Grizzle, a Cigna representative called to testify by Complaint Counsel, admitted that primary care physicians ("PCPs") are considered "specialists."[68] For that reason, Cigna breached the contract by not allowing the specialist PCPs to participate in the contract.[69] Based on

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[66] Frech, Tr. 1443.

[67] RX 20, *in camera* (emphasis added); *accord* RPF 426.

[68] RPF 427.

[69] RPF 428.

Cigna's refusal to abide by the contract's terms — and not based on some allegedly anticompetitive agreement — NTSP sent its notice of termination to Cigna in June 2000.[70]

NTSP's dealings with other payors provide similar examples of situations where NTSP terminated agreements based on contractual or other legal rights. For example, NTSP, as class representative for the participating physicians, sued MSM in 1999 to enforce contractual rights that MSM was violating by not paying the physicians' claims.[71] NTSP terminated the MSM HMO contract in the fall of 2000 based on that litigation.[72] Likewise, NTSP had a contract with HTPN, a Dallas-based IPA, through which the participating physicians could access a contract between HTPN and United.[73] NTSP, as was its right, terminated its contract with HTPN for the treatment of United patients.[74] United even told physicians that the termination was a mutual decision.[75] Based on this undisputed evidence, Complaint Counsel has not proven anything other than NTSP's exercise of its contractual rights, which of course does not qualify for application of the *per se* rule. The end point of Complaint Counsel's argument is that an IPA has no rights, and payors have no duties, under the IPA's existing contracts. Again, Complaint Counsel provides no support for such an extraordinary proposition.

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[70] RPF 430.

[71] RPF 343-44.

[72] RPF 347.

[73] RPF 381-82.

[74] RPF 386.

[75] RPF 387.

b. *Polygram* does not excuse Complaint Counsel's failures in this case.

Realizing the fallacy of its argument under the *per se* rule, Complaint Counsel contends as a fall-back position that NTSP's conduct should be considered "inherently suspect" under *Polygram*, which would require (according to Complaint Counsel's interpretation) "NTSP to put forth plausible and cognizable justifications."

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[76] CC's Post-Trial Brief at 63.

[77] 124 S. Ct. 872 (2004).

[78] Even if *Polygram* applied, however, Complaint Counsel has misinterpreted that case for the reasons discussed below in section II(A)(2)(c).

[79] *Polygram*, Docket No. 9298, slip op. at 3-4.

[80] 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 economist admits that he cannot

identify any direct evidence of potentially collusive acts.[81] Unlike *Polygram*, there has been no proof of a collusive agreement among competing physicians that would even get Complaint Counsel to the issue of whether such an agreement or collusion supports an initial finding of "inherently suspect" under *Polygram*.

Complaint Counsel may try to argue that the Physician Participation Agreement ("PPA") constitutes an agreement for purposes of *Polygram*. Complaint Counsel has already (incorrectly) suggested that the PPA "grants NTSP the right to receive ***all*** payor offers and imposes on the physicians a duty . . . to promptly forward those offers to NTSP,"[82] and that the physicians agree not to pursue offers with payors in deference to NTSP.[83] But the PPA's express language shows that, in reality, there is no prohibition on physicians negotiating directly with payors. Section 2.1 of the PPA says only that NTSP has a right to ***receive*** all "Payor Offers," as that term is defined in Section 1.18 of the PPA; it does ***not*** say that a physician cannot negotiate directly, or through another entity, with a payor.[84] Second, by referring to a "Payor Offer," which is a defined term, Section 2.1 applies only to a very limited number of offers. Under Section 1.18 of the PPA, a "Payor Offer" is made by a "Payor," which is a term defined in Section 1.16 of the PPA to mean "any entity having an active Payor Agreement with NTSP."[85] In other words, Section 2.1 applies only to offers from payors who already

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[81] RPF 136-38, 153, 155-59.

[82] CPF 98.

[83] CPF 99.

[84] Response to CPF 99.

[85] Response to CPF 99.

[86] Response to CPF 99.

[87]

> parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919).[89]

Remarkably, Complaint Counsel's eighty-one-page post-trial brief does not directly address NTSP's *Colgate* argument or *Trinko.* In fact, Complaint Counsel does not cite either case in the argument section of its brief. Instead, Complaint Counsel mentions *Colgate* (but not *Trinko*) only in passing in the remedy section of its brief, claiming that NTSP is relying on "gauzy rationalizations, such as its entirely misplaced reliance on the *Colgate* doctrine."[90] This is an ironic statement because Complaint Counsel never addresses *Colgate* head-on, but instead relies upon a "gauzy,"[91] unsupported statement at the tail-end of its brief to repudiate an eighty-five-year-old Supreme Court case that was reaffirmed and strengthened six months ago in *Trinko.* Given the regard in which the Supreme Court holds *Colgate*, Complaint Counsel ought to explain ***in detail*** why the Administrative Law Judge should reject that case as "gauzy."

Trinko also provides valuable insight on the Supreme Court's reluctance to chill innovation and the development of networks by requiring the creator to provide access to anyone who asks. The plaintiff in *Trinko* sued Verizon Communications, the incumbent local telephone company in New York, for allegedly violating Section 2 of the Sherman Act by breaching duties imposed by the Telecommunications Act of 1996.[92] The Supreme Court framed the issue as follows:

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[89] *Trinko*, 124 S. Ct. at 879.

[90] CC's Post-Trial Brief at 76.

[91] Webster's defines "gauze" as follows: "1 a : a thin often transparent fabric used chiefly for clothing or draperies b : a loosely woven cotton surgical dressing c : a firm woven fabric of metal or plastic filaments 2 : HAZE." http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=gauzy. Complaint Counsel is apparently suggesting that NTSP's reliance on *Colgate*, which was reaffirmed by the Supreme Court earlier this year, is somehow thin, transparent, loose, or hazy.

[92] *Trinko*, 124 S. Ct. at 875.

> In this case, we consider whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act, 26 Stat. 209.[93]

While answering this issue, the Court initially noted that networks which create monopolies and monopoly prices are not automatically unlawful and stressed that they can enhance competition:

> The opportunity to charge monopoly prices — at least for a short period — is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[94]

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[93] *Trinko*, 124 S. Ct. at 875.

[94] *Trinko*, 124 S. Ct. at 879 (emphasis in original).

[95] *Trinko*, 124 S. Ct. at 882 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*, 475 U.S. 574, 594 (1986)).

[96] *Trinko*, 124 S. Ct. at 883 ("We conclude that respondent's complaint fails to state a claim under the Sherman Act.").

In addition to reaffirming *Colgate* and emphasizing a network's procompetitive effects, the *Trinko* Court highlighted the many problems with enforced sharing (or, in this case, enforced messengering), which "requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing — a role for which they are ill-suited."[97] Consistent with its disdain for enforced sharing, the Court found that a claim based on the "'essential facilities' doctrine crafted by some lower courts" was not viable because the Supreme Court has "never recognized such a doctrine."[98] As discussed above, the Court also emphasized the risks associated with overly aggressive enforcement and "false condemnations," which can "chill the very conduct the antitrust laws are designed to protect."[99] That concept is relevant here because Complaint Counsel would have the Administrative Law Judge find an antitrust violation based on an "inherently suspect" standard, despite the absence of any direct evidence of collusion, and impose a remedy that could chill NTSP's business model, which produces spillover, generates efficiencies, and improves health-care quality.[100]

Trinko also recognized that certain conduct, even if anticompetitive, cannot be remedied because it is "beyond the practical ability of a judicial tribunal to control."[101] That principle limits a court's ability to control conduct through a consent decree:

> We think that Professor Areeda got it exactly right: "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume

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97 *Trinko*, 124 S. Ct. at 879.

98 *Trinko*, 124 S. Ct. at 880-81.

99 *Trinko*, 124 S. Ct. at 882.

100 *See, e.g.*, RPF 23-25, 29-38, 41, 85-87, 95, 101, 103-05.

101 *Trinko*, 124 S. Ct. at 883.

> the day-to-day controls characteristic of a regulatory agency." Areeda, 58 Antitrust L. J., at 853.[102]

But that is exactly what Complaint Counsel seeks here — a remedy that would require NTSP to deal with all payors, irrespective of its *Colgate* right, and would involve the Commission in NTSP's day-to-day business. That would be improper. As the Supreme Court emphasized in *Trinko*, the antitrust laws forbid a regulator from imposing its own version of greater competition.[103]

iii. *Polygram* must be read consistently with *California Dental*

The Supreme Court in *California Dental* imposed a high evidentiary burden on a party (like Complaint Counsel) trying to prove that conduct has anticompetitive effects. The Court emphasized the need for empirical proof of actual anticompetitive effects before a defendant must submit any proof of procompetitive effects:

> Justice BREYER suggests that our analysis is "of limited relevance," *post*, at 1623, because "the basic question is whether this . . . theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case," *ibid.* He thinks that the Commission and the Court of Appeals "adequately answered that question," *ibid.*, but ***the absence of any empirical evidence on this point indicates that the question was not answered, merely avoided by implicit burden shifting*** of the kind accepted by Justice BREYER. The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, ***there must be some indication that the court making the decision*** has properly identified the theoretical basis for the anticompetitive effects and ***considered whether the***

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[102] *Trinko*, 124 S. Ct. at 883.

[103] *See Trinko*, 124 S. Ct. at 883 ("The Sherman Act is indeed the 'Magna Carta' of free enterprise, but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." (citation omitted)).

> ***effects actually are anticompetitive***. Where, as here, the circumstances of the restriction are somewhat complex, ***assumption alone will not do***.[104]

The Commission in *Polygram* apparently suggests an analytical step prior to the adjudication required in *California Dental*. *Polygram* required Complaint Counsel to "address the [respondent's] justification, and provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely"[105] if the respondent articulated "a legitimate justification."[106] NTSP has clearly shown that pursuing its own business model, avoiding unnecessary expense and risk, and insisting on payor compliance with applicable laws and contractual obligations is more than "a legitimate justification." Complaint Counsel, on the other hand, has not shown any anticompetitive effects, which is one of the reasons the case should be dismissed.

If Complaint Counsel interprets *Polygram* to mean that Complaint Counsel need not show anticompetitive effects, that interpretation is clearly wrong, both under *Polygram* and *California Dental*. Otherwise, Section 5 becomes a strict liability statute triggered only by the Commission's making a subjective interpretation of the conduct as "inherently suspect." Such an interpretation would clearly fly in the face of *California Dental*. Indeed, on appeal to the D.C. Circuit, the Commission in *Polygram* has now abandoned its burden-shifting approach, which "could be characterized as a finding

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[104] *Cal. Dental*, 526 U.S. at 775 n.12 (emphasis added).

[105] Docket No. 9298, slip op. at 33.

[106] Docket No. 9298, slip op. at 29.

of '*per se* illegality,'"[107] in favor of an argument based on "an abbreviated rule of reason analysis."[108] And *California Dental* requires Complaint Counsel to show actual anticompetitive effects under even an abbreviated or "quick-look" analysis.[109]

Because Section 5 requires proof of actual violation[110] and is not an incipiency statute,[111] any burden shifting which goes on eventually will lead to the analysis contemplated by *California Dental*'s empirical-evidence-of-effects-that-actually-are-anticompetitive standard. ***If*** a court of appeals determines that there is preliminary burden shifting as indefinitely suggested by *Polygram*, the burden on the respondent at any particular stage will never be greater than the burden already placed on Complaint Counsel. In other words, a respondent will not face the burden of making a showing of actual (as opposed to likely) fact prior to the time Complaint Counsel has faced the burden of making a showing of actual fact.[112]

In this case, NTSP has done much more than Complaint Counsel in shouldering and carrying the evidentiary burden of showing what has in fact transpired in the provision of healthcare in the Dallas-Fort Worth Metroplex. As noted during the ten days of hearings, however, Complaint Counsel

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[107] Docket No. 9298, slip op. at 49.

[108] Final Brief for the Respondent Federal Trade Commission at 14, *Polygram Holding, Inc. v. FTC*, No. 03-1293 (D.C. Cir. 2003).

[109] 526 U.S. at 775 n.12.

[110] Section 5, like Section 1, requires an actual contract, combination, or conspiracy. *See U.S. v. Am. Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984) (rejecting claim that "attempt" to violate Section 1creates liability).

[111] Incipiency statutes are those like Section 7 of the Clayton Act, which allows the Commission to stop mergers that "may" substantially lessen competition, 15 U.S.C. § 18, or Section 2 of the Sherman Act, which makes an "attempt to monopolize" unlawful. 15 U.S.C. § 2.

[112] *See Cal. Dental*, 526 U.S. at 775 n.12 (finding that Commission must submit "empirical evidence" showing that "effects actually are anticompetitive" before defendant has "burden to show empirical evidence of procompetitive effects").

[113] Response to CPF 11, 21-23, 460-62.

[114] Docket No. 9298, slip op. at 29.

[115] *Polygram*, Docket No. 9298, slip op. at 29.

[116] Complaint Counsel improperly claims — without citing to any case or other authority — that NTSP "must present evidence that its anticompetitive conduct did *in fact*

[119] *Polygram*, Docket No. 9298, slip op. at 33.

[120] RPF 150-62.

techniques used for its risk contracts and to then extend those same efficiencies to non-risk patients.[123] Even Complaint Counsel's economist admits that NTSP generates efficiencies and improves quality of care through spillover from its risk contracts to its non-risk contracts.[124] Spillover occurs because physicians normally do not change their practice patterns patient-by-patient once they have developed an improved technique.[125] The economic literature and Complaint Counsel's economist both recognize that spillover is maximized to the degree the teams performing the risk and non-risk medical care can continue to work together.[126] And NTSP's internal threshold levels for the entity's involvement in non-risk HMO and PPO contracts is consistent with achieving its teamwork model.[127]

NTSP's business model also prevents free riding, which is "a legitimate efficiency."[128] If NTSP were forced to messenger all offers and deal with all payors, without establishing a threshold level for its own involvement, payors would be able to free ride on the network that NTSP has developed and the efficiencies and spillover that it has created. By eliminating NTSP's ability to set its own threshold level of participation, Complaint Counsel would limit NTSP's incentives to develop further and improve its network because any improvements would have to be offered to all payors. That would be true regardless of what each payor was willing to pay and regardless of whether each one's offer would inordinately burden or weaken NTSP for its efforts to develop and improve its network.

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[123] *See, e.g.*, RPF 21-26, 85-87, 89, 117-18.

[124] RPF 86-87.

[125] RPF 88.

[126] RPF 113-14.

[127] RPF 113-18.

[128] *Polygram*, Docket No. 9298, slip op. at 41.

Allowing NTSP to establish threshold levels for its involvement in contracts also eliminates confusion in the marketplace. NTSP has the right to choose which offers in which it wants to participate and put its reputation as a high-quality IPA on the line. But if NTSP were forced to messenger all payor offers and deal with all payors, physicians would not know if the offer was based on NTSP's own assessment about the quality and reliability of the payor. That would be true for employers and patients as well. They would not know if NTSP was contracting with a payor based on an independent assessment of whether NTSP wanted to put its reputation on the line and deal with that payor, or whether NTSP was contracting with that payor because it was forced to do so by the government. For all these reasons, there can be no doubt that NTSP has articulated cognizable and plausible justifications for any alleged "inherently suspect" conduct.

Third, Complaint Counsel has not submitted ***any*** evidence to show that anticompetitive effects are likely. Instead of preparing any empirical data analyses of its own, Complaint Counsel has just criticized NTSP's data,[129] and that is improper. It is incredibly ironic that Complaint Counsel devotes an entire appendix of its post-trial brief to criticizing Dr. Maness, when its experts, Drs. Frech and Casalino, performed virtually no empirical data analyses in their reports. Fortunately for NTSP, however, Dr. French did perform just enough empirical analysis to disprove any collusion by showing that participating physicians do not follow NTSP's threshold contracting levels.[130]

The almost total absence of data analysis in Complaint Counsel's case explains why Complaint Counsel stoops to personally attack Dr. Maness, a former Bureau-of-Economics economist, for such

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[129] Response to CPF 11, 21-23, 460-62.

[130] RPF 160-61.

perceived deficiencies as not having taught in a tenure-track position.[131] Complaint Counsel's approach seems to be as follows: if you have no contrary data to attack the message, just attack the messenger and emphasize that your experts, although having done virtually no empirical analysis here, have previously been active in academia.[132] j84 utive4tT Tf -oiciis h

[131] Maness, Tr. 2094-95.

[132] Complaint Counsel has even gone so far as to attack an expert — Dr. Edward F. X. Hughes — who did ***not*** testify at the hearing. *See* CC's Post-Trial Brief at 44 ("For reasons sufficient to itself (and not known to the rest of us), NTSP did not do so, declining to have Dr. Edward F. X. Hughes, a medical doctor and holder of a Masters degree in Public Health, take the stand."). If Complaint Counsel must know, Dr. Hughes ruptured his Achilles Tendon and would have had difficulty traveling from Chicago to Fort Worth to testify. If NTSP had known that Complaint Counsel would use Dr. Hughes's absence to suggest that NTSP misled the Administrative Law Judge about the number of experts it intended to call, it might have reconsidered its decision not to make Dr. Hughes face the airports, security check points, airplanes, and wheel chairs that he would have endured during his trip to Fort Worth.

[133] *See, e.g.*, RPF 21-26, 85-87, 89, 117-18.

[134] RPF 113-16, 121-22.

[135] RPF 115.

[136] *See* RX 3118 (Maness Report ¶¶ 83-100); RPF 79, 81-83, 113-16.

[137] NTSP cannot be held to task for failing to use data to which it was refused access. NTSP would have liked to present additional proof of actual procompetitive effects, but the payors objected to the production of their data.

C. Complaint Counsel's analysis of NTSP's dealings with payors ignores critical record evidence.

In its proposed findings of fact and post-trial brief, Complaint Counsel relies on virtually the same evidence cited in its pre-trial filings and ignores other critical record evidence. During the ten days of hearings, NTSP (through cross-examination and otherwise) presented evidence showing that, taken in their proper context, the communications challenged by Complaint Counsel are not anticompetitive. The following explanations — organized by payor — highlight critical evidence that Complaint Counsel glosses over or ignores. This evidence, along with all of the other evidence cited in NTSP's proposed findings of fact, shows that "reliable, probative, and substantial evidence" supports NTSP's position.[143] Any attempt by Complaint Counsel to rely on a different standard of proof would be improper.[144]

1. NTSP's dealings with Aetna were not anticompetitive.

Much of what Complaint Counsel criticizes NTSP for relates to risk contract discussions. NTSP and Aetna were discussing a risk contract during 1999 and 2000.[145] Those discussions broke down, however, in October 2000 when Aetna refused to provide NTSP with the data NTSP needed to perform medical and utilization management.[146] After then, the parties began

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[143] 5 U.S.C. § 556(d).

[144] *Compare* 5 U.S.C. § 556(d) ("A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the ***reliable, probative, and substantial evidence***." (emphasis added)) *with* 16 C.F.R. § 3.51(c)(1) ("An initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by ***reliable and probative evidence***." (emphasis added)).

[145] Jagmin, Tr. 983-84, 1125, 1167; Van Wagner, Tr. 1692-95, 1700; CX 531.

[146] Jagmin, Tr. 1132; Van Wagner, Tr. 1694-96; CX 531.

discussing a non-risk contract that included some risk elements.[147] Although Complaint Counsel incorrectly tries to characterize NTSP's conduct as negotiating economic terms for non-risk contracts, NTSP merely told Aetna that NTSP had minimum threshold levels for HMO and PPO offers.[148] Obviously, Aetna could choose to make an offer at those thresholds to activate NTSP's network, or it could elect to contract with the physicians directly or through other entities.[149] By choosing not to be involved with certain offers — for example, those that paid different rates to different physicians[150] or those below a certain level — NTSP was merely exercising its *Colgate* right to deal with whomever it chose. Finally, any suggestion by Complaint Counsel that a threshold 140% PPO rate was improper or anticompetitive ignores the fact that Aetna paid that same rate to MSM,[151] and that MSM was Aetna's major contract in the Tarrant County area.

Complaint Counsel has also ignored MSM's breaches of contract and NTSP's class action to rectify those breaches. Aetna had a global-risk HMO and PPO contract with MSM,[152] and many of NTSP's participating physicians contracted with MSM to serve Aetna patients, both before and after NTSP's direct involvement with Aetna.[153] MSM began experiencing financial troubles and was not honoring its contracts with the participating physicians.[154] Acting as the physicians' class representative,

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147 Jagmin, Tr. 1010-11.

148 *See, e.g.*, CX 571 (e-mail to Jagmin containing "numbers on the messenger model return").

149 RPF 272.

150 *See* Roberts, Tr. 523-24, 568; Jagmin, Tr. 1165.

151 *See* Jagmin, Tr. 1132-33; Van Wagner, Tr. 1696-1702, 1708-09.

152 Jagmin, Tr. 997, 984-85; RX 832.

153 Jagmin, Tr. 982; RX 832.

154 RPF 344, 348.

NTSP sued MSM to address MSM's continuing breaches of contract and financial problems.[155] In connection with that lawsuit, NTSP sought powers of attorney from the physicians to confirm that it had the authority to act on their behalf in any ***lawful*** manner.[156] That language meant that the powers of attorney were not used to negotiate economic terms for non-risk contracts.[157] Powers of attorney are not uncommon or illegal — in fact, Aetna required NTSP (and other IPAs) to obtain them from participating physicians.[158] MSM eventually filed for bankruptcy and its chief operating officer was convicted of fraud, money laundering, and tax evasion.[159] NTSP ultimately settled with MSM in the bankruptcy court, and the participating physicians received a substantial payment.[160]

The evidence also shows that Aetna did not need to contract with NTSP, which contradicts Complaint Counsel's claim that NTSP had significant leverage.[161] Aetna performed an analysis to assess the effect, if any, of losing NTSP's participating physicians and determined that it would lose only 154 out of its 1816 physicians in Tarrant County and that it would not lose any physicians in several specialties.[162] When compared to the 7,200 physicians on Aetna's panel in the Dallas-Fort Worth Metroplex,[163] the effect, if any, of losing NTSP was even more remote. The current absence of

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[155] Van Wagner, Tr. 1652-53, 1692; RX 335; RX 849; RX 1556; RX1805.

[156] RPF 149.

[157] RPF 149.

[158] Jagmin, Tr. 1135-37, 1139, 1141-42; Van Wagner, Tr. 1702-05, 1707; CX 548; CX 567.

[159] RPF 351-52.

[160] RPF 353.

[161] *See* CC's Post-Trial Brief at 11 ("During these negotiations, Aetna was subjected to unusual pressure to reach an agreement with NTSP.").

[162] RX 9; RX 319.

[163] Jagmin, Tr. 1121.

a contract between Aetna and NTSP,[164] coupled with the fact that Aetna has never reported having an inadequate network in Tarrant County,[165] confirm that Aetna does not need NTSP in its network. And the evidence shows that Aetna sends contracts directly to NTSP's participating physicians and that those physicians contract directly with Aetna.[166] Aetna has also contracted with NTSP's participating physicians though other IPAs.[167]

Complaint Counsel also ignores critical testimony about Aetna's ability to analyze data when arguing "that there was no empirical justification to support" the rates offered to NTSP.[168] During his cross-examination, Mr. Roberts, an Aetna representative, conceded that, because of problems with its own data, Aetna was unable to evaluate NTSP's efficiency claims by comparing the performance of NTSP's participating physicians to other physicians.[169] Instead, Aetna compared all of Aetna's physicians in Tarrant County to all of Aetna's physicians in the entire Dallas-Fort Worth Metroplex, which comprises twenty-two counties.[170] In other words, Aetna never focused its data analysis on NTSP (or any other IPA) in any way, shape, or form;[171] it was forced to rely only on county-wide or

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[164] RPF 380.

[165] RPF 279.

[166] Roberts, Tr. 544-46.

[167] RX 319.

[168] *See* CC's Post-Trial Brief at 13 ("After thoroughly analyzing patient and utilization data, Aetna concluded that there was no empirical justification to support NTSP's collectively set higher rates.").

[169] Roberts, Tr. 560-61 ("Q. And is it correct to say that Aetna, because of problems with its own data, was not able to run an analysis of NTSP physicians compared to other physicians? A. That is correct.").

[170] Roberts, Tr. 561 ("Q. All right. Then what did Aetna do? A. It compared Tarrant County to the rest of our network, not just Dallas County. Q. Okay. So it took Tarrant County to the -- what, the entire metroplex service area? A. Yes. Q. Okay. And how many counties is that? A. Either full or partial, 22 counties.").

[171] Roberts, Tr. 561-62 ("Q. Now, so the analysis that Aetna ran didn't focus at all on NTSP, is that correct? A. That's correct.").

network-wide data that was not broken down by IPA. Mr. Roberts also conceded that Aetna had significant gaps in its data, even though Complaint Counsel tried to suggest that the gaps were in NTSP's data:

> Q. Can you answer my question? ***Were the gaps that you were talking about in response to Complaint Counsel the gaps in Aetna's own data?***
>
> A. ***Correct.***
>
> Q. And is it correct to say that Aetna, because of problems with its own data, was not able to run an analysis of NTSP physicians compared to other physicians?
>
> A. That is correct.[172]

Complaint Counsel also overlooks the competitive nature of NTSP's relationship with Aetna. Although health plans (like Aetna) normally perform utilization-management services, NTSP proposed that Aetna allow it to perform those services.[173]

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[172] Roberts, Tr. 560-61 (emphasis added).

[173] RPF 371.

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

[175] RPF 371–73, 377.

[176] RPF 106-07, 111.

[177] CX 57.

no further action was needed.[184] Cigna attempted to mislead the physicians because the contracts required mutual agreement before they could be assigned.[185] Indeed, Mr. Grizzle admitted that Cigna would have been sensitive to how physicians would have received the change and may not have "follow[ed] purely the contractual provision."[186] Those misrepresentations support NTSP's claim that it has a right to advise physicians about questionable contracting practices by payors.[187]

Complaint Counsel also suggests that NTSP directed physicians to appoint it as their "agent in negotiations with Cigna."[188] But the evidence cited by Complaint Counsel does not show that any physician told Cigna to negotiate with NTSP, and it does not in any way indicate that NTSP negotiated any non-economic term in a non-risk context. The evidence shows that NTSP's actions were the result of numerous legal questions posed by NTSP's participating physicians and requests that NTSP discuss those issues with Cigna.

Complaint Counsel then attempts to tie Cigna's 1997 acquisition of Health Source, and the related misrepresentations by Cigna about the assignment process, to contractual discussions in 1999.[189] But those discussions in 1999 concerned a risk contract between Cigna and NTSP.[190] Cigna

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[184] Response to CPF 259.

[185] Response to CPF 259.

[186] Response to CPF 259.

[187] Indeed, NTSP in 2000 and 2001 reported Cigna to the Texas Department of Insurance ("TDI") for prompt pay violations, noncompliance with contracts, and predatory pricing concerns. Van Wagner, Tr. 1772. In August of 2001, TDI took action against Cigna for violating Texas law; TDI fined Cigna $1.25 million and ordered it to pay restitution to providers as a result of its failure to comply with clean claims laws. RX 3103. Not surprisingly, Cigna's improper conduct caused NTSP to intensify its review of Cigna's contracts and demand that Cigna comply with state law. Van Wagner, Tr. 1772-73.

[188] CC's Post-Trial Brief at 13.

[189] CC's Post-Trial Brief at 13-14.

[190] Grizzle, Tr. 775; Van Wagner, Tr. 1754-55; CX 763, *in camera*.

[198] Grizzle, Tr. 940-42, *in camera*.

[199] CC's Post-Trial Brief at 15.

[200] Grizzle, Tr. 759.

[201] Grizzle, Tr. 759.

[202] RX 2887.012, *in camera*; RX 3118 (Maness Report ¶ 41).

[203] CC's Post-Trial Brief at 15-16.

[204] Grizzle, Tr. 958, *in camera*.

[205] Grizzle, Tr. 959, *in camera*

contract with Cigna at rates higher than what Cigna pays NTSP.[206]

3. NTSP's dealings with United were not anticompetitive.

As an initial matter, Complaint Counsel's stipulation that recognizes the right granted by Texas law to communicate with employers and patients about network adequacy issues and compensation rates makes irrelevant much of the evidence cited in Complaint Counsel's post-trial brief.[207] The City of Fort Worth was the employer-representative of current patients of NTSP's physicians under the PacifiCare risk contract, and NTSP had legitimate concerns about the adequacy of United's panel and the impact on the City's costs if it switched from the PacifiCare-NTSP risk contract to the United non-risk contract. NTSP had the right to discuss those issues with the City. In fact, NTSP's predictions of significantly higher costs under United's non-risk contract came true because the City experienced cost overruns in excess of $10 million shortly after switching to United.[208] Despite Complaint Counsel's suggestions to the contrary, there was nothing improper or anticompetitive about NTSP's communications with the City of Fort Worth.[209]

Complaint Counsel also wrongly suggests that the powers of attorney were anticompetitive.[210] But those documents could be used only "in any lawful way," which precluded NTSP from using them

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[206] RPF 276.

[207] *See* TEX. INS. CODE ANN. § 843.363 (Vernon 2004) (granting physicians right to communicate with patients about network-adequacy issues and compensation rates); Tr. 1149-50 (stipulating that Complaint Counsel is not challenging right to communicate or complain about compensation rates); CC's Post-Trial Brief at 18-21 (discussing communications with City of Fort Worth's representatives about network-adequacy issues and compensation rates).

[208] RPF 394.

[209] This same analysis also proves that there was nothing improper about any communications with Texas Christian University. *See* CC's Post-Trial Brief at 19 n.12.

[210] *See* CC's Post-Trial Brief at 19 (alleging that powers of attorney were solicited to "gain further leverage" in contracting activity).

to negotiate economic terms of non-risk contracts.[211] NTSP told the physicians about this limitation in a general meeting with counsel present.[212] And NTSP told Mr. Quirk of United the same thing; he then made notes stating that the powers of attorney were "for contractual language only," and "NTSP never uses the [powers of attorney] to negotiate rates."[213] Mr. Quirk also admitted that he never saw an executed power of attorney and had no personal knowledge of interactions between NTSP and its participating physicians concerning powers of attorney.[214] Furthermore, NTSP explained to United

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[211] RPF 149.

[212] Van Wagner, Tr. 1941-44.

[213] CX 1083.

[214] Quirk, Tr. 328.

[215] Quirk, Tr. 341-42, 419; Deas, Tr. 2432; CX 1122; CX 1083; CX 1086; RX 283.

[216] *See* CC's Post-Trial Brief at 19 ("Realizing that it had to take tougher actions to weaken United's network in Fort Worth before United would capitulate, NTSP went forward and terminated all of its physicians' participation in United through HTPN.").

[217] Van Wagner, Tr. 1559-60.

[218] CX 1034; *see* Quirk, Tr. 353-54 (stating that United has 8000 physicians in the Metroplex), 354-55 (stating that United has over 2000 physicians in Tarrant County).

the 400 NTSP participating physicians currently contracted with United.[219] In other words, the termination affected less than 5% of United's physician panel in Tarrant County and less than 2% of United's physician panel in the Dallas-Fort Worth Metroplex.[220]

Even if Complaint Counsel could show anything improper about the powers of attorney or NTSP exercising its contractual rights — and it cannot — Complaint Counsel has not proven any anticompetitive effects because the undisputed evidence shows that NTSP did not obtain above-market or supracompetitive rates. United offered NTSP the ***very same*** rates that it had previously offered to ASIA and MCNT, two other IPAs, and a ***lower*** rate than it had previously offered to HTPN in February 2001.[221]

Complaint Counsel also overlooks the competitive, horizontal nature of United's relationship with NTSP. United's negotiations with the City of Fort Worth were going to undercut NTSP's risk contract to treat the City of Fort Worth's employees. NTSP was discussing the loss of that contract, and related problems, with the City, and NTSP was offering data and utilization management services to the City similar to those offered by United.[222]

Finally, United (like Aetna) is biased against NTSP and lacks credibility. NTSP reported United to the TDI for prompt-pay violations, noncompliance with contracts, and concerns about anticompetitive predatory pricing.[223] Just two months later, the TDI fined United and ordered it to pay

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[219] Quirk, Tr. 356; CPF 206.

[220] Quirk, Tr. 356.

[221] CX 1099; Quirk, Tr. 348-49, 411; CX1119; Van Wagner, Tr. 1745-46.

[222] CX 1031; CX 1075; RX 2051; Mosley, Tr. 227-228; Van Wagner, Tr. 1730-33, 1741-44; Quirk, Tr. 412, 431-32 (stating that he knew United would supplant a PacifiCare risk contract); Deas, Tr. 2424-25, 2429-31; CX 1117 (NTSP letter to United mentioning PacifiCare risk contract).

[223] Van Wagner, Tr. 1772.

[224] RX 3103.

[225] Beaty, Tr. 453-54.

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[229] Van Wagner, Tr. 1720-21.

[230] Van Wagner, Tr. 1723; CX 306.

[231] Van Wagner, Tr. 1720; CX 709 (letter describing Blue Cross's refusal of a NTSP offer and statement that

ten to fifteen minutes just before taking the stand,[236] but swore that did not recall discussing the number "145" during his prep session,[237] even though that was the only reason he was called in rebuttal.[238] He also could not recall any other events involving NTSP.[239]

D. Complaint Counsel's suggested remedies are inappropriate.

Although Complaint Counsel has failed to carry its burden in this case, NTSP alternatively discusses the issue of remedy at the direction of the Court.

Complaint Counsel's Proposed Order is overly broad and would make it virtually impossible for NTSP to operate. The Order could cause NTSP to violate Texas state law or to become liable for medical malpractice or other risky conduct. The Order, by forcing NTSP to become party to contracts with payors who are financially unsound or who may be violating state law, would also destroy the risk contract successes and spillover efficiencies that NTSP has achieved. The Order would also require NTSP to expend its resources on contract offers that involve very few of NTSP's participating physicians, discriminate among NTSP's participating physicians, or involve questionable contracting practices likely to lead to time-consuming and divisive disputes.

While the Federal Trade Commission has discretion in formulating orders, that discretion has limitations.[240] The remedy selected, including any "fencing in" provisions, must have a "reasonable

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[236] Haddock, Tr. 2745.

[237] Haddock, Tr. 2746.

[238] Tr. 2740.

[239] Haddock, Tr. 2747-57.

[240] *Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978).

relation to the unlawful practices found to exist."[241] That means that any remedy should be narrowly tailored to any violation found to exist.

Requiring NTSP to become a party to all contracts sent to it by payors, regardless of Texas state law or problems related to the delivery of medical care, is not reasonably related to the asserted charges of price-fixing, nor is it narrowly tailored. At the very least, any remedy should allow NTSP to avoid contracts that put it at risk of violating state law, committing malpractice, or delivering unacceptable health care to patients.

The Proposed Order, like Complaint Counsel's case, ignores the realities of NTSP's need to make business and healthcare decisions. Texas law requires NTSP, as a non-profit 501(a) medical care entity, to have a Board composed of physicians with active practices.[242] Complaint Counsel, despite Fifth Circuit law to the contrary,[243] views NTSP as a "walking conspiracy." Complaint Counsel evidently believes that every decision NTSP makes which disadvantages someone is an event of conspiratorial liability for NTSP. Complaint Counsel phrases its relief as a prohibition of conspiratorial activity, but in the context of the proposed Order those prohibitions of refusals to deal (a double negative) appear to equate to a mandate to contract with all payors. Certainly, Complaint Counsel has not articulated, either on the merits or in regard to proposed relief, any coherent basis for NTSP to operate other than to become a party to and messenger every offer which walks in the door, or to shut down.

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[241] *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1956); *Gibson v. FTC*, 682 F.2d 554, 572 (5th Cir. 1982); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982); *Standard Oil*, 577 F.2d at 662.

[242] TEX. OCC. CODE ANN. § 162.001 (Vernon 2004).

[243] *Viazis*, 314 F.3d at 764.

NTSP is the only multi-specialty physician entity accepting risk contracts in the North Texas area.[244] If it is unable to choose which non-risk payor contracts it will be involved in, it will likely fail because of the legal and operational problems like those previously described. As Dr. Wilensky noted in her testimony, NTSP has a unique spillover business model that should be encouraged for public policy reasons.[245] Complaint Counsel's proposed relief effectively would put that model out of existence.

In determining the appropriateness of a proposed order, the specific circumstances of the case should be considered.[246] Complaint Counsel must show that there is a "cognizable danger" that similar conduct will recur.[247] The cognizable danger must be more than a "mere possibility."[248] Here, Complaint Counsel has not presented substantial evidence that there is a cognizable danger of recurrent violations. In fact, there is no cognizable danger in this case because the conduct that has been challenged by Complaint Counsel was highly individualized conduct with specific payors. In each of the payor histories used by Complaint Counsel to support its claim there were specific justifying circumstances leading to NTSP's actions.

NTSP had a highly complicated relationship with Aetna, involving contracts through another

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[244] Casalino, Tr. 2891; Van Wagner, Tr. 1575-76.

[245] Wilensky, Tr. 2187-88, 2204-05.

[246] *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959) (proper scope of an order depends on the facts of each case and a judgment as to the extent a particular party should be fenced in); *Standard Oil*, 577 F.2d at 662.

[247] *TRW, Inc. v. FTC*, 647 F.2d 942, 954-55 (9th Cir. 1981).

[248] *TRW*, 647 F.2d at 954-55.

MSM, and lawsuits brought against Aetna by the Department of Justice and the Texas Attorney General.[249] NTSP's relationship with Cigna was marked by Cigna's numerous breaches of a letter of agreement that was entered into pending the finalization of a risk deal.[250] NTSP's relationship with United, and most of the facts cited by Complaint Counsel, centered around United's efforts to undercut a risk deal that NTSP had to treat patients of the City of Fort Worth, and NTSP exercising its right under Texas state law (as stipulated by Complaint Counsel) to inform its patients' representatives about issues affecting their future health care.[251] Due to the unique situation between NTSP and each payor that Complaint Counsel uses to support its claim, there is no "cognizable danger" of any recurrent violations.

Moreover, Complaint Counsel has not shown that its overly broad remedy is necessary to address ***existing*** conduct. The cancellation of existing contracts, for example, would be inappropriate for the following reasons: (1) NTSP currently has no contract with Aetna or Blue Cross;[252] (2) the Cigna letter of agreement **[**

][253] and (3) about one year after NTSP and United entered into their contract, United voluntarily approached NTSP and offered a new contract to increase the reimbursement rates.[254] There has been no showing as to any other non-risk contracts. In fact, in the last two years, none of

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[249] RPF 332-33, 339-44, 346-54, 356-60, 364-65.

[250] RPF 418-23, 426-32.

[251] RPF 384-86, 389-95.

[252] RPF 380, 448.

[253] CX 809, ¶ 1, *in camera* **[ ]**.

[254] Van Wagner, Tr. 1746-48 (admitted only as to operative fact that United offer was made).

the non-risk payor offers to NTSP have been at or below either of the Board minimums.[255]

[255] Van Wagner, Tr. 1970-71.

[256] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144-45 (2002) (stating that Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA").

[257] *Nat'l Society of Prof. Engineers v. U.S.*, 435 U.S. 679, 697-98 (1978); *see also Beneficial Corp. v. FTC*, 542 F.2d 611, 620 (3d Cir. 1976) (finding that FTC should consider a remedy's effect on the right to free speech when drafting an order).

[258] Complaint Counsel does not take into account the provisions of the McCarran-Ferguson Act which reserve to the States the right to regulate the relationship between insurance companies and their insureds. *See* 15 U.S.C. §§ 1011, *et seq*.

[259] *See, e.g.*, 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 health care treatment decisions and is liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care."); 28 TEX. EXrble fMBra0 Tj 161.29s and is liable for damages for harm to an insured or enrollee proximately caused by its

[263] *See, e.g.,* Alaska Healthcare Network, Inc., Docket C-4007 (Apr. 25, 2001) ("Provided That nothing in this Order shall prohibit conduct that is approved and supervised by the State of Alaska insofar as that conduct is

conduct that caused the TDI to fine them millions of dollars. NTSP reported the payors to the TDI for improper contracting activities. The payors have also breached contracts with NTSP and that has caused NTSP to assert its rights to enforce the contracts' express terms.

The Commission also lacks jurisdiction over NTSP, a memberless, non-profit corporation. NTSP does not qualify as a "corporation" under the FTC Act and does not act for the profit of any "members." Complaint Counsel also has not carried its burden to prove that NTSP's actions in Texas had an effect on interstate commerce.

Finally, Complaint Counsel fails to suggest a viable remedy narrowly tailored to the asserted specific violations and fails to account for NTSP's rights under both federal and state law. NTSP has the *Colgate* right to deal with whomever it chooses. And Texas law gives NTSP the right to communicate with patients about network adequacy issues and compensation rates; it also provides for the inclusion of certain contractual terms and addresses certain payment issues. NTSP should not face malpractice or other potential liability under Texas law because of any potential remedy. Moreover, Complaint Counsel has not carried its burden to prove that any remedy is needed to address ***existing***

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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